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Long-standing and Presumptively Lawful? *Heller*'s Dicta vs. History and Dicta

Amy Swearer

Abstract

In the past decade, the Supreme Court has strengthened core Second Amendment protections by articulating that the right to keep and bear arms is centered on the natural right of self-defense. Personal firearm possession for the protection of one's home and person is therefore a fundamental right that cannot lightly be infringed by government restrictions. The Court's confusing and still unresolved dicta, however, have led many lower courts to uphold extreme restrictions on firearm ownership for nonviolent felons. This is inconsistent both with historical reality and with the Court's own frameworks for analogous fundamental rights. The Court has yet to address these inconsistencies directly, but when it does, it should strike down such categorical and lifelong firearms disabilities as unconstitutional.

Introduction: *Heller*, *McDonald*, and Felons

For more than two centuries after the Constitution's ratification, the Supreme Court of the United States largely refrained from defining the scope and meaning of the Second Amendment right to keep and bear arms.[1] Many legal commentators and scholars used that silence to propound a jurisprudential theory asserting that the right was collective in nature and belonged to the citizenry as individuals only insofar as individual citizens were connected to the militia.[2] In 2008 and 2010, the Supreme Court struck successive and devastating blows to this academic model with its decisions in *District of Columbia v. Heller*[3] and *McDonald v. Chicago*.[4] Together, these two opinions pronounced that the Second Amendment protects a right that is individual,[5] fundamental,[6] and made applicable to the states through the Fourteenth Amendment.[7]

This paper, in its entirety, can be found at **http://report.heritage.org/lm238**

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Key Points

- The basic scope of the Second Amendment right as clarified by the Supreme Court in *Heller* and *McDonald* is fundamental to the ordered scheme of American liberty.
- It is not an unlimited right, and the limitations of its protections are generally consistent with the framework used in First Amendment analyses.
- It is only through the lens of these foundational premises that *Heller*'s "longstanding and presumptively lawful" dicta ought to be viewed.
- When these lines of dicta are viewed in light of historical guidance and precedent from analogous frameworks, it is difficult to make the words mean what many lower courts have interpreted them to mean.
- Given the core principles of *Heller* and *McDonald*, the Court's own framework for analyzing analogous rights, and the evidently limited scope of historical firearms restrictions, it does not appear that these clear markers are permanent fixtures for future Second Amendment battles.

The majority opinions in both of these seminal cases utilized a very "history-centric" analysis to address questions of what, exactly, the Framers and ratifiers of the Second Amendment understood it to encompass.[8] Even for *Heller*'s grammatical questions involving the amendment's prefatory and operative clauses,[9] the majority looked to their historical contexts to help make sense of their meaning.[10] The *Heller* majority noted that its historical analysis of the Second Amendment was not exhaustive and indicated its awareness that the opinion left some inquiries about the amendment's scope open to future debate,[11] but the Court also purported to answer some vitally important questions about the foundational premises upon which the Second Amendment rests.[12]

From a practical standpoint, the Court left few substantive guidelines for lower courts to follow in subsequent Second Amendment cases. It declined to state explicitly an appropriate level of scrutiny[13] for future challenges to firearms restrictions,[14] only going so far as to reject an "interest-balancing" approach.[15] Perhaps most confusing for lower courts have been a few lines of dicta[16] in *Heller*, which were repeated in *McDonald*, stating that the Court did not intend with its opinion to "cast doubt on longstanding prohibitions on the possession of firearms by felons,"[17] which are "presumptively lawful."[18] The Court did not attempt to justify this presumption or its assertion that such prohibitions are long-standing in nature, even though both the presumption and this assertion appear to be contradicted by the reasoning employed throughout the opinions.[19]

The *Heller* dicta have proven especially problematic for resolving a number of issues regarding restrictions on the ability to carry a firearm for self-defense. Nowhere is this more evident than with federal and state bans on firearm possession by felons convicted of nonviolent crimes,[20] one of the most common restrictions on Second Amendment rights. Under current federal law, nonviolent felons fall into one of the nine categories of persons who are completely and (in most cases) permanently barred from firearm possession.[21] The way for these persons to have their Second Amendment rights restored is for their convictions to be expunged, pardoned, or otherwise set aside under the laws of the jurisdictions where their cases were adjudicated.[22] Currently, many states offer only limited mechanisms for the restoration of firearm rights for nonviolent felons,[23] leading many such individuals to rely on gubernatorial pardons,[24] which are increasingly difficult to obtain.[25] For all practical purposes, there is no federal procedure by which those convicted of federal felonies can have their civil rights restored.[26]

Given the Supreme Court's emphasis in *Heller* and *McDonald* on the fundamental nature of the Second Amendment right, it does not seem to follow rationally that these extremely restrictive laws can be constitutional as applied to felons with no indications of a tendency toward future violence. On the one hand, the Court asserted that such restrictions are longstanding and presumptively lawful, a presumption that lower courts seem to have adopted reflexively without questioning or testing the premises underlying that assertion. On the other hand, the Court used an historical analysis of the Second Amendment that seems to contradict its designation of certain restrictions as "longstanding," and its determination that the Second Amendment right is fundamental appears to preclude a presumption of lawfulness for any restriction, much less a total and permanent prohibition on possessing firearms.

Lower Courts' Use of *Heller*'s Dicta to Undermine Its Core Promises

In an attempt to handle the tension between these two opposing facets of *Heller* and *McDonald*, federal circuit courts increasingly have used the few lines of "presumptively lawful" dicta as a "safe harbor" from which to foreclose any meaningful analysis in cases involving as-applied challenges to the federal firearms disability. Some, like the Eleventh Circuit, have done little more than quote *Heller*'s language as their sole analysis for dismissing as-applied challenges.[27] Most, however, have adopted a two-step analysis to deal with the substance of these questions.[28] First, the court asks whether the conduct burdened by the restriction falls within the scope of the Second Amendment protections.[29] If the burdened conduct does fall within the scope of conduct that the Second Amendment was designed to address, the courts will apply some form of heightened scrutiny in deciding whether the restriction is constitutional as applied to the particular challenger.[30]

In *Heller* and *McDonald*, the Supreme Court declined to articulate what standard of review lower courts should apply in deciding future Second Amendment cases. With few exceptions, the courts that have addressed the issue of restrictions for nonviolent felons have applied watered-down

intermediate standards of review often similar to the very "interest-balancing" tests that *Heller* determined were inappropriate.[31]

On the whole, the result has been extremely unfavorable for challengers to firearms restrictions.[32] Many circuit courts have determined that the Second Amendment protects only the rights of law-abiding citizens to "keep and bear arms" and that possession of firearms by nonviolent felons therefore falls outside the scope of conduct protected by the amendment. In other words, the first prong is often transformed from a question of "protected conduct" into one of "protected class."

The Fourth Circuit offered one of the clearest examples of this reasoning in *Hamilton v. Pallozzi*,[33] holding "that conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment."[34] Because the *Pallozzi* court determined that the label "felony" reflects the sovereign state's assertion that a crime indicates "grave misjudgment and maladjustment," the felon could never again be deemed "law-abiding" absent a pardon from that sovereign state.[35] In the court's view, the only relevant factor was whether the challenger's criminal history contained an unpardoned felony: It would not consider any evidence of rehabilitation, the likelihood of recidivism, or the passage of time since the commission of the felony as bases for reclaiming the title of "law-abiding, responsible citizen."[36]

Even courts that, like the Third Circuit, originally left open the possibility that nonviolent felons might plausibly be able to rebut the presumption of lawfulness in an as-applied challenge have since come to shut that once-open door. In *United States v. Barton*,[37] the Third Circuit initially determined that, while the challenger in this particular case could not show he was a nonviolent felon,[38] a successful challenge might still be possible from a felon convicted of a relatively minor, nonviolent offense who could show either that he was no more dangerous than a typical law-abiding citizen or that sufficient time had passed since the felony conviction such that he no longer posed a threat to society.[39]

Five years later, however, the Third Circuit reversed course in *Binderup v. Attorney General*,[40] rejecting the claim that "the passage of time or evidence of rehabilitation will restore the Second Amendment rights of people who committed serious crimes."[41] Instead, the *Binderup* court determined that it would focus only on the seriousness of the purportedly disqualifying offense and whether it was sufficient to remove the challenger from the protected class of citizens for purposes of the first prong of the two-prong test.[42] It further insisted the true justification for the disarmament of felons is not their likelihood of violent recidivism, but rather that they are "unvirtuous."[43]

A few circuit courts have left open the possibility that as-applied challenges from nonviolent felons may still be successful, but these circuits thus far either have declined to address that question directly or have determined that the firearms restriction in question passed a heightened level of scrutiny under the second prong. For example, in *United States v. Skoien* (*Skoien II*),[44] the Seventh Circuit warned against interpretations of *Heller* that treat it as "containing broader holdings than the Court set out to establish" by reading it as containing an answer as to whether certain gun disabilities are valid.[45] In that sense, at least, the Seventh Circuit has maintained the "presumptively" aspect of *Heller*'s "presumptively lawful" dicta. Unfortunately, the *Skoien II* majority then concluded that some categorical limits on fundamental rights are acceptable and that the challenger could not realistically claim he did not pose an ongoing risk of future violence no matter what offense he had committed or how much time had passed since the offense.[46]

The Sixth Circuit, grasping onto the Seventh Circuit's more moderate application of "presumptively lawful," stands out as an anomaly in its handling of as-applied challenges to modern firearms restrictions. At least as it relates to other firearms restrictions, the court has molded an approach that seems much more consistent with the foundational premises of *Heller* and *McDonald*. The Sixth Circuit's reasoning is also eerily reminiscent of the reasoning used by the Supreme Court in an analogous First Amendment case,[47] making it a hopeful sign of possible future success for nonviolent felons wishing to regain their Second Amendment rights.

In *Tyler v. Hillsdale County Sheriff's Department*,[48] the *en banc*[49] Sixth Circuit analyzed the question of whether the challenger, who was barred from possessing a firearm under Section 922(g)(4) of Title 18 for having been "committed to a mental institution," presented a cognizable Second Amendment claim and how such a claim should be analyzed if it existed.[50] The challenger, Clifford Tyler, had been involuntarily

committed to a mental institution in 1986 for a period of less than 30 days.[51] His commitment occurred as a direct result of acute depression brought on after his wife of 23 years cleaned out their bank account and left him for another man.[52] Tyler was discharged, remained gainfully employed for the next 18 years, remarried, and did not suffer from another instance of mental illness or emotional instability.[53] His doctor testified that Tyler did not show signs of currently suffering from mental illness or of abusing drugs or alcohol and instead characterized Tyler's 1986 commitment as "a brief reactive depressive episode."[54] Nonetheless, federal law prohibited Tyler from purchasing or possessing a firearm, and Michigan law did not provide a mechanism through which his Second Amendment rights could be restored.[55] Tyler argued that the Second Amendment precludes Congress from "permanently prohibiting firearm possession by currently healthy individuals who were long ago committed to a mental institution."[56]

Although the court was divided over its reasoning, the majority and concurring opinions reached the same bottom line: Even under the two-step framework, Tyler was not categorically unprotected by the Second Amendment, and the government had failed to meet its burden under a heightened level of scrutiny.[57]

The *Tyler* court first denounced any use of the first prong that would interpret *Heller* as "invit[ing] courts onto an analytical off-ramp to avoid constitutional analysis."[58] Quoting from *Skoien*, the Sixth Circuit noted that *Heller* had explicitly left open questions regarding "what other entitlements the Second Amendment creates, and what regulations legislatures may establish."[59] *Heller* further "expressly declined to expound upon the historical justifications for bans on firearms possession by felons and the mentally ill,"[60] and its "presumptively lawful" dicta should not be used "to enshrine a permanent stigma on anyone who has ever been committed to a mental institution for whatever reason."[61] It is therefore not correct, in the Sixth Circuit's view, to give *Heller*'s presumption of lawfulness conclusive effect, because a presumption implies the possibility that an as-applied challenge could succeed under the right circumstances.[62]

Performing its own historical analysis of the Second Amendment, the Sixth Circuit concluded that firearms disabilities for felons and the mentally ill were "presumptively lawful" not because those persons fall outside the historical purview of the Second Amendment right, but because the regulations can be presumed to satisfy some heightened standard of scrutiny.[63] It then applied intermediate scrutiny as opposed to strict scrutiny, noting the near unanimous preference for this standard in courts assessing cases under Section 922(g).[64]

The Sixth Circuit acknowledged that the government's stated interests in protecting the community from crime and preventing suicide were not only legitimate, but compelling.[65] Nonetheless, the court held that the government had not presented sufficient evidence to support the conclusion that people previously committed to mental institutions categorically and permanently constituted such an ongoing and heightened risk of perpetrating gun violence that it was reasonably necessary to bar them permanently from gun ownership.[66] The government merely cited studies showing a need to ban those currently in the midst of a mental health crisis or only recently removed from commitments to mental health facilities from possessing firearms.[67]

Finally, the Sixth Circuit noted what it called "the biggest problem for the government" in this case: Congress had already answered the question of whether it was reasonably necessary to bar people such as Tyler permanently from possessing guns.[68] From 1986 to 1992, federal law offered a mechanism through which to obtain relief from Section 922(g) disabilities.[69] Although Congress defunded the program, in 2008, it authorized federal grants for state background checks on the express condition that states created a relief-from-disabilities program.[70]

History of Arms Prohibitions Does Not Support Assertions That Total and Permanent Firearms Disabilities Are "Long-standing"

The Sixth Circuit in *Tyler* understood *Heller*'s "presumptively lawful" language within its proper context: as dicta in a majority opinion unwilling to rigorously assess whether these assertions are consistent with history and enduring judicial doctrines. And while the *Tyler* court felt bound by the *Heller* and *McDonald* dicta, it did not cut off its own historical and judicial analysis in the process of following it. Rather, it determined that a particular state policy, though presumed lawful, was in fact unlawful.

With this effort in mind, how well does the Supreme Court's other assertion—that of the firearm

disability's long-standing nature—hold up in light of similar historical and jurisprudential analyses? The answer appears to be "not very well at all." Until very recently, the history of gun restrictions and prohibitions in the Western world has been significantly limited in comparison to the allegedly long-standing regulations cited in *Heller*. In short, permanent and complete bans on gun possession are more modern anomaly than they are ancient doctrine.

Rise and Fall of "Civil Death." Western civilization is no stranger to the idea that those who commit serious criminal offenses may be punished by having certain civil rights stripped from them. Both the Greeks and Romans imposed states of "infamy" on citizens who committed offenses involving moral turpitude.[71] This effectively rendered the person a noncitizen: He could no longer vote, attend public assemblies, hold public office, or make public speeches.[72] In short, an infamous person was prohibited from participating in civic affairs.

After the fall of the Roman Empire, the punishment of infamy slowly morphed into the "civil death" laws of Medieval Europe.[73] In England, it would form the basis for the attainder practices so reviled by the American colonists and later prohibited by the United States Constitution.[74] Under English common law, a felony sentence carried three distinct legal disabilities: forfeiture of the felon's property and possessions to the king or feudal lord; the corruption of the felon's blood, which barred him from transferring or bequeathing his estate to his heirs; and an almost complete extinction of the felon's civil rights.[75] From the time of conviction—which carried a default capital sentence—to the carrying out of the execution, the felon was considered *extra legem positus*:[76] For all practical purposes, in the eyes of society, he was already dead.[77]

At first glance, this common-law practice may appear to serve as a foundation upon which to build an argument for a long-standing tradition of permanent firearms disabilities for felons.[78] A closer inspection, however, reveals serious flaws with this theory.

First, and perhaps most persuasively, the Framers of the Constitution explicitly rejected both the origin and function of common-law civil death[79] by prohibiting bills of attainder[80] for treason that punished the convict with forfeiture and the corruption of blood.[81]

Second, the nature of a "felony" has changed dramatically in the past 300 years. Throughout the age of civil death laws, a felony conviction stood as an automatic death sentence.[82] This is likely because felony charges were reserved originally for situations in which "it is...clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society."[83] Civil death was a transitional state between the felon's sentence and his relatively swift execution, and the status of "dead as a matter of law" was an efficient way to settle a felon's affairs before he became "dead as a matter of biology."[84] Further, because the convicted felon was soon to die, forfeiture of his property—arms or otherwise—and the loss of his civil rights hardly provide modern society with a solid foundation from which to analogize regarding the reacquiring of property or civil rights. Release back into society, much less the restoration of civil rights, was very rarely an option.

The meaning of a felony conviction in the age of modern firearms prohibitions bears little resemblance to the felony of Blackstone's day, much less that of the earlier common-law civil death era.[85] The growth of regulatory and nonviolent crimes punishable as felony offenses means that a much wider net is cast in which a much broader percentage of the population is caught.[86] The increased focus on sentencing reform and the decreasing popularity of the death penalty mean that the vast majority of convicted felons today will reenter society.[87] Quite simply, the felony of the common-law civil death era cannot be used with any semblance of intellectual honesty as a historical counterpart to the modern felony.

Historical Standards of Limited Disarmament to Prevent Imminent Violence. The history of specific arms prohibitions hardly fares better as a foundation on which to stake claims of the "long-standing" nature of categorical and permanent firearms disabilities. Rather, both English common law and the overwhelming weight of American jurisprudence before the 1960s support a much more limited premise: Where the facts and circumstances give specific reason to believe that a person will likely cause imminent unlawful harm to others, he may be disarmed until he assures the community that he does not pose a violent threat. Even then, exceptions ought to be made for limited keeping of arms in self-defense.

One of the earliest alleged "arms control" measures in the Western world was the Statute of Northampton, a medieval law under which a person could not "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of Justices or

other Ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure."[88] Despite attempts to use this statute to justify modern disarmament of nonviolent felons (and gun control measures generally),[89] there are several gaping holes in the logic of such an assertion.

First, by the time of the 1689 English Declaration of Rights, this statute was rarely enforced, and its violation had long been demoted to a fineable offense.[90] This stands in stark contrast to the severe punishments meted out for the violation of modern-day felon-in-possession statutes.[91] Along these same lines, the Statute of Northampton was limited in scope to the possession of arms outside the home and in no way constituted a permanent, complete prohibition on possessing firearms in the home for self-defense.

Second, the statute could be violated only when one acted "malo animo"—that is, when the person intended to ride about those places armed "in such a manner as will naturally cause a terror to the people."[92] This is not equivalent to the modern disarmament of felons under which any use or possession of certain weapons is unlawful, not just those uses intended to cause fear of unjustified violence.

Third, the Statute of Northampton acted primarily as a preventive measure. If reasonable fears of violence existed, the person responsible for causing those fears could be required to pledge sureties of peace.[93] It was only after the would-be troublemaker refused to give surety or broke his pledge of surety that he faced punishment—the forfeiture of his armor and an indeterminate prison sentence "at the pleasure of the king."[94] Moreover, this punishment was imposed only for an unlawful use of arms post-surety, meaning that the use of arms in reasonable self-defense was permitted even for persons who were considered risks for future unlawful violence.[95] Further, there was no prohibition on the post-imprisonment purchase of arms and armor to replace those forfeited for a violation of the statute.[96] This is consistent with the common law's general aversion to arms disabilities and still provided "courts with a large stick with which to reduce the risks to society from a free person who nevertheless posed a threat of breaching the peace with arms."[97]

The 1689 English Declaration of Rights provides perhaps the closest equivalent of a pre-20th century disarmament of criminals who were not sentenced to death. While the Declaration explicitly recognized a right for Protestant subjects to bear arms, a contemporaneous law took steps to disarm Roman Catholics,[98] who were seen as presumptively treasonous supporters of the dethroned James II.[99] Once again, however, this law stopped far short of providing a rationale that could be used to support modern firearms restrictions imposed on nonviolent felons. Directly underlying this disarmament of Catholics was a somewhat justified fear of possible subversion of the newly crowned Protestant co-monarchs, William and Mary.[100] The disability was even further removed from a broad-scale felon disarmament than was the Statute of Northampton: It imposed no arms restrictions on violence-prone Protestants and was founded on concerns related not to violence broadly, but to specific insurrectional violence that could destabilize the entire kingdom.

Additionally, the disability for Catholics was strikingly limited in comparison to modern firearm prohibitions levied on nonviolent felons. A Catholic could avoid disarmament by subscribing to a statutory declaration against popery and swearing allegiance to the Protestant king,[101] and if the Catholic refused to make such a declaration, the law recognized that even an avowed Catholic supporter of James II had a natural and legally recognized right to self-defense.[102] Therefore, while he could not stockpile weapons akin to a home arsenal, he could "have or keep...such necessary weapons...for the defence of his house or person."[103]

In similar fashion, some American colonies undertook to disarm suspected British loyalists in the early stages of the Revolution. The Continental Congress recommended that local authorities disarm all persons "notoriously disaffected to the cause of America,"[104] and this recommendation was implemented by Massachusetts, Virginia, and Pennsylvania.[105] While this disarmament lacks the religious underpinnings seen in the English disarmament of Catholic citizens, neither restriction can be understood outside its proper context as an enactment directed against a reasonably distrusted group during a period of domestic upheaval. In the words of noted Second Amendment scholar C. Kevin Marshall, "[T]o the extent that one can distill any guidance from the English disability and the Revolutionary disarmament, it would seem at most to be that persons who by their actions—not just their thoughts—betray a likelihood of violence against the state may be disarmed."[106]

Finally, the next great American upheaval—the Civil War—did not produce anything close to the

widespread disarmament of rebellious individuals seen in previous eras. At a time when "Americans were more disunited, more distrustful of each other, and more thoroughly polarized in their competing visions of the common good than at any other time in American history,"[107] there were indeed occasional instances of disarmament by Union officers in rebellious or deeply divided states known for harboring Confederate sympathizers,[108] but after the conclusion of the war, Congress took great pains to protect the Second Amendment rights of newly freed southern blacks against attempts by white militias to disarm them.[109]

Modern Departure from Historical Limitations. Prior to the 1930s, states unanimously avoided imposing restrictions on the possession of firearms, focusing instead on the regulation of how and where those firearms could be carried.[110] Laws generally sought to prohibit or restrict the concealed carrying of "short guns" and almost never regulated the carrying of "long guns."[111] The first definitive federal attempt to regulate the actual possession of firearms came with the 1934 National Firearms Act, which did not ban possession of certain weapons per se but did impose a hefty tax on transfers of machine guns, short-barreled rifles, and short-barreled shotguns.[112]

The Federal Firearms Act of 1938 (FFA) set the groundwork for current federal firearms disabilities, prohibiting the transfer and sale of firearms to certain classes of persons, including those convicted of a "crime of violence."[113] This first complete categorical ban on the receipt of firearms by a class of felons was upheld by the First and Third Circuits in 1942, with both courts relying heavily on the collective-rights view of the Second Amendment explicitly rejected in *Heller*.[114]

It was almost four decades before Congress repealed the FFA and implemented the Gun Control Act of 1968 (GCA), which extended the disability to include all felons, not just those convicted of "crimes of violence."[115] The GCA also, for the first time in American history, prohibited not just the unlawful receipt of firearms, but their possession as well.[116] Never in all of this time—and certainly not since *Heller* and *McDonald*—has the Supreme Court directly addressed this disability, either generally or as applied to nonviolent felons.

Should the Court analyze the question with a continued emphasis on guidance from and analogy to history, there is very little from which it could derive support for *Heller*'s assertion of the long-standing nature of modern firearms disabilities for nonviolent felons. Rather, these permanent and complete bans are recent, severe departures from historical precedent, ushered in during a time of since-dismissed assumptions of a weak and collective Second Amendment right. Actual long-standing precedent in America and pre-Founding England supports far less drastic measures of disarmament. In this respect, a modern firearms disability "can be consistent with the Second Amendment to the extent that…its basis credibly indicates a present danger that one will misuse arms against others and the disability redresses that danger."[117]

Given this historical preference for assessing actual danger before imposing arms prohibitions, the Fourth Circuit wrongly rejected evidence of rehabilitation, the likelihood of recidivism, and the passage of time as bases from which a person could challenge laws prohibiting his possession of firearms. These categories are precisely those utilized in every historical context for firearms disabilities. They are, quite simply, *the* longstanding markers of the right to keep and bear arms for self-defense: Where they exist, so does the right; where they are absent, so is the right.

Packingham's First Amendment Framework Undermines Interpretations of *Heller*'s "Presumptively Lawful" Language

If modern gun prohibitions for nonviolent felons are not long-standing, can they at least be upheld under a doctrine of their presumptive lawfulness? On many occasions, courts and commentators have considered the First and Second Amendments as using analogous frameworks for constitutional jurisprudence.[118] Notably, the Seventh Circuit utilized the First Amendment framework in a Second Amendment context just one year after the Supreme Court decided *McDonald*, ruling against Chicago's complex and arduous licensing process.[119] For this reason, the Supreme Court's recent unanimous decision in a First Amendment case may evidence a need for many lower courts to reevaluate their interpretations of *Heller*'s "presumptively lawful" language.

In *Packingham v. North Carolina*,[120] the Supreme Court considered the extent to which a state could constitutionally restrict the First Amendment rights of registered sex offenders even after they completed their sentences. A North Carolina statute prohibited these particular felons from accessing social networking sites, which it defined broadly to include far more

than traditional forums like Facebook.[121] The petitioner was convicted of violating this statute after a police investigator discovered his mundane Facebook postings, even though the state never alleged that the petitioner used the website to contact minors or engage in other illicit activity.[122] The petitioner challenged his conviction on the grounds that the statute unconstitutionally restricted his First Amendment rights.

The Court reiterated the First Amendment significance of the "vast democratic forums of the Internet" and singled out social media in particular as offering "relatively unlimited, low-cost capacity for communication of all kinds."[123] It did not venture into a traditional analysis of the First Amendment's precise relationship to the Internet, determining simply that it should "exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks" accessible online.[124]

Guided by this self-imposed caution, the Court struck down the statute, holding that even if it assumed the statute was content-neutral and therefore subject only to intermediate scrutiny, it failed to meet this standard. Under intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest."[125] For First Amendment purposes, this means that a law must not "burden substantially more speech than is necessary to further the government's legitimate interests."[126]

Further, government may not "suppress lawful speech as the means to suppress unlawful speech."[127] Under this standard a state presumably could enact specific, narrowly tailored restrictions on a sex offender's use of the Internet, like statutes prohibiting them from using websites to contact or gather information about a minor. It could not, however, entirely foreclose a sex offender's access to social media on the chance that he might use versatile websites to engage in such conduct.[128]

The Court acknowledged that states certainly have a legitimate interest in protecting children from sexual predation, "a most serious crime and an act repugnant to the moral instincts of a decent people."[129] Legislatures need not sit idly by and allow evils to occur, and they can pass laws to protect citizens from sexual assault and abuse.[130] But the existence of a legitimate, compelling state interest "cannot, in every context, be insulated from all constitutional protections."[131]

A cornerstone principle of the First Amendment is that "all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."[132] Social media websites—including the nontraditional forums incidentally prohibited under the law—are some of the most powerful and easily accessible means available to private citizens to express their views.[133] By prohibiting sex offenders from accessing this modern public square, with its principal sources for news, employment opportunities, speech, and other exploration of "the vast realms of human thought and knowledge," North Carolina's statute was "unprecedented in the scope of First Amendment speech it burdens."[134]

Interestingly, the Court expressed an unfavorable opinion of collateral consequences[135] in general. Although it did not elaborate or give any indication of a future willingness to readdress the constitutionality of these post-conviction "civil remedies,"[136] it noted "the troubling fact that the law imposes severe restrictions on persons who already have served their sentences and are no longer subject to the supervision of the criminal justice system."[137] Without expressly addressing the inherent tension between collateral consequences and the jurisprudence regarding the rights of convicted criminals,[138] the Court recognized that it is "unsettling to suggest" that Internet access could be so greatly restricted for felons after the completion of their sentences.[139]

The Court's *Packingham* analysis, if distilled to a basic formula applicable to all fundamental rights, is essentially this: Statutes infringing on the exercise of fundamental rights must be specific and narrowly tailored to further a compelling—or at least an important—government interest. A law categorically foreclosing access to the most powerful and easily accessible means of exercising the fundamental right, even if applicable only to a subset of citizens who are most prone to abusing the exercise of that right, cannot pass that test.[140]

If these distilled *Packingham* principles are applied to firearm restrictions, it would seem that states and the federal government cannot impose broad, categorical, and permanent disabilities on the possession of all firearms, regardless of a compelling government interest in public safety. Instead, restrictions on the fundamental right to keep and bear arms must be specific and narrowly tailored to address public safety concerns. At the very least, the *Packingham* principles point any Second Amendment analysis back to the historical approach of restricting gun possession for a limited subset of persons who pose specific and definable risks of future violence and only for such a time as that risk continues to exist.

Just as statutes may not substantially burden more speech than is necessary by foreclosing large swaths of Internet activity to those who have proved themselves likely to victimize others with that activity, neither may statutes substantially burden the Second Amendment rights of those who have not evidenced violent behaviors as a means of curbing gun violence generally. This is consistent with *McDonald*'s rejection of arguments maintaining that the Second Amendment must be treated differently than other provisions of the Bill of Rights are treated because guns are dangerous.[141] The right to keep and bear arms certainly has public safety implications—but so does the right to free speech, as evidenced by the restrictions North Carolina sought to impose on that right for sexual predators.

This framework, should it be applied to analogous post-sentence-completion Second Amendment restrictions, would also vindicate the Sixth Circuit's reasoned historical analysis in *Tyler*. Both *Tyler* and *Packingham* deal with comparable restrictions on Section 922(g)(1)'s ban on gun possession by felons: *Tyler* in its analysis of the same prohibition for a different class of persons and *Packingham* in the sheer breadth and scope of a law seeking to foreclose principal means of exercising a fundamental right. Both opinions connect the legitimacy of restrictions on fundamental rights first back to the historical limitations on the particular right and then outward to the effectiveness of those restrictions in protecting the public. Both opinions exhibit a general disfavor toward broad, categorical, or permanent restrictions on fundamental rights, even for those who reasonably deserve closer scrutiny before exercising those rights. Both opinions, in that way, also undermine interpretations of *Heller*'s dicta upon which so many lower courts have thus far relied.

The Second Amendment right, like most other enumerated rights, is not unlimited.[142] A comprehensive and meaningful analysis of constitutionally sound policies for regulating the possession of firearms by nonviolent felons is beyond the scope of this paper, but it is not unreasonable to suggest that some restrictions may be imposed in this regard just as *Packingham* allowed for the possibility of more narrowly tailored restrictions on a sex offender's First Amendment rights. At the end of the day, however, the current permanent federal firearms disability for nonviolent felons—as well as those implemented in many states—cannot survive under a *Packingham*-esque framework, and it is *Packingham*'s framework that appears to provide the most stable basis for building on *Heller* and *McDonald* while still remaining consistent with two centuries of constitutional jurisprudence.

Conclusion

The Supreme Court clarified the basic scope of the Second Amendment right in *Heller* and *McDonald*. It is fundamental to the ordered scheme of American liberty and applies to individuals in a capacity unconnected to militia service. At its core, it is as much concerned with the private, natural right of self-defense as it is with safeguarding against tyranny in a public context. It is not an unlimited right, and the limitations of its protections are generally consistent with the framework used in First Amendment analyses. It is only through the lens of these foundational premises that *Heller*'s "longstanding and presumptively lawful" dicta ought to be viewed.

When these lines of dicta are placed in their proper context, viewed in light of historical guidance and precedent from analogous frameworks, it is difficult to make the words mean what many lower courts have interpreted them to mean. They are not "analytical off-ramps" from which politically desirable conclusions can be assumed without justification. Rather, they are nothing more than clear markers of the limitations the Supreme Court placed on itself during its initial foray into the uncharted territory of complex Second Amendment jurisprudence. Given the core principles of *Heller* and *McDonald*, the Court's own framework for analyzing analogous rights, and the evident historical scope of firearms restrictions, it does not appear that these clear markers are permanent fixtures for future Second Amendment battles.

*—**Amy Swearer** is a Legal Policy Analyst in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation.* *Special thanks are owed to Professors David Kopel and Nelson Lund for their gracious advice and comments during the review of this paper.*

Endnotes

1. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Before 2008, the Supreme Court addressed questions directly related to the Second Amendment in only a handful of cases, never attempting to define the scope of the right itself. *See* Houston v. Moore, 18 U.S. 1 (1820) (holding that states have concurrent power over the militia where not preempted by Congress); United States v. Cruikshank, 92 U.S. 542 (1875) (holding that the Second Amendment applies by its own force only to the federal government); Presser v. Illinois, 116 U.S. 252 (1886) (holding that prohibitions on private paramilitary organizations are not unconstitutional infringements on the right to keep and bear arms); United States v. Miller, 307 U.S. (1939) (holding that federal regulations banning the possession of weapons ill-suited for use in an organized militia do not violate the Second Amendment).
2. *See, e.g.*, Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 Chi.-Kent L. Rev. 349, 351 (2000) ("[T]he Second Amendment pertains only to citizen service in a government-organized and regulated militia…the regulation of which specifically appertains to Congress in Article I, Section 8."); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. Dayton L. Rev. 5, 30 (1989) ("The 'right to bear arms' concerned the ability of the states to maintain an effective military, not an individual right to keep weapons for any purpose whatsoever."). Several federal circuit courts also reiterated this theory in the 20th century. *See* Hickman v. Block, 81 F.3d 98 (9th Cir. 1996); United States v. Warin, 530 F.2d 103 (6th Cir. 1976). *But see* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. Rev. 1359 (1998). A militia-centric theory in reference to Second Amendment analogues in state constitutions can be found as early as 1842, but the Supreme Court's relative silence on Second Amendment issues made the establishment of underlying constitutional theory a mostly academic pursuit. *See* State v. Buzzard, 4 Ark. 18, 29–33 (Ark. 1842) (Dickinson, J., concurring); City of Salina v. Blaksley, 72 Kan. 230 (Kan. 1905).
3. 554 U.S. 570 (2008).
4. 561 U.S. 742 (2010).
5. *See Heller*, 554 U.S. at 581 ("We therefore start with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.").
6. *See McDonald*, 561 U.S. at 778 ("In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").
7. *See id*. at 749–50 ("[In *Heller*], we held that the Second Amendment protects the right to keep and bear arms for the purposes of self-defense…. [W]e hold that the Second Amendment right is fully applicable to the States."). Section 1 of the Fourteenth Amendment reads, in relevant part: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Before passage of the Fourteenth Amendment, the Bill of Rights applied only to the federal government and to federal court cases, and states were not obligated to adopt similar protections for state laws or courts. The "Due Process" clause of the Fourteenth Amendment led to a doctrine of incorporation, whereby the Supreme Court would incorporate specific parts of certain amendments, making them applicable to the states. *See* James W. Ely, Jr., *Due Process Clause*, in The Heritage Guide to the Const. (David F. Forte & Matthew Spalding, eds., 2nd ed. 2014), http://www.heritage.org/constitution/#!/amendments/14/essays/170/due-process-clause (last visited Dec. 18, 2017).
8. *See Heller*, 554 U.S. at 599, 605; *McDonald*, 561 U.S. at 768–69. *See also id*. at 777–78 (describing the ratification of the Fourteenth Amendment and the effect of its history on the Second Amendment's incorporation to the states).
9. The text of the Second Amendment is divided into two clauses, understood in grammatical terms as a prefatory clause and an operative clause. Prefatory clauses clarify—but do not limit—the function of the operative clause, which serves as the primary message of the sentence. The clause "A well regulated Militia, being necessary to the security of a free State," is prefatory and is therefore an explanatory principle for the operative clause, "the right of the people to keep and bear Arms, shall not be infringed." In other words, the sentence could be correctly rephrased as "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." *See Heller*, 554 U.S. at 578–81.
10. *See, e.g.*, *id.* at 582–92 (concluding after grammatical analysis that the few historical examples of the phrase "keep arms" all "favor viewing the right to 'keep Arms' as an individual right unconnected with militia service").
11. *See id*. at 626 ("Although we do not undertake a historical analysis today of the full scope of the Second Amendment…."); *id.* at 635 ("[S]ince this case represents the Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field…. And there will be time enough to expound on the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.").
12. *See id.* at 635 ("And whatever else [this opinion] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."); *id*. at 628–29 ("As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right…. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." The District's requirement that firearms be kept inoperable is unconstitutional because "[t]his makes it impossible for citizens to use them for the core lawful purpose of self-defense….").

13. The level of scrutiny determines the rigor with which the Court will evaluate claims, and the level employed for judicial review of a law or regulation greatly affects the likelihood that it will be struck down as unconstitutional. The most rigorous level is strict scrutiny, which historically is applied to claims involving "suspect classifications" of race and national origin and to some claims where a fundamental right is at stake. Strict scrutiny places the burden on the government to show that it has a compelling state interest, the law or regulation is necessary to achieve the objective, and it is narrowly tailored to achieve that objective. Because this is a high burden, roughly 70 percent of statutes and regulations are found unconstitutional when strict scrutiny is applied. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793 (2006). Intermediate scrutiny is less exacting, requiring that the law be substantially related to an important government interest. The Supreme Court thus far has explicitly used intermediate scrutiny only for classifications involving biological sex and familial legitimacy and regularly uses it within the context of "content-neutral" First Amendment restrictions. Rational basis review, the least rigorous level of review, is employed for all other claims and necessitates only that the government show a rational relationship between a legitimate state purpose and the disparity of treatment. The Court has not yet articulated a clear methodology for classifying which claims will receive intermediate, as opposed to strict, scrutiny. *See generally* David Smolin, *Equal Protection*, *in* The Heritage Guide to the Constitution, 511.
14. The Court stated in *Heller* that the District of Columbia's ban on possessing operable handguns in the home would "fail constitutional muster" under "any of the standards of scrutiny we have applied to enumerated constitutional rights." *Heller*, 554 U.S. at 628. However, the majority appeared to acknowledge its own evasion of the critical determination of just what standard of scrutiny should apply. *See id*. at 634 ("[Justice Breyer] criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions."). Although the Court declared in *McDonald* that the right to keep and bear arms is "fundamental," it did not explicitly dictate that it would use strict scrutiny when evaluating Second Amendment claims, a standard it has applied to all other fundamental rights. *See McDonald*, 561 U.S. at 789 ("Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights.... This conclusion is no more remarkable with respect to the Second Amendment than it is with respect to all the other limitations on state power found in the Constitution.").
15. *Heller*, 554 U.S. at 634–35 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing approach'.... A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.... The Second Amendment is no different.").
16. "Dicta" generally refers to statements of opinion or belief that are authoritative but not binding on future cases. Although it is sometimes difficult to delineate which parts of an opinion are dicta and which parts constitute binding interpretation, to the extent that legal actors agree on the delineation, "future courts could be expected to follow a case's holding and consider its dicta only to the extent that such discussions prove helpful." *See* Michael B. Abramowicz & Maxwell L. Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953 (2005). However, it is not unusual for circuit courts to treat Supreme Court dicta—especially from recent cases—as essentially binding on them. *See* David B. Kopel & Joseph G. S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 St. Louis U. L.J. 193, 199–201 (2017); Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1356, n.32 (2009).
17. *Heller*, 554 U.S. at 625.
18. *Id*. at 626, n. 26 ("We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.").
19. For example, the Court made no attempt to explain how restrictions on Second Amendment rights for certain classes of citizens could be presumptively lawful, even though restrictions on fundamental rights are generally held to strict scrutiny, a level of judicial review entailing a presumption that the law is unconstitutional. The exception has been "time, place, and manner" restrictions on First Amendment rights, which are subjected to a specific type of intermediate scrutiny. *See*, *e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989) ("Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are 'justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.'"). These restrictions, however, are more akin to laws regulating types of weapons and methods of carry than they are to the total loss of the Second Amendment right.
20. Although there are many possible ways to differentiate between violent and nonviolent crimes, the distinction provided by the Federal Firearms Act of 1938 is instructive. The act defined "crimes of violence" that disqualified a person from receiving firearms as "murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year." Federal Firearms Act, 52 Stat. 1250 § 6 (1938). Arguably, crimes like arson, firearms offenses, drug trafficking, and driving under the influence could be included in such a category. The precise distinction is beyond the scope of this paper, which seeks merely to point out that there clearly are crimes that are nonviolent in nature. While certainly repugnant from a moral standpoint and worthy of punishment, offenses like fraud, identity theft, larceny, violation of parole or probation, extortion, and forgery do not inherently evidence violent behavior.
21. 18 U.S.C. § 922(g) prohibits the possession of firearms by persons who have been convicted of a crime punishable by imprisonment for a term exceeding one year; who are fugitives from justice; who have been adjudicated as a mental defective or committed to a mental institution; who are unlawfully residing in the United States; who were dishonorably discharged from the armed forces; who have renounced their United States citizenship; who are currently under a restraining order; or who have been convicted of a misdemeanor crime of domestic violence. There are narrow exceptions for those convicted of felonies related to antitrust violations or unfair trade practices. 18 U.S.C. § 921(a)(20)(A).
22. *See* 18 U.S.C. § 921(a)(20)(B).

23. State mechanisms for the restoration of an offender's firearm privileges are both varied and complex. Restoration approaches range from automatic restoration under state law upon completion of a sentence (Minnesota) to a permanent disability for certain offenses that cannot be removed even by a pardon (California). For a complete overview of the various methods for restoration of state firearm privileges, see Restoration of Rights Project, *State Law Relief from Federal Firearms Act Disabilities*, Collateral Consequences Resource Center (May 2017), http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonstate-law-relief-from-federal-firearms-act-disabilities/.

24. In a significant number of states, a gubernatorial pardon is either de jure or de facto the only means of having one's firearms rights restored. *See id*. It is sometimes not enough that nonviolent felons are entitled under state law to possess firearms. For example, under Alabama state law, only persons convicted of violent crimes are subject to state firearms disabilities, and only for handguns. However, even these state offenders—entitled under state law to possess all firearms—remain subject to the federal firearms disability unless the state of Alabama restores *all* of the offender's civil rights in their entirety. *See* Caron v. United States, 524 U.S. 308 (1998) (holding that even though Massachusetts restored petitioner's right to possess long guns, because Massachusetts withheld the restoration of handgun possession rights from the petitioner, "[f]ederal law uses this state finding of dangerousness in forbidding petitioner to have any guns" and the federal firearms disability still applied to petitioner).

25. While pardons are not technically "unobtainable," their accessibility has declined to the extent that some scholars deem them "phantom remedies." *See*, *e.g.*, Tara Adkins McGuire, *Disarmed, Disenfranchised, and Disadvantaged: The Individualized Assessment Approach as an Alternative to Kentucky's Felon Firearm Disability and Other Arbitrary Collateral Sanctions Against the Non-Violent Felon Class*, 53 U. Louisville L. Rev. 89 (2014); Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753 (2011). Particularly for those convicted of federal felonies, the odds of receiving a presidential pardon are grim: Between 1980 and 2010, fewer than 1,400 individuals were pardoned under the federal system, a mere 8 percent of all who applied. *See Presidential Clemency Actions by Administration: 1945 to Present*, U.S. Dep't of Justice (Oct. 11, 2017), https://www.justice.gov/pardon/clemency-statistics; *see also* Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 Harv. J.L. & Pub. Pol'y 833 (2016). Applicants for gubernatorial pardon in many states should also have little cause for hope. *See* Restoration of Rights Project, *Characteristics of Pardon Authorities*, Collateral Consequences Resource Center (Aug. 2017), http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities/.

26. Only federal law can nullify the effect of a federal conviction, and the Supreme Court has upheld this standard even though Congress for decades has not funded the sole mechanism available to remove a federal felon's firearm disability. *See* Beecham v. United States, 511 U.S. 368 (1994) (reasoning that states cannot restore the civil rights of federal felons, even where there is no federal restoration procedure, because it cannot be assumed that Congress intended all felons in every jurisdiction to have access to such restoration).

27. In a notably short opinion, the 11th Circuit determined that it did not matter that the petitioner utilized a gun in self-defense, because he was excluded from the class of citizens covered by the Second Amendment. United States v. Rozier, 598 F.3d 768, 771 (2010). The court did not utilize the two-pronged test described below, instead concluding that petitioner was categorically excluded from Second Amendment protections even after an assessment that "felons do not forfeit their constitutional rights upon conviction." *Id*. It did not expound on how a felon who did not forfeit his constitutional rights upon conviction nevertheless permanently forfeited upon conviction the entirety of his right to keep and bear arms for self-defense. Similarly, the Third Circuit accepted *Heller* as holding unequivocally that "the Second Amendment offers no protection for…possession by felons and the mentally ill," apparently giving its presumptions conclusive effect. *See* United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010).

28. For a complete history of this two-part test's development in the federal circuit courts, as well as analysis of minor distinctions in their language, see Kopel & Greenlee, *supra* note 16, at 212–229.

29. *See*, *e.g.*, *Marzzarella*, 614 F.3d at 89 ("First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.").

30. *See*, *e.g.*, *id.* at 89 ("If it does not [burden conduct protected by the Second Amendment], our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny.")

31. For a thorough examination of how some lower courts have essentially adopted the approach set forth in Justice Breyer's dissent but explicitly rejected by the majority, see Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 Geo. Wash. L. Rev. 703 (2012).

32. A notable exception to this is *Holloway v. Sessions*, which at the time of publication is pending before the Seventh Circuit. In *Holloway*, the U.S. District Court for the Middle District of Pennsylvania declared that § 922(g)(1) is unconstitutional as applied to the Petitioner, who more than 10 years earlier had been convicted of his second DUI. Holloway v. Sessions, No. 1:17–CV–81 (M.D. Penn. Sept. 28, 2018). Under Pennsylvania law, this second DUI, while a misdemeanor, carried a maximum sentence of five years imprisonment. *Id*. at 7. The petitioner was sentenced to the mandatory minimum of 90 days in jail, which he was allowed to serve under work-release—the most lenient punishment allowed under the circumstances. *Id*. at 3–4. While this conviction would not have disqualified him from firearm possession under state law, the petitioner was disqualified under § 922(g)(1) and therefore had his firearm application denied following a mandatory background check. *Id*. at 4, 11–12. In declaring the statute unconstitutional as applied to the petitioner, the district court noted, among other things, that "under Pennsylvania law, actual or attempted violence is not an element of driving under the influence at the highest rate of alcohol" and that the offense was therefore nonviolent despite its potential for perilous or tragic outcomes. *Id*. at 9. The district court's analysis of the various factors weighing for or against petitioner's disarmament nearly mirrors the Sixth Circuit's analysis in the context of § 922(g)(4), referenced below.

33. 848 F.3d 614 (4th Cir. 2017).

34. *Id*. at 626.
35. *Id*. (referencing Binderup v. Attorney General, 836 F.3d 336 (3d Cir. 2016)).
36. *Id*.
37. 633 F.3d 168 (3d Cir. 2011).
38. Barton had previous convictions for possession of cocaine with intent to distribute and for receipt of a stolen firearm. *Id*. at 170. The court concluded that these were substantially similar to violent crimes, rendering unpersuasive any claim by Barton that he was no more likely to commit a crime of violence than were other members of society. *Id*. at 174.
39. *Id*. at 174. *See also* Schrader v. Holder, 704 F.3d 980 (D.C. Cir. 2013) (holding that section 922(g)(1) is constitutional as applied categorically to common-law misdemeanants but also noting that the court "would hesitate to find" a 64-year-old veteran with a single four-decade-old violent misdemeanor conviction to be "outside the class of 'law-abiding, responsible citizens'" protected by the Second Amendment).
40. 836 F.3d 336 (3d Cir. 2016).
41. *Id*. at 349.
42. *Id*. at 350.
43. *Id*.
44. 614 F.3d 638 (7th Cir. 2010).
45. *Id*. at 640.
46. Skoien had twice been convicted of domestic battery against two different women and was arrested for unlawful possession of multiple firearms while still on probation for the second conviction. *Id*. at 645.
47. *See infra*, "*Packingham*'s First Amendment Framework."
48. 837 F.3d 678 (6th Cir. 2016).
49. "En banc" signifies that the decision was made by a full court of all the appellate judges. In some jurisdictions, including all U.S. Courts of Appeals, cases will be decided initially by panels of three or four judges. In some situations, cases may be reheard en banc, and the entire panel of appellate judges may overturn or uphold the smaller panel's initial determination. *See* Fed. R. App. P. 35.
50. *Tyler*, 837 F.3d at 681.
51. *Id*. at 683.
52. *Id*.
53. *Id*.
54. *Id*. at 684.
55. § 922(g)(4) prohibits the possession of firearms by a person "who has been adjudicated as a mental defective or who has been committed to a mental institution." The same federal mechanism for the restoration of gun rights for federal felons applies to those committed to mental institutions, rendering the mechanism effectively moot because Congress has not funded it for decades. Further, Michigan is one of several states that have not adopted their own mechanisms for restoring the gun rights of those with mental health commitments.
56. *Tyler*, 837 F.3d at 685.
57. *See id*. at 699 ("Thus, we conclude that Tyler has a viable claim under the Second Amendment and that the government has not justified a lifetime ban on gun possession by anyone who has been 'adjudicated as a mental defective' or 'committed to a mental institution.'... As we see it, the government may justify § 922(g)(4) in one of two ways: (1) with additional evidence explaining the necessity of § 922(g)(4)'s lifetime ban or (2) with evidence showing that § 922(g)(4) is constitutional as applied to Tyler because he would be a risk to himself or others were he allowed to possess a firearm.").
58. *Id*. at 686.
59. *Id*. at 687 (quoting *Skoien II*, 614 F.3d at 640).
60. *Id*. at 590.
61. *Id*. at 688.
62. *Id*. at 686.
63. *Id*. at 689–90.
64. *Id*. at 692. The *Tyler* majority's analysis of the appropriate level of scrutiny was not wholly based on common use by sister courts and did give a fairly in-depth explanation based on constitutional jurisprudence. For example, it determined that the Tenth Circuit was correct in differentiating between the Second Amendment right and other rights due to the "risk inherent in firearms and other weapons." It also added that the permanence of the gun disability did not necessitate the application of strict scrutiny, even though such permanence would trigger this standard for infringements on other fundamental rights, because other sections of the Gun Control Act have consistently been reviewed under intermediate scrutiny.
65. *Id*. at 693.

66. *Id.* at 695 ("This is compelling evidence of the need to bar firearms from those currently suffering from mental illness and those just recently removed from an involuntary commitment. It does not, however, answer why Congress is justified in permanently barring anyone who has previously been committed, particularly in cases like Tyler's, where a number of healthy, peaceable years separate the individual from their troubled history.").
67. *Id.* ("This evidence helps explain why it might be reasonable to prevent those with past suicide attempts from ever possessing firearms, but it does not fully justify the need to permanently disarm anyone who has been involuntarily committed for whatever reason.... Likewise, the evidence relied on by the government...highlights why it may be appropriate to prohibit firearm ownership by currently mentally ill individuals and those who were recently committed....").
68. *Id.* at 697.
69. *Id.*
70. *Id. See* NICS Improvement Amendments Act of 2007.
71. *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration*, 160 U. Penn. L. Rev. 1789, n.25 (2012); Alex C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 Wis. L. Rev. 1045, 1059 (2002).
72. *See* Danielle R. Jones, *When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 Stan J. Civ. Rts. & Civ. Liberties 237, 244–45 (2015); Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 Harv. BlackLetter L.J. 53, 54 (2006).
73. *See* Chin, *supra* note 71, at n.25; Mark Haase, *Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota*, 99 Minn. L. Rev. 1913, 1919 (2015).
74. Harry David Saunders, *Civil Death—A New Look at an Ancient Doctrine*, 11 Wm. & Mary L. Rev., 988, 988–90 (1970). *See* U.S. Const. art. III, § 3, cl. 2 ("The Congress shall have the Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except for the Life of the Person attainted.").
75. *See* Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, *supra* note 72, at 54.
76. "Outside of the law." *See* Avery v. Everett, 18 N.E. 148, 150 (N.Y. 1888) ("The incident of civil death attended every attainder of treason or felony, whereby, in the language of Lord Coke, the attainted person 'is disabled to bring any action, for he is extra legem positus, and is accounted in law civiliter mortuus[.]'").
77. *See* William Blackstone, Commentaries 4:373–79, The Founders' Constitution (University of Chicago Publisher's Ed.), http://press-pubs.uchicago.edu/founders/print_documents/a1_9_3s2.html ("When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence by the common law is attainder.... He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man; for, by an anticipation of his punishment, he is already dead in law.").
78. *See* United States v. Barton, 633 F.3d 168, 174–75 (2011) (holding that a felony conviction disqualifying an individual from asserting his Second Amendment rights was no different from the forfeiture of other civil rights).
79. Saunders, *supra* note 74, at 990. In some instances, states passed statutes enforcing certain aspects of civil death practices, but these statutes were "considered penal and strictly construed" to apply only to those with capital or life sentences. *Id.* at 991.
80. A "Bill of Attainder" means conviction by the legislature, as opposed to a "state of attainder," which refers to the punishment of that conviction. In this sense, the Constitution's use of "attainder" in the Treason Clause has the dual meaning of conviction and punishment. *See* Chin, *supra* note 71, at n.26; *see also* Saunders, *supra* note 74, at 990 ("When civil death statutes were enacted, the legislatures of many states failed to provide a proper definition.").
81. U.S. Const. art. III, § 3, cl. 2.
82. Chin, *supra* note 71, at 1797; Saunders, *supra* note 74, at 989–90. This premise has been roundly accepted by the Supreme Court. *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 473 & n.35 (1977) (explaining that "a bill of attainder originally connoted a Parliamentary Act sentencing [someone] to death" and that "attainder of death was usually accompanied by a forfeiture of the condemned person's property...and the corruption of his blood, whereby his heirs were denied the right to inherit his estate"); Furman v. Georgia, 408 U.S. 238, 317 n.8 (1972) (Marshall, J., concurring) ("[T]he English also provided for attainder ('dead in law') as the immediate and inseparable concomitant of the death sentence. The consequences of attainder were forfeiture of real and personal estates and corruption of blood.").
83. William Blackstone, Commentaries 4:373–79, The Founders' Constitution (University of Chicago Publisher's Ed.), http://press-pubs.uchicago.edu/founders/print_documents/a1_9_3s2.html. By Blackstone's time, however, even lesser offenses were often punished with theatrical public execution, and a person could find himself hanged for such petty offenses as horse thievery or banknote forgery. *See* McGuire, *supra* note 25, at 91–94.
84. Chin, *supra* note 71, at 1797; Saunders, *supra* note 74, at 990. *But see John* 11:1-43 (King James Version).
85. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 697 (2009); John G. Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, Heritage Found. Legal Memorandum No. 130 (Aug. 6, 2014), http://www.heritage.org/crime-and-justice/report/criminal-law-and-the-administrative-state-the-problem-criminal-regulations.

86. *See, e.g.*, Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 Harv. J.L. & Pub. Pol'y 1065, 1074–77 (2014) (discussing the provenance and growth of "public welfare offenses"); Paul J. Larkin, Jr., *Regulatory Crimes and the Mistake of Law Defense*, Heritage Found. Legal Memorandum No. 157 (July 9, 2015), http://www.heritage.org/crime-and-justice/report/regulatory-crimes-and-the-mistake-law-defense (explaining that certain classes of crimes have no relation to common-law offenses and urging the adoption of a "mistake of law" defense to protect well-intentioned citizens from being punished for nonblameworthy conduct).
87. *See* Chin, *supra* note 71, at 1804–07 (citing to data compiled from the Bureau of Justice Statistics and various state criminal justice agencies and noting that over half of those convicted of felonies avoid prison sentences altogether); McGuire, *supra* note 25, at 91–94 (describing criminal justice and capital punishment reform in early America as it developed in response to English practices).
88. Statute of Northampton, 2 Edw. 3, c. 3 (1328).
89. *See, e.g.*, Priya Satia, *On Gun Laws, We Must Get the History Right*, Slate (Oct. 21, 2015 9:34 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/10/wrenn_v_d_c_gun_case_turns_on_english_laws_of_1328_and_1689.html. *But see* David Kopel, *English Legal History and the Right to Carry Arms*, The Wash. Post (Oct. 31, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/31/wrenn-history/?utm_term=.4c4d5dfc48eb.
90. *See* R v. Knight, (1686) 90 Eng. Rep. 330, 330 (K.B.); Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 104, 184 n.36 (1994); *id.* at 191–92 n.32.
91. William Hawkins, A Treatise of the Pleas of the Crown: Or, a System of the Principal Matters Relating to that Subject, Digested Under Their Proper Heads ch. 63, §§ 4, 9 (Leach ed. 1788) (1716).
92. *See* Marshall, *supra* note 85, at 716–17.
93. *Id.* at 718 (referencing Hawkins, *supra* note 91, at ch. 60, § 15); *see also* William Rawle, A View of the Constitution of the United States of America 126 (2d ed. Phila., Philip H. Sickles 1829) (1825) (referencing earlier English commentators and concluding that "even the carrying of arms abroad by a single individual, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace. If he refused he would be liable to imprisonment.").
94. Statute of Northampton, 2 Edw. 3, c. 3 (1328).
95. *See* Hawkins, *supra* note 91, at ch. 60, § 23; Hyde v. Greuch, 62 Md. 577, 582 (1884).
96. McGuire, *supra* note 25, at 96.
97. Marshall, *supra* note 85, at 719.
98. An Act for the better secureing of the Government by disarming Papists and reputed Papists, 1 W. & M., Sess. 2, c. 15, § 4 (1688) (Eng.).
99. After Henry VIII broke from the Catholic Church in 1534, England went through periods of dramatic distrust of Catholic citizens, who were often accused of popery—reflecting a widely believed conspiracy theory that English Catholics were perpetually plotting to establish a tyrannical Catholic monarchy beholden to Rome. *See* BBC Radio 4, *Titus Oates and the Popish Plot*, In Our Time (May 12, 2016), http://www.bbc.co.uk/programmes/b079rbcj.
100. While a thorough examination of the complex relationship between Catholics and Protestants in 17th and 18th century England is beyond the scope of this paper, two realities are quite clear: At least some Catholic Englishmen at some points during that time plotted violent overthrows of Protestant monarchs, and the perceived threat from these radicals often teetered on the point of terrorism regardless of whatever real threat they may or may not have posed. *See generally* John Pollock, The Popish Plot: A Study in the Reign of Charles II (London: Duckworth and Co. 1903); Dr. Edward Vallance, *The Glorious Revolution*, BBC History (Feb. 17, 2011), http://www.bbc.co.uk/history/british/civil_war_revolution/glorious_revolution_01.shtml; Bruce Robinson, *The Gunpowder Plot*, BBC History (Mar. 3, 2011), http://www.bbc.co.uk/history/british/civil_war_revolution/gunpowder_robinson_01.shtml.
101. An Act for the better secureing of the Government by disarming Papists and reputed Papists, 1 W. & M., Sess. 2, c. 15, § 1 (1688) (Eng.) (referring to the oath of supremacy instituted by Queen Elizabeth I, in Act of Supremacy 1558, 1 Eliz 1 c. 1 (1558)).
102. *See* Marshall, *supra* note 85, at 722–23.
103. An Act for the better secureing of the Government by disarming Papists and reputed Papists, 1 W. & M., Sess. 2, c. 15, § 3 (1688) (Eng.).
104. 4 Journals of the Continental Congress, 1774–1789, at 205 (Washington Chauncey Ford ed., 1906).
105. *See, e.g.*, Act of Mar. 14, 1776, ch. VII, 1775–1776 Mass. Acts 31 (disarming persons who were "Disaffected to the Cause of America"); Act of Apr. 1, 1778, ch. 796, §§ 2, 4, 9 Pa. Stat. 238-39 (requiring loyalty oath); Act of May 5, 1777, 1777 Va. Acts 8 (directing militia officers to disarm free-born males over the age of 16 who refuse to renounce allegiance to King George III); Act of Apr. 1, 1778, ch. 796, §§ I, II, V, 9 Pa. Stat 238–39 (ordering persons who refuse to take an oath supporting the Commonwealth of Pennsylvania to surrender their arms to the militia lieutenant of the residing county).
106. Marshall, *supra* note 85, at 727–28.
107. Kopel, *supra* note 2, at 1369. *See also id.* at 1445–1446 (analyzing the Second Amendment claims of Lincoln's critics during the Civil War).

108. General John C. Fremont, as part of a declaration of martial law in Missouri, ordered that all persons found with firearms in certain areas be shot. *See* Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right 233 n.96 (1984). Colonel C. Carroll March similarly ordered a general confiscation of guns and ammunition from those not serving in Maryland's loyal militias. *Id*. at 233. It should be noted that while the terms of surrender for the Confederacy included the relinquishment of all military equipment, General Grant allowed officers to keep their sidearms.
109. *See* Kopel, *supra* note 2, at 1447–60.
110. Even modern scholars who are convinced that *Heller*'s historical premises are somewhat inaccurate refer entirely to Antebellum state laws regulating the carrying of arms in public and not to general prohibitions on possession. *See generally* Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 L. & Contemp. Probs. 11 (2017).
111. *See id*.
112. The $200 transfer tax was to be paid by the transferor, and it was unlawful to receive covered firearms without the applicable tax stamp. National Firearms Act of 1934, 48 Stat. § 1236 (1934), http://legisworks.org/sal/48/stats/STATUTE-48-Pg1236.pdf. The NFA did not regulate handguns and was the first attempt by a government entity to regulate the possession of long guns.
113. Federal Firearms Act of 1938, 52 Stat. § 1250 (1938), http://legisworks.org/sal/52/stats/STATUTE-52-Pg1250.pdf.
114. *See* Cases v. United States, 131 F.2d 916 (1st Cir. 1942); United States v. Tot, 131 F.2d 261 (3d Cir. 1942). For an analysis of the reasoning utilized in these cases, see Marshall, *supra* note 85, at 699–700.
115. *See* Gun Control Act of 1968, 18 U.S.C. § 921 (1968).
116. *See id.*
117. Marshall, *supra* note 85, at 698.
118. For example, the *Heller* majority looked to the Second Amendment's historical background "because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." *Heller*, 554 U.S. at 591. It also rejected the premise that the Second Amendment protects only those arms in existence at the time of its ratification, observing that the First Amendment protects modern forms of communication. *Id*. at 582. *See also* Tyler v. Hillsdale County Sheriff's Dep't, 837 F.3d 678, 711 (6th Cir. 2016) (Sutton, J. concurring) ("The First Amendment offers a useful analogy [to the Second Amendment].... What is true for the First Amendment is true for the Second."); United States v. Marzzarella, 614 F.3d 85, 96–97 (3d Cir. 2010) (determining that Second Amendment claims, like First Amendment claims, are subject to a sliding scale where less stringent standards may apply depending on the degree to which the statute burdens the right and the way in which the petitioner frames his challenge); David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 Tenn. L. Rev. 417 (2014) (describing in detail how the Supreme Court has "strongly indicated that First Amendment tools should be employed to help resolve Second Amendment issues"); Jordan E. Pratt, *A First Amendment-Inspired Approach to* Heller*'s "Schools" and "Government Buildings"*, 92 Neb. L. Rev. 537 (2014) (concluding that "lessons from First Amendment doctrine counsel in favor of a narrow interpretation of *Heller*'s schools and government buildings."); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L.Rev. 375, 413 (2009) (arguing that *Heller* categorically excludes certain people and arms from Second Amendment protection, just as certain types of speech are categorically excluded from First Amendment protection).
119. Ezell v. City of Chicago, 651 F.3d 684 (2011). After McDonald, Chicago enacted a strict registration and licensing regime requiring the completion of a certified firearm-safety course. The course must provide at least one hour of shooting range instruction, even though shooting ranges were prohibited from operating within city limits. The Seventh Circuit noted *Heller*'s parallels to First Amendment jurisprudence that holds that some limited and well-defined classes of speech are categorically unprotected. It further developed these parallels by borrowing from First Amendment doctrine regarding judicial review and determined that if an activity was protected by the amendment, "the rigor of... judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right," with broadly prohibitory laws restricting core exercises of the right being categorically unconstitutional. *See id*. at 702–04. Importantly, the *Ezell* court focused on unprotected categories of speech, not unprotected categories of persons.
120. 137 S.Ct. 1730 (2017).
121. *Id*. at 1733–34. *See* N.C. Gen. Stat. Ann. §§ 14–202.5.
122. *Packingham*, 137 S.Ct. at 1734.
123. *Id*. at 1735.
124. *Id*. at 1736.
125. *Id*. (quoting McCullen v. Coakley, 573 U.S. ___, ___, 134 S.Ct. 2518, 2534 (2014)).
126. *Id*. (quoting *Coakley*, 134 S.Ct. at 2535).
127. *Id*. at 1738 (quoting Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002)).
128. *Id*. at 1737 ("In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.")
129. *Id*. at 1736 (quoting *Ashcroft*, 535 U.S. 234).
130. *Id*.
131. *Id*. (quoting Stanley v. Georgia, 394 I.S. 557, 563 (1969).

132. *Id*. at 1735.

133. *Id*. at 1735, 1737 ("While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular.... These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'").

134. *Id*. at 1737.

135. Collateral consequences are those that are not imposed as direct criminal punishments for the violation of a criminal statute but nonetheless "restrict the activities of ex-offenders and curtail their liberties after they are released from confinement or their period of probation ends." *See* John G. Malcolm & John-Michael Seibler, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism*, Heritage Found. Legal Memorandum No. 200 (Mar. 7, 2017), http://www.heritage.org/sites/default/files/2017-03/LM-200.pdf.

136. Collateral consequences have been challenged under several legal theories, none of which appears to have been successful. *See*, *e.g.*, Smith v. Doe, 538 U.S. 84 (2003) (holding that Alaska's Sex Offender Registration Act did not violate the Ex Post Facto Clause); Richardson v. Ramirez, 418 U.S. 24 (1974) (determining that the disenfranchisement of individuals with criminal convictions is a constitutionally permissible collateral consequence); Helvering v. Mitchell, 303 U.S. 391, 399 (1938) (finding that the Double Jeopardy Clause does not prevent Congress from imposing both a criminal penalty and a civil penalty on the same person for the same offense, because the Double Jeopardy Clause only prohibits twice imposing criminal punishments in such a situation); Hawker v. New York, 170 U.S. 189 (1898) (holding that a state law barring felons from medical practice, even as applied retroactively, did not violate U.S. Const. art. I, § 10); Calder v. Bull, 3 U.S. 386 (1798) (holding that the Ex Post Facto Clause applies exclusively to criminal punishment).

137. *Packingham*, 137 S.Ct. at 1737.

138. Although analysis of this tension is largely beyond the scope of this paper, it should be noted that many collateral sanctions would not likely withstand even the lowest level of scrutiny applied to prison regulations for those currently serving sentences. For example, regulations affecting the free speech of prisoners must be at least reasonably related to a legitimate government interest—a standard seemingly not applied to collateral sanctions like the revocation of a person's driver's license for nondriving offenses. The Court has given state and federal legislators broad leeway in determining how to punish criminal offenders. *See* Ewing v. California, 538 U.S. 11, 27–28 (2003) (plurality opinion) (stating that absent a violation of due process or the imposition of cruel and unusual punishment, concern for the "wisdom, cost-efficiency, and effectiveness" of criminal punishment "is appropriately directed at the legislature").

139. "Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue meaningful and rewarding lives." *Packingham*, 137 S.Ct. at 1737. While this portion of the *Packingham* opinion is both dicta and a policy-based argument as opposed to a binding interpretation of law, it is an important insight into the Court's current attitude toward collateral consequences generally.

140. As Justice Alito notes in his concurrence, research consistently shows that convicted sex offenders who reenter society are significantly more likely than any other type of offender to be rearrested for a new rape or sexual assault. *See id*., 137 S.Ct. at 1739 (Alito, J., concurring); Roger Przybylski, *Recidivism of Adult Sexual Offenders*, U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (July 2015), https://www.smart.gov/pdfs/RecidivismofAdultSexualOffenders.pdf. The Internet is also a powerful tool for would-be child abusers, giving them easy access to a minor's personal information, providing them with unique ways of communicating with minors, and often enabling them to track the minor's location or determine daily behavioral patterns.

141. *See McDonald*, 561 U.S. at 782–83 (2010) ("Municipal respondents maintain that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety.... The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.").

142. District of Columbia v. Heller, 554 U.S. 570, 595 (2008).