

Disarmament and the Doctrine: Race, Reconstruction, and the Contestations over the Second Amendment

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ABSTRACT

*In a striking doctrinal turn, the Roberts Court has begun invoking the history of Black marginalization—not to confront systemic racism per se, but to support the expansion of gun rights. In *District of Columbia v. Heller*, *McDonald v. City of Chicago*, and *New York State Rifle & Pistol Association v. Bruen*, the Court has emphasized how antebellum slave codes and postbellum Black Codes denied firearms to Black Americans, speaking in the grammar of racial reparations to constitutionalize individual gun ownership.*

This Note builds on that development to challenge the reflexive mainstream embrace of gun regulation as a racial-justice project. Modern laws like felon-in-possession statutes appear to promote public safety but extend the logic of historical disarmament, routing social harm through criminal law. Like the War on Drugs, these regulations reinforce racialized patterns of incarceration while further excluding Black Americans from full citizenship. Yet the Court's willingness to acknowledge the racial history of firearm regulation, however incomplete and opportunistic, creates an opening to contest these laws on both originalist and political justice grounds.

The analysis situates Bruen's history-and-tradition methodology within progressive originalism, treating the Reconstruction Amendments as a constitutional rebirth aimed at racial equality and democratic inclusion. By centering the history of Black disarmament, this Note argues the current doctrinal moment offers unexpected potential to challenge enforcement regimes that mask racial control as public safety. It proceeds in four parts: normative critique, historical analysis, Bruen's competing narratives, and implications for felon-in-possession challenges.

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INTRODUCTION

In one of the Supreme Court's most striking doctrinal turns, the Roberts Court has begun invoking the history of Black marginalization—not to confront systemic racism *per se*, but to support the expansion of individual gun rights. As Professor Melissa Murray has observed, this evocation of postbellum subordination has been “broad and sweeping (and selective),” consistently depicting the ways in which “Southern states sought to deny the citizenship of newly freed African Americans by denying them the right to

keep and bear arms.”¹ The rhetorical move, visible in *District of Columbia v. Heller*,² *McDonald v. City of Chicago*,³ and *New York State Rifle & Pistol Association, Inc. v. Bruen*,⁴ reflects a deeper asymmetry in the Court’s engagement with race: while its equal protection jurisprudence has grown increasingly skeptical of race-conscious remedies, its Second Amendment jurisprudence is shaped by an extensive documentation of disarmament along the color line.⁵

The Court’s recent willingness to acknowledge this record creates a rare opening to contest modern firearm laws, not only on originalist terms but also as a matter of political justice. As such, this Note interrogates the Court’s use of racial history in Second Amendment doctrine as a means of challenging the mainstream liberal embrace of gun regulation as a remedy for racial subordination.⁶ It highlights how many of these laws, particularly felon-in-possession statutes, can be understood as facially centering public safety, but in practice function to extend historical disarmament and serve as conduits for confinement that reinforce the exclusion of Black Americans from full citizenship.

The Court’s hyper-fixation on historical practice in Second Amendment jurisprudence is not incidental but the product of a broader methodological shift.⁷ In *Heller*, the Court held for the first time that the Second Amendment “plainly” protected an individual’s right to use firearms for self-defense, grounding that right in the perceived original public meaning of the

¹ Melissa Murray, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501, 1529 (2024).

² 554 U.S. 573, 614 (2008) (“Black[] [people] were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed [B]lack[] [people’s] constitutional right to keep and bear arms.”).

³ 561 U.S. 742, 776 (2010) (demonstrating how the Reconstruction-era “Congress routinely referred to the right to keep and bear arms and decried the continued disarmament of [B]lack[] [people] in the South.”).

⁴ 597 U.S. 1, 61-63 (2022) (articulating how the Fourteenth Amendment was drafted with Congress’s eye especially focused on ensuring formerly enslaved individuals had access to firearms for self-defense).

⁵ Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23 (2022) (examining the Court’s opinions in *Trump v. Hawaii*, 585 U.S. 667 (2018), *Shelby County v. Holder*, 570 U.S. 529 (2013), and in the affirmative action context).

⁶ See, e.g., Lois Beckett, ‘Dying of Whiteness’: why racism is at the heart of America’s gun inaction, *GUARDIAN* (Aug. 9, 2019), <https://www.theguardian.com/us-news/2019/aug/08/racism-gun-control-dying-of-whiteness> [<https://perma.cc/ZR28-SXRB>].

⁷ For advocates of the Court’s turn towards “history and tradition,” see Stephen Sachs, *Dobbs and the Originalists*, 47 HARV. J.L. & PUB. POL’Y 539 (2024); Randy E. Barnett and Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023); William Baude, *Of Course the Supreme Court Needs to Use History. The Question is How*, *WASH. POST* (August 8, 2022), <https://www.washingtonpost.com/opinions/2022/08/08/supreme-court-use-history-dobbs-bruen/> [<https://perma.cc/WV5N-EC3K>]. For critiques, see JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM* (2024); Reva B. Siegel, *The Levels-of-Generality Game: “History and Tradition” in the Roberts Court*, 47 HARV. J.L. & PUB. POL’Y 565 (2024); Cary Franklin, *History and Tradition’s Equality Problem*, 133 YALE L.J. 946 (2024); *Duncan v. Bonta*, 19 F.4th 1087, 1123 (9th Cir. 2021) (Berzon, J., concurring) (noting “there are frequently traditions that support each side of a constitutional controversy.”).

constitutional text.⁸ The elevation of the archives as a doctrinal apparatus became complete in *Bruen*, where the Court announced that gun regulations must be consistent with the “Nation’s historical tradition of firearm regulation” to survive constitutional scrutiny.⁹ Rejecting interest balancing and means-end tests, the Court elevated history from context to constraint, turning originalist narratives into a gatekeeper for contemporary gun laws.¹⁰

Within this legal tradition, however, lies a deeply racial legacy of Black disarmament.¹¹ Before and after the Civil War, Southern states enacted a litany of statutes that prohibited Black gun ownership, later adopting facially neutral laws—like discretionary licensing regimes—that effectuated the same ends, often under the guise of public safety.¹² These practices were conscious efforts to deny Black Americans full citizenship and autonomy.¹³

Although the Court’s turn to this history of Black disarmament raises questions about the consistency of the Justices who employ it, it nevertheless offers powerful doctrinal and rhetorical frameworks to challenge the racialized enforcement of gun regulations. Put simply, the same history the Court uses to expand gun rights can be deployed to challenge enforcement practices that criminalize Black gun possession. In particular, the Court’s invocation of the Reconstruction period creates a surprising point of convergence

⁸ *Heller*, 554 U.S. at 616.

⁹ *Bruen*, 597 U.S. at 8.

¹⁰ Conner Greene, *The Second Amendment’s Domestic Violence Problem: How Rahimi Exposes the Flaws of Bruen’s Problematic Historical Analogue Test*, 72 CLEV. ST. L. REV. 937, 942 (2024) (arguing that by replacing the traditional “means-ends scrutiny” typically associated with constitutional law with a pure historical inquiry, the Second Amendment has now been placed “into a special protected category of its own”); see also Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 133 (2023) (“No matter how it is framed, *Bruen* departs dramatically from traditional forms of implementing doctrine. . . . It places front and center . . . comparisons between modern and historical laws in light of their purposes and on-the-ground operation.”).

¹¹ See *McDonald*, 561 U.S. at 843-851 (Thomas, J., concurring in part and concurring in the judgment) (surveying the history of Black disarmament after the Civil War and its connection to lynching); see generally T. Markus Funk, *Gun Control in America: A History of Discrimination Against the Poor and Minorities*, in GUNS IN AMERICA: A READER 390 (Jan E. Dizard, Robert Muth & Stephen P. Andrews eds., 1999). (“One undeniable aspect of the history of gun control in the United States has been the conception that the poor, especially the non-white poor, cannot be trusted with firearms.”); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

¹² Discretionary licensing regimes, also known as “may-issue” systems, are frameworks where a government authority has the subjective power to approve or deny an application for a firearm license, even if all objective criteria are met. William Jacobs-Perez, *Rethinking Gun Violence Prevention: Post-Bruen Policing and the Decriminalization of Minority Gun Ownership*, 23 U. MD. L.J. RACE RELIGION GENDER & CLASS 104, 106 (2023). For instance, Martin Luther King Jr. was denied a concealed carry permit even after his house was firebombed. ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 235 (2011).

¹³ Indeed, in *Dred Scott v. Sandford*, Chief Justice Roger Taney argued that one reason Black people could not be citizens under the Constitution was that it “would give to persons of the negro race” the right to “keep and carry arms wherever they went.” 60 U.S. (19 How.) 393, 417 (1857) (enslaved party), superseded by constitutional amendment, U.S. CONST. amend. XIV (1868).

with a tradition of progressive originalism—one that treats the Thirteenth, Fourteenth, and Fifteenth Amendments as constitutional rebirth aimed at democratic inclusion.¹⁴ This Note draws from that lineage, treating the history of Black people as an entry point to recover and codify the transformative, yet unfulfilled, potential of the Reconstruction Amendments’ original design, which envisioned constitutional law as a tool for the fuller realization of freedom and equality.¹⁵

At the same time, the argument developed here should not necessarily be read as a reflection of the author’s own first-best policy preferences. Rather, it begins from the recognition that the Court’s decisions in *Heller*, *McDonald*, and *Bruen* have closed off certain avenues of firearm regulation. Within those constraints, one should be attentive to selective enforcement and pursue the analysis without regard to ideological valence. As Professor Richard Re has recently emphasized, constitutional scholars should strive for “intellectual independence” by advancing arguments that at times eschew neat ideological categorizations, thereby resisting the pull of “hackery.”¹⁶ In that spirit, this Note acknowledges the disproportionate harm that gun

¹⁴ See JACK M. BALKIN, *LIVING ORIGINALISM* 25-27 (2011) (arguing that the original meaning of the Fourteenth Amendment provides a foundation for a progressive constitutional tradition grounded in equal citizenship and fidelity to principle through evolving application); Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012) (“Judges, scholars, and ordinary citizens writing or speaking in the originalist tradition consistently ignore the original understanding of the Fourteenth Amendment even when that understanding should, on originalist principles, control the outcome of a case”); Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Race, Originalism, and Skepticism*, 25 U. PA. J. CONST. L. 1241, 1245 (2023) (noting that Reconstruction Originalism is concordant with the racial equality project); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 51 (2000) (“The entire Bill of Rights takes on new meaning when viewed through the prism of the later Fourteenth Amendment . . .”).

¹⁵ And the moment is particularly ripe for litigators and scholars to advance the efficacy of progressive originalism—the Court’s Justices are conflicted on what exactly the contours of originalism are. The influence of Justice Ketanji Brown Jackson cannot be overlooked. In *Allen v. Milligan*, a case about the dilution of the Black vote in Alabama, Justice Jackson both demonstrated her willingness to accept originalism as “our normal assessment of the Constitution” and one which begins with a race consciousness inherent within the Reconstruction Amendments’ ethos. Transcript of Oral Argument at 57, *Merrill v. Milligan*, No. 21-1086, 2022 WL 3580300 (Aug. 22, 2022). In this light, Justice Jackson has forced upon the Court a serious question: whether fidelity to original meaning requires centering the emancipatory purposes of the Thirteenth, Fourteenth, and Fifteenth Amendments, or whether the Court will continue to privilege the Founding era’s more exclusionary baselines instead. Cf. RACHEL BARKOW, *JUSTICE ABANDONED: HOW THE SUPREME COURT IGNORED THE CONSTITUTION AND ENABLED MASS INCARCERATION* 10 (2025) (highlighting that originalism can both speak to the philo-juridical inclinations of the current conservative Justices and also help usher in a more decarceral legal era).

¹⁶ Richard Re, *Foreword: To a Conservative Warren Court*, 139 HARV. L. REV. 2, 84 n.463 (2025) (quoting Professor Akhil Reed Amar who suggests that scholars should identify at least one major area where their legal views diverge from their political preferences). Professor Re defines “hackery” as “obedience to the current wishes of a political party or other special interest, usually for reasons of personal gain and not based on any legitimate principle.” *Id.* at 53. Such intellectual capture undermines the credibility and legitimacy of constitutional scholarship, which depends on reasoned analysis rather than pre-determined allegiances.

violence has had on Black communities while interrogating how gun regulation reproduces racially disparate harm.

This Note proceeds in four parts. Part I briefly rehearses the normative critique of carceral gun control regimes and highlights their racially disparate enforcement. From here, Part II traces the history of Black disarmament from the colonial era up through the Black Power era. It argues that gun regulation has long functioned as a tool of racial domination and that this history is central to understanding the architecture of modern firearm law.¹⁷ Part III examines *Bruen*'s competing racial narratives through two amicus briefs, revealing fundamental tensions about whether regulation promotes or undermines racial justice. Part IV argues that *Bruen*'s doctrinal instability creates openings to challenge felon-in-possession statutes, which disproportionately burden Black Americans while reproducing historical patterns of subordination. Though the Court's recent decision in *United States v. Rahimi* narrows these openings,¹⁸ status-based disarmament remains doctrinally contested, with judges increasingly questioning categorical disarmament without individualized dangerousness findings.¹⁹ If navigated carefully, this fluidity has the potential to reshape understandings of both gun rights and racial justice.²⁰

¹⁷ For an equally important discussion on how a history of racialized oppression contributes to modern gun culture, see ALEXANDRA FILINDRA, *RACE, RIGHTS, AND RIFLES: THE ORIGINS OF THE NRA AND CONTEMPORARY GUN CULTURE* (2023).

¹⁸ 602 U.S. 680, 682 (2024) (finding that an individual who poses a "clear threat" of physical violence to another may be disarmed); *id.* at 773, n.7 (Thomas, J., dissenting) (finding that "specious" notion of restricting firearms to "law-abiding" individuals relies on dicta and judicial language taken out of context).

¹⁹ See RICHARD H. FALLON JR., *THE CHANGING CONSTITUTION: CONSTITUTIONAL LAW IN THE TRUMP-ERA SUPREME COURT* 160 (2025) (describing the Court's Second Amendment jurisprudence as being in an "experimental stage," expanding into the contested space of which, if any, historical analogues can be used to justify felon-in-possession laws).

²⁰ See Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 296 (2020) ("The image of historically marginalized persons, including racial minorities and women, facing the threat of disarmament could lead courts in some cases to adopt equality-based justifications for protecting Second Amendment rights More generally, courts might invoke the purportedly subordinating effect of gun control measures as a reason to be skeptical of gun control generally."); Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. 537, 547 (2022) ("[I]n this time of growing public awareness of institutional racism and implicit bias, legal developments that push judges and justices to recognize the hidden ways that racism works are likely to be a good thing. If nothing else, the history of racist gun laws may make it easier to see, and to eliminate, the racism deeply embedded in other areas of law."); *but see* Daniel S. Harawa, *NYSRPA v. Bruen: Weaponizing Race*, 20 OHIO ST. J. CRIM. L. 163, 165 (2022) ("Without serious revisions to Fourth Amendment policing doctrines, along with a *real* reckoning with the anti-Blackness endemic to America (but not only to America), Black people will never bear arms the same as white people. Or put differently, if a Black person *does* decide to carry a gun as freely as a white person, it will be at their peril.").

I. A NORMATIVE CRITIQUE

In recent decades, progressive advocacy around gun control has increasingly relied on carceral tools such as mandatory minimums, possession offenses, and aggressive policing tactics.²¹ Yet these strategies reinforce the dynamic they purport to resist: the over-policing of Black communities and the expansion of criminal records of those most vulnerable to state violence.²² True, progressives justify such measures as protecting communities from gun violence but the enforcement mechanisms (especially where involving felony charges and mandatory prison time) reproduce the harms of mass incarceration they claim to oppose. This Part seeks to unpack those contradictions, arguing that a serious commitment to racial justice requires problematizing the legal paradigms that criminalize gun possession and legitimize discretionary enforcement.²³

The mainstream liberal orientation towards firearm regulation mirrors earlier investments in drug prohibition, where public health and safety concerns were routed through criminal law.²⁴ Like drug policy, contemporary gun control relies on facially neutral laws that produce deeply racialized enforcement patterns.²⁵ Studies consistently show that weapons enforcement

²¹ Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 451-61 (1999); Conor Friedersdorf, *The Anti-gun Laws that Make Progressives Uneasy*, THE ATLANTIC (Feb. 10, 2022), <https://www.theatlantic.com/ideas/archive/2022/02/blue-americas-new-gun-control-debate/622035/> [https://perma.cc/XW63-RYDY].

²² Jacob Sullum, *Gun Control is Just as Racist as Drug Control*, REASON (Feb. 2022), <https://reason.com/2022/01/16/gun-control-is-just-as-racist-as-drug-control/> [https://perma.cc/7DAF-64F9] (“African Americans, who represent about 14 percent of the U.S. population, accounted for 45 percent of arrests for weapon offenses in 2020”); Omari Daniels & Julie Zauzmer Weill, *D.C. Council passes new criminal code, despite some objections*, WASH. POST (Nov. 15, 2022), <https://www.washingtonpost.com/dc-md-va/2022/11/15/dc-criminal-code-passes-objections/> [https://perma.cc/3DYY-VYXX] (noting that DC’s felon-in-possession laws “would exacerbate racial disparities in incarceration”). While this Part focuses primarily on possession offenses and felon-in-possession statutes, the critique extends to other progressive gun control measures such as universal background checks and assault weapon bans. Though these policies may appear less punitive, they too rely on criminal penalties for violations, enforced through the same racialized policing mechanisms that produce disparate arrest and prosecution rates. As such, even “moderate” gun reforms participate in the carceral system they ostensibly aim to transcend.

²³ As Jennifer Carlson has noted, “an anti-racist gun policy requires decentering the criminal justice system as the go-to institution for solving gun violence.” *Beyond Law and Order in the Gun Debate*, BRENNAN CTR. FOR JUST. (June 29, 2021), <https://www.brennancenter.org/our-work/research-reports/beyond-law-and-order-gun-debate> [https://perma.cc/8BAV-3CJ3].

²⁴ See ANDREW MANUEL CRESPO & JOHN RAPPAPORT, CRIMINAL LAW AND THE AMERICAN PENAL SYSTEM: CASES AND CONTEXT 709-11 (1st ed. 2025); see also Elie Mystal, *Why Are Public Defenders Backing a Major Assault on Gun Control?*, THE NATION (July 26, 2021), <https://www.thenation.com/article/society/black-gun-owners-court/> [https://perma.cc/N3JG-LFRT] (“Everything that has been said about the need to liberalize drug laws is being said . . . about the need to liberalize gun laws. And the statistics totally back them up.”).

²⁵ See MICHELLE ALEXANDER, THE NEW JIM CROW (2010); DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS (2007); *United States v. Brewer*, 624 F.3d 900, 912 n.14 (8th Cir. 2010) (“The disproportionate impact of the crack cocaine guidelines on minorities should concern every federal judge, and provide another reason why guideline sentences for crack cocaine offenders warrant special attention.”).

disproportionately targets Black individuals, with stop-and-frisk tactics in New York City revealing a distinctive pattern: weapons stops operate as more of a dragnet than stops for violent crimes or drugs, producing fewer arrests but more confrontations with civilians.²⁶ And just as the perceived violence of the drug trade led to judicial expansion of police power and deference to officer judgment,²⁷ gun regulation operates in a parallel fashion, inviting courts to treat armed individuals in over-policed communities as inherently dangerous and presumptively criminal. As one scholar observes, “the same critiques that have been embraced in one context might have real bite in the context of a legal debate with very different political valence.”²⁸

Felon-in-possession statutes—laws that criminalize gun possession by anyone previously convicted of a felony—most sharply demonstrate how gun control regimes extend carceral logic. The federal version, codified at 18 U.S.C. § 922(g)(1), does not punish firearm misuse but mere possession, turning legal status into a proxy for dangerousness.²⁹ Those previously convicted of a felony are categorically barred from gun ownership for life, regardless of the underlying conduct.³⁰ While facially race-neutral, the pre-existing disproportionate number of Black people convicted of felonies³¹

²⁶ For instance, FBI crime reports demonstrated that arrest rates were five times greater for Black individuals than white people; and that 54 percent of state court defendants convicted for weapons crimes were Black, as compared to 44 percent white. Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2194 (2016). Another study shows arrest rates for Black Americans as five times higher than white Americans for weapons offenses. Jeffrey A. Fagan & Garth Davies, *Policing Guns: Order Maintenance and Crime Control in New York*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA, at 191-221. And between 1997 and 1999, the ratio of stops to arrests for weapons crimes was 20.08 among Black people (compared to 7.03 for violent crimes and 9.94 for drugs). *Id.* See also Levin, *supra* note 26, at 2196.

²⁷ See, e.g., *United States v. Campos*, 306 F.3d 577, 580 (8th Cir. 2002) (listing the presence of a firearm and ammunition as the government’s circumstantial evidence of defendant’s intent to distribute methamphetamine).

²⁸ See Levin, *supra* note 26, at 2205; Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 L. & PHIL. 437, 445 (“The true test of our commitment to a theory is whether we are willing to accept its implications when we might prefer not to do so.”).

²⁹ It is here that Levin finds the parallel between firearm regulation and criminal drug statutes especially compelling—and instructive. Levin, *supra* note 26, at 2215, 2217 (“If our focus is less on an act than the dangerousness of an item or substance, maybe that should cut against our use of ‘nonviolent drug offense’ to describe possession or distribution of . . . drugs known to have severe or even lethal health effects.”). Levin further posits that “the dangerous nature of the substance did not prevent a range of scholarly and judicial critiques of the sentencing and enforcement mechanisms of crack cocaine’s criminal treatment. . . . Crack addiction and the violence associated with the crack trade exacted massive tolls on poor communities of color—but so too did the use of criminal law to address these problems.” *Id.* at 2218.

³⁰ Emma Luttrell Shreefer, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation’s Century-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 154 (2019).

³¹ As of 2025, Black Americans make up 41 percent of prison and jail populations but are only 14 percent of all U.S. residents. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2025*, PRISON POLICY INITIATIVE (Mar. 11, 2025), <https://www.prisonpolicy.org/reports/pie2025.html> [https://perma.cc/F7J6-8KED]. Overall, it is estimated that the national incarceration rate of Black people is six times the rate of white people and more than twice

translates into similarly disproportionate felon-in-possession convictions: in 2018, 54 percent of all persons convicted under the law were Black, while only 25 percent were white.³² These disparities are the predictable consequence of a legal framework that builds on the racial legacies of prior carceral policies, such as the War on Drugs.³³ Felon-in-possession statutes thus entrench Black gun ownership as inherently suspect, reinscribing racial hierarchy under colorblind legality.³⁴ Part IV returns to these statutes in depth, examining how the Court's historical framework might be deployed to challenge them.

While debates over the Second Amendment are deeply polarized, there is a surprising bipartisan consensus around harsh penalties for “unlawful” gun possession.³⁵ In this manner, as Nicholas Johnson has argued, the modern liberal orthodoxy is “willing to settle for targeted gun bans just in places with large Black populations,” a policy he describes as “perverse” because it “would brand the entire [Black, urban] community with a badge of inferiority through a race-coded deprivation of an established prerogative of American citizenship.”³⁶ The post-*Bruen* landscape reveals exactly this pattern: gun rights are constitutionally protected when asserted by white gun owners, criminalized when linked to prior criminal legal system contact—contact that falls disproportionately on Black Americans. A serious commitment to racial justice requires reimagining gun policy outside the carceral frame.

Essential to this creative endeavor is the harnessing of constitutional language and legal theories too often ceded to conservative voices. As Professor Re has argued, our legal culture is undergoing a broader

the rate in every single state. Leah Wang, *Updated Charts Show the Magnitude of Prison and Jail Racial Disparities, Pretrial Populations, Correctional Control, and More*, PRISON POL'Y INITIATIVE (Apr. 1, 2024), <https://www.prisonpolicy.org/blog/2024/04/01/updated-charts/> [https://perma.cc/7DGA-W8U5].

³² *Quick Facts: Felon in Possession of a Firearm*, U.S. SENT'G COMM'N (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY18.pdf [https://perma.cc/RT86-9W8W].

³³ As of 2000, “African Americans constituted 62.7% of all drug offenders admitted to state prison, which means that relative to population, they were admitted at 13.4 times the rate of white Americans.” *Kann v. Winn*, 319 F. Supp. 2d 162, 179 n.27 (D. Mass. 2004). These disparities in enforcement are not necessarily reflective of similar disparities in rates of drug use or even drug dealing. ALEXANDER, *supra* note 25, at 96-97. “Indeed, studies suggest that rates of drug use—particularly among school-age users—were substantially higher among white[] [people] than in [B]lack or Latino populations.” Levin, *supra* note 26, at 2181.

³⁴ Levin, *supra* note 26, at 2197 (“What makes a specific instance of gun possession criminal may be the criminal history of a defendant, meaning that felon-in-possession laws are embedded in a broader range of decisions about criminal law and its enforcement.”).

³⁵ Mugambi Jouet, *Guns, Mass Incarceration, and Bipartisan Reform: Beyond Vicious Circle and Social Polarization*, 55 ARIZ. ST. L.J. 240, 246-47 (2023) (finding that draconian punishments for firearm offenses “is a matter on which U.S. conservatives and liberals have atypically agreed in past decades,” relying on a 2022 study which found that 81 percent of Republicans and 50 percent of Democrats support stricter sentences for violent crime).

³⁶ Nicholas Johnson, *Firearm Policy and the Black Community*, 45 CONN. L. REV. 1491, 1587 (2013).

realignment, in which methodological and ideological categories are being unsettled and reconfigured.³⁷ Such a reorientation requires recovering what the Court's invocation of history leaves underappreciated: a legal tradition in which access to arms was intertwined with claims of full Black citizenship within the American polity.

Before addressing this history, it is important to establish that while this Note focuses on felon-in-possession laws, the critique extends broadly. Consider popular reforms like universal background checks, assault weapon bans, and red flag laws. These proposals are framed as race-neutral public safety measures, yet implementation and enforcement implicate the same racialized legal system that produces disparate outcomes. Background checks rely on conviction databases shaped by prior policing disparities.³⁸ Even assault weapon bans, when enforced through stops and searches, channel discretion to officers who disproportionately police Black neighborhoods. As such, felon-in-possession statutes offer the clearest example of how gun control operates through the racialized logic of mass incarceration. To the extent regulations can avoid reliance on prior criminal history—focusing instead on mechanisms like waiting periods, safe storage requirements, or individualized assessments untethered from conviction records—they *may* escape some of these critiques, though questions of enforcement and access remain.

II. THE HISTORY OF BLACK DISARMAMENT

The historical relationship between firearms and racial subordination is constitutive of the legal traditions the Court now recovers. As Professors Joseph Blocher and Darrell Miller have observed, “[g]un rights and regulation have always been deeply intertwined with America’s original sin, slavery, and its legacy of racial oppression.”³⁹ From the earliest slave codes to the postbellum Black codes, American lawmakers used firearm restrictions to enforce racial hierarchies and limit Black autonomy. In the aftermath of emancipation, efforts by Black communities to arm themselves for self-defense were met with swift and violent legal backlash through formal laws and informal state-sanctioned terror.⁴⁰ This pattern continued through

³⁷ Richard Re, *Legal Realignment*, 92 U. CHI. L. REV. 1965 (2025).

³⁸ Background checks warrant nuanced analysis. Those based solely on criminal history inherit the racial disparities embedded in prior policing and prosecution, making them difficult to distinguish from felon-in-possession analyses. Background checks for mental health concerns are distinct, however, though implementation raises questions about racial disparities in psychiatric diagnosis and involuntary commitments. See JONATHAN M. METZL, *THE PROTEST PSYCHOSIS* (2010). Nevertheless, this Note’s critique centers on criminal history regulations, where racialized enforcement is well-documented; screenings based on mental health are beyond this Note’s scope.

³⁹ JOSEPH BLOCHER & DARRELL H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* 35 (2018).

⁴⁰ Cottrol & Diamond, *supra* note 11, at 317-19.

the Jim Crow era, when the first generation of ostensibly neutral licensing and permit regimes functioned as tools of selective disarmament, preserving white supremacy under the guise of public order.⁴¹ Across these historical moments, gun regulation functioned less as a public safety measure than as a mechanism to deny Black people the tools for self-defense and self-determination.

Recovering this history complicates contemporary claims about which traditions serve as constitutional lodestars. As the Court increasingly relies on history to shape the Second Amendment, selective attention to episodes of Black disarmament risks collapsing a contested past into a one-directional account of regulatory authority. Tracing this history thus operates to serve two purposes: it clarifies the historical record the Court now treats as doctrinally dispositive, while also recovering idioms that, though not always judicially ratified, inform how marginalized communities have understood political agency in the absence of state support.

A. *The Early History of Disarming Black People*

From the outset of American law, firearm regulation developed through a racially demarcated legal regime—one that courts have since treated with antipathy, even as its structural logic continues to shape modern gun control. Understanding how this racially stratified regime developed is essential to assessing what weight such practices can plausibly bear under the Court's history-and-tradition framework.⁴²

1. *The Colonial Era*

At the incipience of America, a dual legal system regarding gun ownership, stratified on racial lines, emerged. Fears about African revolts among enslaved people ran parallel to the proliferation of the slave trade itself.⁴³ Thus, in the name of internal order, the statutes of many colonies

⁴¹ See Brief of the Black Attorneys of Legal Aid et al. as Amici Curiae in Support of Petitioners, at 9, No. 20-843 (July 20, 2021) [hereinafter BALA et al.] (discussing how the Sullivan Act of 1911, the grandfather to the regulation at issue in *Bruen*, was passed in response to post-Reconstruction “concerns about organized labor, the huge number of immigrants, and race riots in which some [B]lack[] [people] defended themselves with firearms”).

⁴² Pre-colonial English history, though relevant to understanding the Second Amendment's intellectual origins, lies beyond this Note's scope. As two influential scholars observe, discussions of the Second Amendment “should begin with the commonplace observation that the Bill of Rights [drafters] did not believe they were creating new rights.” BLOCHER & MILLER, *supra* note 39, at 320. English settlers brought with them a centuries-old tradition of armed citizenry—codified in the Assize of Arms and the English Bill of Rights (1689)—which Blackstone later described as among the auxiliary, and natural, rights of English subjects. See 1 WILLIAM BLACKSTONE, COMMENTARIES *143-144. This tradition informed colonial law but was adapted along racial lines in ways examined in this Section.

⁴³ An Act for Prohibiting the Importation of Negroes for the Time Herein Mentioned, No. 1371, 5 Statutes at Large of South Carolina 36 (1787).

specified that white men be armed at public expense.⁴⁴ Moreover, white men were required to serve as patrollers, a specialized posse dedicated to keeping order among the enslaved population, in colonies with large enslaved populations.⁴⁵ Colonial legislatures and slaveholding authorities, with few exceptions,⁴⁶ systematically disarmed enslaved Black people (alongside Indigenous Americans).⁴⁷ This pattern intensified throughout the colonial period as slave codes proliferated across the colonies.⁴⁸

In short, this bifurcated legal system had an important conditioning effect on American cultural norms. Those who were suspect classes in England—the poor, religious dissenters—found the right to bear arms to be considerably more robust in the American context whereas Black people “had come to occupy the social and legal space of the suspect classes in England.”⁴⁹ Ironically, Black presence in colonial America helped strengthen the view that the security of the state was best achieved through the arming of all free citizens.⁵⁰ The logic of racial exclusion enabling white civic expansion would become a foundational feature of the American legal imagination, carried through to the framing of the Constitution and beyond.

⁴⁴ See, e.g., 2 Laws of the Royal Colony of New Jersey 15-21, 49, 96, 133, 289 (Bernard Bush ed., 1977); see also South Carolina Slave Code of 1740 No. 670, 7 S.C. Stat. 397 (1740).

⁴⁵ Cottrol & Diamond, *supra* note 11, at 324.

⁴⁶ Ironically, South Carolina, which had the harshest slave codes of this period, may have been the colony most enthusiastic about extending the right to bear arms to free Black people. With its majority Black population, the state’s need to control the enslaved population was especially acute. To secure free Black assistance in controlling the slave population, South Carolina in the early eighteenth century permitted free Black men the right of suffrage, the right to keep firearms, and the right to undertake militia service. *Id.* at 326.

⁴⁷ See generally Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1712 (2012). This historical backdrop sits uncomfortably in the post-*Bruen* search for historical analogues for gun regulations. See *infra* Section IV.B.

⁴⁸ As early as 1639, Virginia prohibited enslaved Africans from carrying guns. CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* 12 (2021). Notably, this same statute required the arming of white men at public expense. Cottrol & Diamond, *supra* note 11, at 325. And these laws proliferated after insurrectionist scares in 1687, 1709, 1710, 1722, 1723, and 1730. *Id.* One key point of the laws, according to the Virginia governor, was to “impose a ‘perpetual Brand’ on [B]lack[] [people] as different and inferior to white[] [people].” ALEJANDRO DE LA FUENTE & ARIELA J. GROSS, *BECOMING FREE, BECOMING BLACK* 74 (2020); Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1370, n.31 (1991) (discussing laws in New York); ANDERSON, *supra* note 48, at 18 (“Even the supposedly anti-slavery Quakers, who dominated colonial Pennsylvania, passed a statute saying ‘If any negro shall presume to carry any guns, . . . pistols, . . . or other arms or weapons whatsoever, without his master’s special license . . . he shall be whipped with twenty-one lashes on his bare back.’ All thirteen colonies, in fact, had some arms-control law forbidding the possession of guns by ‘suspect groups—Indians, slaves, . . . and sometimes, free Black[] [people]’”) (internal citations omitted).

⁴⁹ Cottrol & Diamond, *supra* note 11, at 326.

⁵⁰ *Id.*

2. *American Rights and Slavery's Wrongs*

Even after the Second Amendment was adopted,⁵¹ its implementation instantiated an explicitly racial categorization of citizenship. As a visible sign of the Amendment's racialization, the Uniform Militia Act was enacted one year later.⁵² The Act called for the enrollment of every free, able-bodied *white* male between the ages of eighteen and forty-five into the militia. The Act further specified that every militia member was to provide himself with a musket or firelock, a bayonet, and ammunition.⁵³ Scholars note that the statute's racial restriction "indicates the unrest the revolutionary generation felt toward arming [B]lacks and perhaps the recognition that one of the functions of the militia would indeed be to put down slave revolts."⁵⁴

In the decades between the Revolutionary and Civil Wars, firearm restrictions focused on free Black people rather than enslaved individuals whose disarmament was already embedded in the legal structure of slavery. Southern states authorized extensive surveillance of Black communities through statutes that empowered white citizen patrols to search homes, seize weapons, and suppress unauthorized arms-bearing.⁵⁵ Although the distinction between enslaved and free Black residents does not determine the outcome of the Roberts Court's history-and-tradition analysis under *Bruen*—ultimately, it is the disarmament of both that is relevant—it underscores that firearm regulation targeted Black gun possession to delimit the established understandings of political membership within the original Bill of Rights.

At the same time that Southern states were systematically disarming Black Americans, economic competition between white and Black communities frequently fueled racial violence in the antebellum North.⁵⁶ In response to recurrent mob attacks and the failure of states to provide

⁵¹ U.S. CONST. amend. II.

⁵² Uniform Militia Act of 1792, ch. 33, 1 Stat. 271.

⁵³ *Id.* § 1, 1 Stat. 271.

⁵⁴ Cottrol & Diamond, *supra* note 11, at 332.

⁵⁵ Compare Black Code, ch. 33, section 19, Laws of La. 150, 160 (1806) (denying enslaved persons access to firearms absent written permission to hunt within the boundaries of an owner's plantation), with An Act Concerning Slaves, § 9, Acts of Fla. 289, 291 (1824) (authorizing white citizen patrols to "enter into all negro houses and suspected places, and search for arms and other offensive or improper weapons, and [] lawfully seize and take away all such arms, weapons and ammunition"); see also Cottrol & Diamond, *supra* note 11, at 338 (discussing how Florida, Georgia, Maryland, and Virginia had entirely prohibited free Black people from carrying arms after the Nat Turner slave revolt and authorized white citizen patrols to seize arms found in the homes of free Black people).

⁵⁶ See LEON LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860, at 159, 165 (1961) (explaining that in fields where Black people were allowed to compete with whites, who were often the new Irish immigrants, violence often erupted); see also LEONARD CURRY, THE FREE BLACK IN URBAN AMERICA 1800-1850: THE SHADOW OF THE DREAM (discussing an 1843 incident of mob violence in Boston where "several hundred white[] [people] attacked and severely beat every [B]lack [person] they could find, dispersed only by the combined efforts of police and fire personnel").

protection, Black residents in several cities sought to organize militia units and other forms of collective armed resistance.⁵⁷ Episodes such as the 1841 Cincinnati riots—in which Black residents repelled a white mob of nearly 1,500, only for authorities to respond by disarming Black residents rather than their attackers—illustrate both the capacity of armed Black communities to repel white mob violence and the consequences that followed for exercising their rights.⁵⁸

Racialized disarmament thus emerged as a national strategy: in the South, tied to slavery's preservation; in the North, to controlling free Black economic and political assertiveness. In both cases, Black Americans' access to arms symbolized their broader endeavor towards citizenship—claims that many white Americans were unwilling to recognize.

3. *Disarmament and the Postbellum (Dis)Order*

Whereas colonial laws enforced Black disarmament through the racial thesis of enslavement, the postbellum Black Codes retooled these mechanisms for a formally emancipated but still subordinated population, adapting exclusion to fit a new constitutional order.⁵⁹ Among their various provisions were explicit and implicit attempts to disarm Black people—alongside curfews, vagrancy laws, and labor contract requirements. In many jurisdictions, Black Americans were either categorically prohibited from owning firearms or subjected to discretionary licensing regimes administered by white officials. A representative example is Louisiana's Statute of 1865, which prohibited Black people not in military service from carrying firearms without special permission from white authorities, enforced through forfeiture, fines, forced labor, or corporal punishment.⁶⁰

⁵⁷ Cottrol & Diamond, *supra* note 11, at 341.

⁵⁸ See *id.* at 342; see also ANDERSON, *supra* note 48, at 78-81. In September 1841, racial tensions in Cincinnati culminated in two consecutive nights of white mob violence involving as many as 1,500 participants. *Id.* at 78. On the first night, white rioters destroyed Black-owned businesses and attacked predominantly Black residential areas. Cottrol & Diamond, *supra* note 11, at 342. Black residents armed themselves and successfully defended their neighborhood, temporarily dispersing the mob. *Id.* When rioters returned the following night—this time equipped with a six-pound cannon—violent clashes ensued, leaving multiple individuals dead and many injured. ANDERSON, *supra* note 48, at 80. Local authorities ultimately responded by disarming Black residents and detaining adult Black men, purportedly for their protection, after which white mobs resumed their attacks. Cf. Kevin McGruder, *Black New York and the Draft Riots*, N.Y. TIMES (July 26, 2013), <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2013/07/26/black-new-york-and-the-draft-riots/> [<https://perma.cc/U8L3-5CK6>] (describing similar dynamics during the 1863 Draft Riots).

⁵⁹ Shreefter, *supra* note 30, at 168; see also KENNETH STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877*, at 80 (1965) (describing Reconstruction as “twilight zone between slavery and freedom”).

⁶⁰ An Act to Prohibit the Carrying of Fire-Arms on Premises or Plantations of Any Citizens, Without the Consent of the Owner, §1, 1865 La. Acts 14, 14-16 (J.O. Nixon, 1866); similar statutes proliferated throughout the South. ANDERSON, *supra* note 48, at 86-88. In Mississippi, for instance, firearms confiscated from freedmen were frequently transferred to local white militias,

This is not to say that the Southern states' regulation of Black life operated even-handedly; on the contrary, their posture was Janus-faced, intimately regulating Black access to firearms while remaining intentionally oblivious to the private violence visited upon Black communities. For example, in 1866, Black and white Republicans attempted to convene a state constitutional convention in New Orleans.⁶¹ At the convention hall, these aspirational leaders were slaughtered by a mob of Confederate veterans led by the city police force.⁶² As Professor Herbert Shapiro writes, "the United States Army units stationed in New Orleans failed to take any effective action to protect the convention, and the [Andrew] Johnson administration in Washington ignored warnings that violence was likely."⁶³

The simultaneous wielding of the regulatory sword and institutional apathy to Black death concerned northern Republicans, who saw the South as trying to reinstitute slavery.⁶⁴ Representative George Hoar, a Massachusetts Republican, directly cited the 1865 Louisiana statute as part of a "series of laws which must have been designed to restore the negro to a state of practical servitude."⁶⁵ More generally, Senator John Sherman warned that in areas where Black populations were dense, a few armed white men could "carry terror among ignorant negroes . . . without arms, equipment, or discipline."⁶⁶ Senator Adelbert Ames emphasized that the right to bear arms was inseparable from the right to political expression.⁶⁷ In some counties, he explained, speaking publicly as a Republican was so dangerous that orators had to appear with armed protection.⁶⁸ And Senator Lyman Trumbull, while opening debate on the Senate's version of the 1866 Civil Rights Act, described the Reconstruction Amendments as an opportunity to repudiate laws such as those in Mississippi which "prohibit[ed] any negro or mulatto from having

law enforcement authorities, or members of the Ku Klux Klan. See Stefan Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R.L.J. 67, 72 (1991). States also restricted access to inexpensive firearms commonly available to freed people through taxation, licensing schemes, and outright prohibitions. *Id.* at 74. In some jurisdictions, sheriffs—often affiliated with the Klan—were authorized to arrest Black individuals attempting to purchase firearms. *Id.* at 95.

⁶¹ Johnson, *supra* note 36, at 1500.

⁶² HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* 5 (1988).

⁶³ *Id.* at 6, 7 (describing another act of white mob violence in Memphis, led by the state's Attorney General, leading to the killings of forty-six Black citizens).

⁶⁴ ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 60-68 (2019).

⁶⁵ Report of George F. Hoar, W. A. Wheeler, Wm. P. Frye, *reprinted in* CHARLES H. JONES, *AN ABRIDGMENT OF THE DEBATES OF CONGRESS 1369* (H. Holt & Co. 1875). Hoar specifically noted that the law had the effect of "depriving the great mass of the colored laborers of the State of the right to keep and bear arms, always zealously prized and guarded by his white employers." *Id.* at 25.

⁶⁶ Tahmassebi, *supra* note 60, at 92.

⁶⁷ *Id.*

⁶⁸ *Id.*

fire-arms.”⁶⁹ These concerns translated directly into legislative action. The Senators most responsible for drafting the Fourteenth Amendment understood that the protection of Black life required that the Bill of Rights be incorporated against the states, of which the right to keep and bear arms was critical.⁷⁰ To Radical Republicans, possessing arms was an urgent necessity, “vital both as a means of maintaining the recently reunited Union and as a means of preventing virtual re-enslavement of those formerly held in bondage.”⁷¹ Without arms, Black Americans could not defend themselves, vote, or speak freely.⁷²

The concerns were not paternalistic. Black political leaders during Reconstruction—including Blanche Bruce, John Lynch, Joseph Rainey, and Abraham Galloway—likewise understood access to arms as integral to both self-preservation and political participation, essential tools for defending against white paramilitary violence that sought to suppress the Black vote.⁷³ And this understanding extended beyond the confines of the halls of Congress. Frederick Douglass, whose writings have become an important source for understanding Reconstruction-era constitutional thought,⁷⁴ consistently articulated his vision of freed people’s citizenship as being equally tied to the “cartridge box” as it was the “ballot” and “jury box.”⁷⁵ Contemporary observers perceived this concept as well: as one Mississippian noted with alarm, freedmen viewed the Civil Rights Act of

⁶⁹ Stephen Halbrook, *Personal Security, Personal Liberty, and “The Constitutional Right to Bear Arms”*: *Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995).

⁷⁰ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1235-38 (1991).

⁷¹ Cottrol & Diamond, *supra* note 11, at 345. Take, for instance, how during Mississippi’s violent electoral campaign of 1875, white “rifle clubs” sought to prevent freedmen from voting. See FONER, *supra* note 64, at 94. See also JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 65-66 (2017) (“Many Reconstruction legislators argued that the Fourteenth Amendment was necessary to ensure that recently freed slaves would receive state protection from private violence.”).

⁷² See FONER, *supra* note 64, at 94 (highlighting how Black political leaders, who were in communication with the drafters of the Fourteenth Amendment, thought it codified “equality, expansively defined”). Of course, this coheres well with Blackstone’s description of the right to arms, to be exercised “when the sanctions of society and laws are found insufficient to restrain the violence of oppression.” 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *140.

⁷³ See JOHN R. LYNCH, REMINISCENCES OF AN ACTIVE LIFE: THE AUTOBIOGRAPHY OF JOHN ROY LYNCH 166-67 (1970) (describing how clubs in Mississippi were converted into armed organizations used to intimidate and suppress Black voters); 44 CONG. REC. 2101-04 (1867) (supporting armed self-protection to escalating racial violence); see also FONER, *supra* note 64, at 119 (discussing Rainey’s view that constitutional guarantees were hollow absent physical security); NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS 35 (2014) (describing Galloway’s routine public carrying of a pistol).

⁷⁴ See, e.g., Jack M. Balkin & Sanford Levinson, *Frederick Douglass as Constitutionalist*, 83 MD. L. REV. 260 (2023).

⁷⁵ Frederick Douglass, LIFE AND TIMES OF FREDERICK DOUGLASS: HIS EARLY LIFE AS A SLAVE, HIS ESCAPE FROM BONDAGE, AND HIS COMPLETE HISTORY TO THE PRESENT TIME 449 (1883).

1866 and the Fourteenth Amendment as guaranteeing a right to bear arms “regardless of the state law in opposition.”⁷⁶ The stakes of the constitutional moment become clear in this light. At bottom, the Fourteenth Amendment was no mere textual expansion of federal power—it was drafted on the precipices of Reconstruction’s collapse and white paramilitary violence, when protecting Black life was not simple poetics but a necessity.⁷⁷

Yet the federal government’s attempts at intervention were met with an unsympathetic Supreme Court. In *United States v. Cruikshank*, the Court reviewed federal indictments brought under the Enforcement Act of 1870 against Klansmen who had massacred Black citizens in Colfax, Louisiana and confiscated their weapons.⁷⁸ The Act made it a felony to conspire to deprive citizens of constitutional rights and the government argued that the attackers’ disarmament and killings were part of such a conspiracy. The Court rejected that theory, holding that the First and Second Amendments constrained only federal action and that, absent state involvement, the Fourteenth Amendment did not authorize federal prosecution of private racial terror.⁷⁹ As Justice Clarence Thomas later observed in *McDonald v. City of Chicago*,⁸⁰ *Cruikshank* not only misread the Fourteenth Amendment but actively enabled the subjugation of Black citizens.⁸¹ Without federal enforcement of their rights, Black Americans were left vulnerable to mobs whose violence was often carried out with impunity or even the support of local governments.⁸²

Cruikshank marked a broader retreat by the Supreme Court from the promises of Reconstruction. Although figures like Representative John Bingham, the primary author of the first section of the Fourteenth Amendment, clearly intended to apply the Bill of Rights to the states,⁸³ the Supreme Court refused to embrace that view.⁸⁴ In *Presser v. Illinois*, the Court upheld a state law banning armed public parades for those who were not members of the militia, and in the process, reaffirmed that the Second

⁷⁶ FONER, *supra* note 64 at 93.

⁷⁷ ANDERSON, *supra* note 48, at 94. In one particularly illuminating passage, Anderson writes how the Fourteenth Amendment was drafted at the same time that “African Americans tried to flee Texas ‘as if from death’ because white[] [people] were determined to keep Black people ‘in perfect terror of their lives.’” *Id.*

⁷⁸ 92 U.S. 542, 563 (1875); *see also* RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER & SPIRIT* 182 (2021) (recounting the factual predicates of *Cruikshank*).

⁷⁹ *Id.* at 567-68.

⁸⁰ 561 U.S. 742 (2010).

⁸¹ *See id.* at 855-56 (Thomas, J., concurring).

⁸² *See id.* at 856.

⁸³ *See* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* § 9 181-214 (1998).

⁸⁴ *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1803 n.3 (2010); *Slaughterhouse Cases*, 83 U.S. 36, 40, 52-57 (1872).

Amendment was a limitation on *only* the federal government.⁸⁵ Although the opinion acknowledged in dicta that disarming the public could interfere with federal militia powers, it offered no remedy for individuals.⁸⁶

The consequences of the Supreme Court's retreat were devastating. With limited access to firearms, recently freed Black Americans looked to state governments for protection against criminal conspiracies.⁸⁷ Instead, local politicians effectively sanctioned private forces to enforce a white supremacist social and political vision. Chief among these forces was the Klan, who broke up Republican meetings,⁸⁸ lynched Black political leaders,⁸⁹ and assaulted Black militiamen.⁹⁰ Most emblematic, in 1876, a white militia massacred Black militiamen in Hamburg, Georgia, simply for organizing a Fourth of July parade.⁹¹ The commander, Ben Tillman, would later brag this was an opportunity to "teach the negroes a lesson" by "killing as many of them as was justifiable."⁹²

B. *Black Self-Defense and the Emergence of Modern Firearm Regulation*

In the Court's modern Second Amendment jurisprudence, constitutional meaning is derived almost exclusively from antebellum and Reconstruction-era history.⁹³ That focus has narrowed the Court's doctrinal gaze to a discrete temporal window. However, Black disarmament—and corresponding claims to armed self-defense—did not end with Reconstruction. In the decades that followed, Black political actors developed a constitutional sensibility shaped by what Saidiya Hartman has described as the "afterlife of slavery": a condition in which formal legal freedom coexisted with ongoing exposure to racialized violence and state neglect.⁹⁴ Within that reality, Black intellectuals and organizers transformed armed self-defense from a pragmatic survival strategy into an articulated political philosophy

⁸⁵ 116 U.S. 252, 265-67 (1886).

⁸⁶ *Id.* at 269.

⁸⁷ Cottrol & Diamond, *supra* note 11, at 348.

⁸⁸ FONER, *supra* note 64, at 116-17.

⁸⁹ Pickens County Herald and West Alabamian (Carrollton, Ala.), *Negro Killed*, Sept. 7, 1870.

⁹⁰ *Grant, Reconstruction and the KKK*, PBS AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/grant-kkk/> [<https://perma.cc/BW6R-BEBT>] (last visited Jan. 19, 2026).

⁹¹ Ronald G. Shafer, *July 4 Parade Sparked Hamburg Massacre in South Carolina*, WASH. POST (July 4, 2022), <https://www.washingtonpost.com/history/2022/07/04/hamburg-massacre-july-4/> [<https://perma.cc/6MWA-7LSR>].

⁹² STEPHEN DAVID KANTROWITZ, BEN TILLMAN & THE RECONSTRUCTION OF WHITE SUPREMACY 67 (2000).

⁹³ *See infra* Part III.

⁹⁴ Alexis Okeowo, *How Saidiya Hartman Retells the History of Black Life*, NEW YORKER (Oct. 26, 2020), <https://www.newyorker.com/magazine/2020/10/26/how-saidiya-hartman-retells-the-history-of-black-life> [<https://perma.cc/XM7Y-A5LH>].

that contested both white supremacist violence and the emerging liberal assumptions about gun regulation. This shift also provoked legal backlash, revealing the contingent protection of Second Amendment rights when exercised by Black actors.

Although the twentieth-century practices discussed in this Section cannot independently establish the scope of the Second Amendment right under *Bruen*'s methodology, they matter in two distinct ways. First, to the extent post-Reconstruction legal history reflects a continuous understanding of arms-bearing as integral to Black citizenship, it is probative of constitutional meaning in the sense Justice Kavanaugh described in his concurrence in *Rahimi*: post-ratification history, "at least when reasonably consistent and longstanding," can illuminate the meaning of vague constitutional text.⁹⁵ Properly understood, the principle turns less on official endorsement by legislatures or courts and more on whether a constitutional understanding persisted over time—even outside formal legal institutions. Second, and separately, the constitutional sensibility developed by Black political actors performs different but related work. It exposes what contemporary gun control discourse obscures: that a constitutional language existed, developed by the very people the Fourteenth Amendment was designed to protect, in which arms-bearing was understood as essential to racial equality. That tradition unsettles assumptions embedded in modern status-based prohibitions, including felon-in-possession laws, which treat Black gun ownership as presumptively dangerous rather than a rite of civic membership. What follows traces this countervailing constitutional practice, one that supplies the animating force behind contemporary challenges to racially inflected gun regulations.⁹⁶

Malcolm X perhaps best exemplifies this shift from pragmatic self-defense to a radical, though constitutionally committed, conception of Black self-determination.⁹⁷ For Malcolm, armed self-defense was not

⁹⁵ *Rahimi*, 602 U.S. at 715 (Kavanaugh, J., concurring). The concurrence further suggests that such history may extend to the present moment. *Id.* at 3.

⁹⁶ See Brief of Black Guns Matter et al. as Amici Curiae Supporting Petitioners, *N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen*, 597 U.S. 1, 11 (2022) (No. 20-843) (tracing the history of armed self-defense from Reconstruction through the Black Panther Party to argue that discretionary licensing regimes perpetuate the racist tradition of denying Black Americans the means of self-protection). The brief expressly describes the trials and tribulations of the Black Panthers to argue that "[a]rmed self-defense has always been vitally important to the African American community." *Id.* The brief is an example of how litigants leverage twentieth-century Black political thought to provide the intellectual resources and historic grounding for contemporary constitutional challenges.

⁹⁷ Around the same time Malcolm X was articulating his constitutional vision, grass-roots organizations were institutionalizing armed self-defense. For example, the Deacons for Defense and Justice, formed in 1964 in Jonesboro, Louisiana, composed largely of Black veterans, arose in response to Klan violence and local law enforcement's indifference. LANCE HILL, *THE DEACONS FOR DEFENSE: ARMED RESISTANCE AND THE CIVIL RIGHTS MOVEMENT* 2, 10-11 (2004). They escorted civil rights workers, guarded Black churches, and patrolled neighborhoods to deter mob attacks—operating not in defiance of the movement's broader aims, but in tandem with it, providing protective infrastructure that allowed nonviolent protests to occur in

merely reactive; it was an affirmation of personhood, bound up in a systemic critique of American imperialism and racial capitalism. As such, he rejected the Gandhian imperatives of pacifism as a “criminal philosophy,” one designed to domesticate Black resistance,⁹⁸ instead linking Black armament to global anti-colonial revolutions—in Algeria, Egypt, and the American Revolution—as legitimate political expression.⁹⁹ Indeed, Malcolm characterized this right in constitutional terms: “Article number two of the constitutional amendments . . . provides you and me the right to own a rifle or a shotgun.”¹⁰⁰ The New York Times denounced this constitutional claim as subversive, revealing how legal rights became negotiable when demanded by Black leaders.¹⁰¹

Malcolm’s ideological legacy offered the scaffolding for the Black Panther Party, whose founders built on his constitutional commitments while translating them into a formal program of armed community defense. Initially designated “the Black Panther Party for Self-Defense,” the Oakland-based organization was responding (in small part) to Klan violence in the South and (in large part) police brutality in their own backyard.¹⁰² Huey Newton, the Party’s founder and a part-time law student, understood and articulated the organization’s central premise: the public display of their guns for everyone—especially the police—to see.¹⁰³ As the San Francisco Examiner aptly put it, albeit with disquiet, “It’s All Legal,” a reference to California’s open-carry laws.¹⁰⁴

The backlash was swift. In 1967, mere months after the group began armed police patrols, the California legislature passed the Mulford Act, prohibiting loaded firearms in public.¹⁰⁵ Don Mulford, the bill’s sponsor, denied any racial motivation, but Assemblyman Willie Brown observed that Mulford had long opposed similar legislation “until Negroes showed

the first place. See Johnson, *supra* note 36, at 1548-50. The Deacons are a modern, visible example of how armed protection could serve liberal democratic ends.

⁹⁸ ALEX HALEY & MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 422 (1965). As he would put it elsewhere, “How can you justify being nonviolent in Mississippi and Alabama, when your churches are being bombed, and your little girls are being murdered . . . ?” Malcolm X, *Message to the Grassroots* (Nov. 10, 1963), <https://teachingamericanhistory.org/document/message-to-grassroots/> [<https://perma.cc/N5A2-GUA8>] (address at the Northern Negro Grass Roots Leadership Conference).

⁹⁹ See HALEY & MALCOLM X, *supra* note 98, at 423.

¹⁰⁰ WINKLER, *supra* note 12, at 134.

¹⁰¹ See *To Arms with Malcolm X*, N.Y. TIMES (Mar. 14, 1964), <https://www.nytimes.com/1964/03/14/archives/to-arms-with-malcolm-x.html> [<https://perma.cc/52E3-WBNG>].

¹⁰² WINKLER, *supra* note 12, at 134.

¹⁰³ See Adam Winkler, *The Secret History of Guns*, ATLANTIC (Sep. 2011), <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/> [<https://perma.cc/GCH9-WZPF>].

¹⁰⁴ *It’s All Legal: Oakland’s Black Panthers Wear Guns, Talk Revolution*, SAN FRANCISCO SUNDAY EXAM’R & CHRON. (Apr. 30, 1967), <https://www.newspapers.com/article/san-francisco-chronicle-oaklands-black/185849240/> [<https://perma.cc/AGX9-BW3S>].

¹⁰⁵ WINKLER, *supra* note 12, at 131.

up in Oakland—[Mulford's] district—with arms and then [Mulford sought] restrictive legislation.”¹⁰⁶ As legal historian Adam Winkler has noted, the Act “succeeded in ending the Black Panthers’ armed police patrols.”¹⁰⁷ Herein lies the Second Amendment’s racial contingency: rights that had long been tolerated among white gun owners were rapidly curtailed when exercised by Black radicals.¹⁰⁸

C. *Patterns and Continuities*

The historical record elucidates that the disarmament of Black Americans cannot be reduced to the banner of public safety. It functioned as a mechanism of white supremacy, limiting Black Americans’ physical security while excluding them from the ideals that bearing arms carried in the American imagination. From colonial slave patrols to the twentieth-century surveillance state, firearm regulation carries a legacy that complicates contemporary gun control. Access to arms was not only a barometer of citizenship; it was a condition of survival for Black Americans targeted by private violence and abandoned by state and local governments.¹⁰⁹ As Cottrol and Diamond conclude in a prescient article written in 1991: “perhaps a stronger case can be made that a society with a dismal record of protecting a people has a dubious claim on the right to disarm them.”¹¹⁰

This fraught legacy now resurfaces as courts increasingly look to history to define the Second Amendment’s boundaries. While this judicial turn sparks conversations about selective originalism and deregulatory agendas, it also creates a precarious opportunity to reclaim this racial history as part of

¹⁰⁶ ANDERSON, *supra* note 48, at 136.

¹⁰⁷ WINKLER, *supra* note 12, at 140.

¹⁰⁸ The regulatory backlash extended beyond California and reached its apotheosis in the Gun Control Act of 1968. Clayton E. Cramer, *The Racist Roots of Gun Control*, KAN. J.L. & PUB. POL’Y, 17, 21 (1995). Following the assassinations of Martin Luther King and Robert Kennedy, the Act targeted “Saturday night specials”—cheap handguns associated with urban crime. WINKLER, *supra* note 12, at 131. The law fell hardest on economically marginalized Black communities where affordable firearms were often the only accessible means of self-defense. Cf. Barry Bruce-Briggs, *The Great American Gun War*, 45 PUB. INT. 37, 50 (1976) (“[i]t is difficult to escape the conclusion that the ‘Saturday night special’ is emphasized because it is cheap and is being sold to a particular class of people.” As one critic put it, the Act “was passed not to control guns but to control [B]lack[] [people].” ANDERSON, *supra* note 48, at 140; but see Jennifer L. Behrens & Joseph Blocher, *The Great American Gun Myth: Race and the Naming of the Saturday Night Special*, 108 MINN. L. REV. HEADNOTES 293 (arguing that there is little supporting evidence that the ban on cheap firearms in the late 1960s was explicitly motivated by racial animus).

¹⁰⁹ Cf. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 650-51 (1991) (arguing that the Second Amendment is conceived as foundational to a republican political order, encouraging democratic participation through an individualized defense of liberty).

¹¹⁰ Cottrol & Diamond, *supra* note 11, at 361. As they further note, “Perhaps . . . it is unwise to place the means of protection totally in the hands of the state, and that self-defense is also a civil right”; see also Levinson, *supra* note 109, at 656 (“I do not want to argue that the state is necessarily tyrannical . . . But it seems foolhardy to assume that the armed state will necessarily be benevolent.”).

a broader critique of punitive legal structures. Part III traces how this history has already been strategically deployed in recent litigation, particularly in *Bruen*.¹¹¹

III. PAST AS PROLOGUE: BLACK DISARMAMENT AND THE SUPREME COURT'S HISTORICAL TURN

The Supreme Court's embrace of historical analysis in Second Amendment jurisprudence has marked a profound shift in constitutional interpretation. In *Bruen*, the Court held that gun regulations must be consistent with the Nation's "historical tradition of firearm regulation."¹¹² Such an approach is a novel doctrinal turn, wherein modern gun laws must be evaluated by analogy to historical forebears.¹¹³ This turn is not neutral—outcomes depend on which histories are invoked and how they are framed, a responsibility litigants bear. Against this backdrop, race has emerged as a site of strategic contestation. Across *Heller*, *McDonald*, and *Bruen*, the Court has invoked the history of Black disarmament to justify expanding gun rights, while litigants deployed competing racial narratives—some challenging discretionary licensing as reproducing racialized criminalization, others defending regulation as protecting Black communities from violence. This Part traces that development, illuminating the Court's historical method and the openings it creates for advocates to center racial justice concerns.

A. *The Court's Methodological Turn: From Heller to Bruen and Back to 1791*

The Supreme Court's modern Second Amendment jurisprudence began with *District of Columbia v. Heller*, in which the Court recognized that the Second Amendment protects an individual right to possess firearms for self-defense.¹¹⁴ For over two centuries prior, the Second Amendment remained largely unenforced, with the Court never striking down a gun regulation as unconstitutional in that period.¹¹⁵ Beyond the novelty of the

¹¹¹ For instance, in Section III.C.1. *infra*, public defenders invoke the spirit of Black radical thought to challenge discretionary licensing, demonstrating how this once dormant history is perpetually latent for excavation, and readily able to be translated into constitutional arguments within the legal frameworks conservatives built.

¹¹² N.Y. St. Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 17 (2022).

¹¹³ See Blocher & Ruben, *supra* note 10, at 107.

¹¹⁴ However, as Danny Li incisively observes, Justice Thomas—the author of the *Bruen* opinion—was the first to suggest explicitly in an authored opinion that the Second Amendment could protect an individual's right to bear arms against federal gun regulation in his concurring opinion in *Printz*. Danny Y. Li, *Antisubordinating the Second Amendment*, 132 YALE L.J. 1821, 1845-46 (2023).

¹¹⁵ The Second Amendment thereby existed as what one scholar called "an ignored patch of text in our constitutional conversations." Levinson, *supra* note 109, at 640. During this

holding, what marked *Heller* as the beginning of a new jurisprudential era was the interpretive method the Court employed: history. Rather than applying conventional tiers of scrutiny, the *Heller* majority grounded its analysis in the “original meaning” of the Second Amendment.¹¹⁶

Writing for the Court, Justice Scalia parsed the text into two distinct clauses—the prefatory reference to militias and the operative guarantee of the right to bear arms—concluding that the former did not limit the latter.¹¹⁷ He surveyed English and early American history, ultimately finding that “bear arms” unambiguously referred “to the carrying of weapons *outside* of an organized militia,”¹¹⁸ and that the Second Amendment codified a long-standing right to self-defense.¹¹⁹ For Justice Scalia, this historical inquiry was essential: originalism constrains judicial discretion by fixing constitutional meaning at the time of adoption, removing the “power to decide on a case-by-case basis whether the right is really worth insisting upon” based on contemporary policy preferences.¹²⁰ The right to bear arms was thus rooted in the Framers’ fear that an armed citizenry might be the final safeguard of liberty.¹²¹ As such, the Court invalidated D.C.’s restrictive handgun regime, affirming a right to possess firearms for “self-defense in the home.”¹²²

No sooner had the Court laid down its holding in *Heller* than the next significant Second Amendment challenge emerged. Mere hours after the Court’s decision, a lawsuit was filed in federal court in Chicago challenging the city’s ordinance banning any unregistered guns.¹²³ Thus, in 2010, *McDonald* incorporated the Second Amendment into the Fourteenth Amendment’s Due Process Clause, making the “right to keep and bear arms”

interregnum, states took up the regulatory mantle, adopting varying approaches to concealed carry—including discretionary “may-issue” regimes like New York’s Sullivan Act, N.Y. PENAL LAW § 400.00(2)(f), which requires applicants to demonstrate “proper cause” for needing a permit. *Kachalsky v. County of Westchester*, 701 F.3d 81, 83 (2d. Cir 2012) (referring to the proper cause provision pursuant to New York Penal Law section 400.00(2)(f)).

¹¹⁶ *Heller*, 554 U.S. at 614.

¹¹⁷ *Id.* at 577.

¹¹⁸ *Id.* at 584 (emphasis added). The opinion relies particularly on the idea that “nine state constitutional provisions written in the 18th century or the first two decades of the 19th . . . enshrined a right of citizens to ‘bear arms in defense of themselves and the state’ or ‘bear arms in defense of himself and the state.’” *Id.* at 584-85.

¹¹⁹ *Id.* at 635; see also William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1472 (2024) (noting that *Heller* appreciated that Anglo-American legal thought “coalesced around the idea that the right to bear arms . . . preexisted the adoption of any constitution”).

¹²⁰ *Heller*, 554 U.S. at 634; see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (articulating that judges should interpret the Constitution to enforce its original and “fixed meaning,” without taking into consideration “current societal values” or the judge’s own preferences).

¹²¹ *Id.* at 598.

¹²² *Id.* at 636.

¹²³ See Lyle Denniston, *Second Amendment Drama: Act II*, SCOTUSBLOG (Feb. 25, 2010), <https://www.scotusblog.com/2010/02/second-amendment-drama-act-ii> [<https://perma.cc/FB7G-HHQE>].

applicable to the states.¹²⁴ Justice Alito's majority opinion extended *Heller*'s reasoning that the right to bear arms is "fundamental to our scheme of ordered liberty" and "deeply rooted in our Nation's history and tradition."¹²⁵

The Court's jurisprudence reached its apotheosis in *New York State Rifle & Pistol Association, Inc. v. Bruen*. While *Heller* and *McDonald* discussed regulations surrounding handgun possession in one's home, *Bruen* clarified how courts should evaluate gun restrictions.¹²⁶ In doing so, the Court, addressing the Sullivan Act—which required "proper cause" for a firearms permit—held that "the Second and Fourteenth Amendments protect an individual's right to carry a hand-gun for self-defense outside the home."¹²⁷

The *Bruen* Court said that lower courts misunderstood *Heller* by applying intermediate scrutiny, giving too much deference to legislatures, thereby turning the constitutional right to bear arms in public into a "second-class right."¹²⁸ Rather than employing standards of review, the majority wrote that gun regulations are constitutionally permissible only if "the regulation is consistent with this Nation's historical tradition of firearm regulation."¹²⁹ The Court affirmed that lower courts must reason by analogy, considering at least two metrics: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."¹³⁰ To this end, *Bruen*'s path-breaking decision constitutionalized concealed public carry, invalidating "may-issue" regulatory schemes.¹³¹

The resulting transformation of a once dormant constitutional clause into a vehicle for robust individual rights has come with a methodological price: the elevation of history as both source and boundary. But as the next Section shows, what counts as "history" is not politically neutral. In each iteration of this gun-rights triptych, the Court's opinion—each authored by one of its most conservative members—draws on racial memory to legitimize its constitutional project. This turn to Black suffering is not incidental, nor unprecedented. In the years leading up to *Heller*, critics of gun regulation had already begun deploying Black voices as a strategic rhetorical and litigation technique. Still, the Court's explicit recognition of second-class citizenship marks a doctrinal rupture. It gestures towards a possibility: that the very history now used to justify gun rights might instead be reclaimed to

¹²⁴ *McDonald*, 561 U.S. at 791.

¹²⁵ *Id.* at 745 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

¹²⁶ See *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting) (noting that the majority of circuits, after *Heller*, are employing an "analytically awkward" two-step test to determine the constitutionality of gun rights).

¹²⁷ *Bruen*, 597 U.S. at 1.

¹²⁸ *Id.* at 70.

¹²⁹ *Id.* at 3.

¹³⁰ *Bruen*, 597 U.S. at 29.

¹³¹ Brandon del Pozo & Barry Friedman, *Policing in the Age of the Gun*, 98 N.Y.U. L. REV. 1831, 1845 (2023) (identifying *Bruen* as a "mopping-up operation" for the "long and steady victory march" for "proponents of an unregulated right to bear arms").

challenge the carceral enforcement of gun laws and center a different vision of racial justice.

B. *Racial History as Constitutional Currency*

Having established the Court's turn to history, this Section examines how race enters that calculation. The deployment of Black disarmament history did not originate with the Court; rather, gun rights advocates strategically mobilized racial justice rhetoric for decades before *Heller*. Yet the Court's own engagement with this history from *Heller* to *Bruen* marks a doctrinal shift. Reconstruction-era racial subordination has become a source of constitutional meaning, deployed to support a deregulatory account of the right to bear arms. A close reading of these decisions reveals that a history of Black disarmament plays a recurring and structurally significant role in the articulation of Second Amendment rights.

1. *The Strategic Rise of Racial Appeals in Pro-Gun Advocacy*

The conservative Justices' receptivity to the discussion of race in the Second Amendment context runs in sharp contrast to its color-blind aspirations when interpreting the Equal Protection Clause of the Fourteenth Amendment. As Chief Justice John Roberts famously wrote in *Parents Involved v. Seattle School District No. 1*, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹³² Yet to say that the Court's invocation of race in the Second Amendment context is merely opportunistic overlooks the deeper ideological synergy between

¹³² 551 U.S. 701 (2007). In *Students for Fair Admissions v. Harvard*, decided one year after *Bruen*, Chief Justice Roberts reiterated this stance: "[E]liminating racial discrimination means eliminating all of it." 600 U.S. 181, 206 (2023). This vision is grounded in "anticlassification" theory: the idea that the Constitution forbids any state action that classifies individuals by race, regardless of context, motive, or effect. See Jack M. Balkin & Reva Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); *infra* Section IV.A.

At first glance, the Court's racial history in *McDonald* and *Bruen* seems consistent. Racial history contextualizes a race-neutral right to bear arms rather than justifying race-conscious remedies. Race, in other words, is not a basis for government action. But this elides a deeper tension: the Justices who invoked Black disarmament to expand gun rights often minimize racial subordination elsewhere. The Reconstruction narratives animating the gun rights cases find no parallel in cases like *Shelby County v. Holder*, 570 U.S. 529 (2013), where the Court dismissed voting disparities as insufficient to justify preclearance. See Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1 (2020). In that light, the Court's use of racial memory in the Second Amendment sphere appears like a selective constitutional aesthetic, rather than a principled appreciation of past injustice.

Nonetheless, selective memory differs from silence. However inconsistent, as this Note hopes to express, the Court's turn to Black history in these opinions destabilizes a long-standing tradition of racial erasure, not just in Second Amendment doctrine but in what the Justices might now deem as civil rights litigation more broadly. And that aperture creates space for new arguments and new claimants.

racial injustice and libertarian distrust of state power—a convergence that has shaped gun rights advocacy since the 1970s. In this way, the Court’s turn to race in Second Amendment jurisprudence is best understood as less an aberration, than as the product of a longer lineage of advocacy and argumentation, unfurling itself in the conservative Justices’ own interpretation of constitutionalism.

Notably, libertarian arguments for gun rights developed in close conversation with racial justice claims during and immediately after the Civil Rights Movement. As Reva Siegel has noted, modern gun debates concretized “in the shadow of civil rights struggle.”¹³³ By the early-1970s, gun-rights activists intensified their resistance to gun regulation and organizations like the National Rifle Association (“NRA”) became staunch civil libertarians objecting to governmental intervention in any form.¹³⁴ The NRA, for instance, embraced the “individual right” interpretation of the Second Amendment while simultaneously deploying racial justice rhetoric.¹³⁵ And these advocates—some explicitly invoking the Civil Rights Act of 1964—argued that gun control measures disproportionately harmed Black Americans’ ability to defend themselves in high-crime areas.¹³⁶ In NRA publications, activists framed gun licensing laws as modern-day analogues to Jim Crow, warning that disarmament of Black communities would lay the groundwork for broader state control over all Americans.¹³⁷ NRA leader John Aquillino added his own perspective: “[G]un owners are the new n***** . . . of society.”¹³⁸ Gun rights discourse fused libertarianism with a discerning invocation of racial injustice.

These early, if crude, efforts at race-consciousness took on more sophisticated and institutionalized forms during the 1980s. After Ronald Reagan’s election as President, the Republican-led Senate sought to “refashion the constitutional law under which gun-control laws would be judged.”¹³⁹ Under the direction of Senator Orrin Hatch, the Senate Subcommittee on the Constitution published a report entitled *The Right to Keep and Bear Arms* in 1982.¹⁴⁰ The report, which furthered the “individual right of the American

¹³³ Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV L. REV. 191, 236 (2008).

¹³⁴ See Zick, *supra* note 20, at 247; see also Alice L. Granse, *Gun Control and the Color of the Law*, 37 L. & INEQ. 387, 394 (2019) (“The NRA was reborn as a full-blown anti-gun control organization after a coup at the annual convention in 1977”).

¹³⁵ Siegel, *supra* note 133, at 209.

¹³⁶ Li, *supra* note 114, at 1834.

¹³⁷ *Id.*

¹³⁸ Paul Taylor, “Powder Burn: As Gun-Control Advocates Hit a Bull’s Eye or Two, the NRA tries to Sharpen Its Aim.” WASH. POST, July 6, 1982, at A4.

¹³⁹ Li, *supra* note 114, at 1836.

¹⁴⁰ See SUBCOMM. ON THE CONST. OF THE S. COMM. ON THE JUDICIARY, 97TH CONG., *THE RIGHT TO KEEP AND BEAR ARMS*, at VII (1982) (“Immediately upon assuming chairmanship of the Subcommittee on the Constitution, I sponsored the report . . . [on] the history of the controversy over the right to keep and bear arms.”).

citizen to keep and carry arms,”¹⁴¹ relied on the history of Black disarmament to advance its conclusions.¹⁴² In the 1990s, NRA lawyers published law review articles arguing that gun control reflected “discrimination and oppression of Black[] [people], other racial and ethnic minorities, immigrants, and other ‘unwanted elements,’” translating political rhetoric into scholarly legitimization.¹⁴³

It may come as no surprise, then, that racial identity, politics, and memory became central to *Heller*’s litigation strategy. The original lead plaintiff was Shelley Parker, a Black woman seeking handguns to defend herself against drug dealers in her D.C. neighborhood. Her lawyers explicitly linked Parker’s identity to Thurgood Marshall’s strategic client selection: sympathetic and media-friendly.¹⁴⁴ Though Parker was dismissed from the lawsuit for lack of standing, race remained integral to the advocacy.¹⁴⁵ For example, Professors Cottrol, Diamond, and Tahmassebi—scholars whose foundational work in the early 1990s helped establish race and the Second Amendment as a serious field of legal inquiry—filed an amicus brief attacking the Sullivan Act as one example of a “facially neutral law[] . . . enforced in a discriminatory manner.”¹⁴⁶ Meanwhile, the NAACP Legal Defense Fund urged the Court to uphold the gun ban, arguing that “[h]andgun violence in the District exacts a particularly high toll on the District’s African-American residents.”¹⁴⁷

These genealogies matter. By the time the Supreme Court was ready to decide *Heller*, the racial scripts had been refined and specifically crafted

¹⁴¹ *Id.*

¹⁴² First, it cited *Dred Scott v. Sandford*, 60 U.S. 393 (1857), for the proposition that citizenship, denied to Black people then, became fully actualized upon a personal bearing of arms. *Id.* Secondly, the report pointed to the Black Codes discussed at length in Part II.A.iii. *Id.*

¹⁴³ Tahmassebi, *supra* note 60, at 67.

¹⁴⁴ Robert A. Levy, *Anatomy of a Lawsuit: District of Columbia v. Heller*, ENGAGE, Oct. 2008, 27, 29, <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/XaixaVaK662iuLmR0z2WiQYxNEwuA6II3CAZT5BD.pdf> [<https://perma.cc/UE3N-244F>].

¹⁴⁵ However, a race-conscious litigation strategy was more successful in *McDonald*, where the lawyers chose as lead plaintiff Otis McDonald—a seventy-six-year-old Black Chicagoan who wanted to own handguns to defend himself from burglars. Li, *supra* note 114, at 1853. McDonald, for his part, appreciated his racial positioning. As he later reflected, “[t]here was a wrong done a long time ago that dates back to slavery time. I could feel the spirit of those people running through me as I sat in the Supreme Court.” Dahleen Glanton, *Otis McDonald, 1933-2014: Fought Chicago’s Gun Ban*, CHI. TRIB. (Apr. 6, 2014, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-2014-04-06-ct-otis-mcdonald-obituary-met-20140406-story.html>.

¹⁴⁶ Li, *supra* note 114, at 1851, quoting Brief of Congress of Racial Equality as Amicus Curiae Supporting Respondent, at 3, *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁴⁷ Brief for NAACP Legal Defense & Educational Fund, Inc. as Amici Curiae Supporting Petitioners at 3, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290). Although the NAACP did not compete with the petitioners on the terrain of history, they clearly understood its salience in the ongoing debate, briefly writing that “the modern firearm regulations at issue in this case should be not be confused with the Black Codes, [or] other discriminatory laws the Fourteenth Amendment invalidated.” *Id.* at 31.

for judicial incorporation. The Roberts Court did not invent the Second Amendment's racial inflection. It inherited it, then codified it.

2. *Speaking of Race: Racial History in Heller and McDonald*

The Roberts Court's embrace of Black disarmament history to justify gun rights emerged within a confluence of doctrinal and advocacy conditions. By 2008, decades of gun rights organizing had refined racial justice arguments into litigation-ready constitutional claims, while the emerging jurisprudential commitment to originalism privileged historical tradition as the lodestar of constitutional meaning, creating doctrinal conditions receptive to the vignettes of racial subordination that advocates had strategically deployed. This pattern—where the Court advances novel interpretations of the Constitution through racial appeals—has historical precedent. The Court expanded the Due Process Clause of the Fourteenth Amendment to protect criminal defendants through egregious trials of southern Black defendants, a move eased by national horror towards southern lynch law.¹⁴⁸ School integration in *Brown v. Board* emerged as a sociopolitical response to a Cold War imperative.¹⁴⁹ And the Warren Court's advancement of First Amendment protections worked in direct conversation with the popularity of the Civil Rights Movement.¹⁵⁰ Perhaps the “gun rights revolution” can be said to have emerged amid national conversations on race that surged during the early years of America's first Black presidency. What is distinguishable, however, is the velocity of deployment: from *Heller* (2008) to *McDonald* (2010), the Court moved race from a peripheral gesture to a central pillar of its adjudicatory lens.

Justice Scalia's use of race in *Heller* came late in the opinion and did not directly equate gun restrictions to Jim Crow—that would come in *McDonald*.¹⁵¹ Nevertheless, the Court recounts Black people's history of disarmament to confirm a core doctrinal claim: The Second Amendment protects an individual, not collective, right to bear arms.¹⁵² Scalia drew upon antislavery literature,¹⁵³ postbellum congressional debates,¹⁵⁴ and

¹⁴⁸ Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 52 (2000).

¹⁴⁹ See generally Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

¹⁵⁰ See generally LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965).

¹⁵¹ Bridges, *supra* note 5, at 75.

¹⁵² *Heller*, 554 U.S. at 579.

¹⁵³ See, e.g., *id.* at 609 (“Joel Tiffany, for example . . . wrote that ‘the right to keep and bear arms also implies the right to use them if necessary in self defence,’” quoting JOEL TIFFANY, *A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY* 117-18 (1849)).

¹⁵⁴ *Id.* at 615 (citing a joint congressional report which recognized that “seizing all fire-arms found in the hands of freemen . . . is in clear and direct violation of the personal rights as guaranteed by the Constitution of the United States”).

Freedmen's Bureau reports¹⁵⁵ to assert that lawmakers and advocates understood Black Americans to have an individual right to armed self-defense.¹⁵⁶ Ultimately, what emerged was a race-aware originalism that acknowledged historical injury insofar as it marshaled support to fortify the constitutional status of the armed individual.

The Court sharpened this framework in *McDonald*, where it engaged in a thorough discussion of “the criticality of gun rights to black liberation,”¹⁵⁷ presenting “a narrative that indelibly links race equality and gun rights as symbiotic.”¹⁵⁸ Justice Alito relied on Reconstruction-era history to recast the right to keep and bear arms as a Reconstruction-era civil right whose protection was central to the Fourteenth Amendment's project of securing equal citizenship. Though much of this history has been discussed above,¹⁵⁹ nearly a fifth of the opinion is an exposition of Black subalternity immediately after the Civil War, arguing that freed-people's disarmament was both a historical injustice and a legal harm that the Fourteenth Amendment sought to remedy. Justice Alito further argued that the Thirty-Ninth Congress's “efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental.”¹⁶⁰ Any narrower reading would have left Black people in the South “vulnerable to attack by many of their worst abusers: the state militia and state peace officers.”¹⁶¹

McDonald thus forged two links of inheritance: first to *Heller* itself, using Southern Black experience to demonstrate that the Second Amendment has always been linked with skepticism towards state power; then to the advocacy of Cottrol, Diamond, and Tahmassebi, signaling how the NRA's racial iconography had fused with the Court's language. Even so, this account accurately identified when gun rights were deeply intertwined with Black survival and civic membership, offering a historically grounded acknowledgment of armed self-defense's emancipatory stakes.

¹⁵⁵ *Id.* at 615-16 (noting a Freedmen's Bureau report from 1866 which stated that civil laws which disarm Black people infringed upon established Constitutional rights).

¹⁵⁶ *Id.* at 616.

¹⁵⁷ Bridges, *supra* note 5, at 77.

¹⁵⁸ Zick, *supra* note 20, at 245.

¹⁵⁹ See *McDonald v. City of Chicago*, 561 U.S. 742, 771-78 (2010). Justice Alito recounted widespread disarmament of Black Americans following the Civil War, citing Mississippi's 1865 law banning freedmen from owning firearms, and reporting on armed militias of ex-Confederates who forcibly stripped Black Union workers of their weapons. *Id.* at 772-73. Alito highlighted Section 14 of the Freedmen's Bureau Act of 1866, which guaranteed all citizens “the constitutional right to bear arms,” and framed the Reconstruction Congress's actions as evidence that this right was fundamental—not just a protection against discrimination, but a safeguard against domination. This, of course, is not to say this history is complete or impartial. See Murray, *supra* note 1, at 1529, n.156 (“The *McDonald* Court ignored evidence that the Fourteenth Amendment was intended to authorize states to *limit* the bearing and keeping of arms by those bent on using racial terrorism and violence to subordinate and subjugate newly freed Black[] [people].”).

¹⁶⁰ *McDonald*, 561 U.S. at 773.

¹⁶¹ *Id.* at 779.

Justice Thomas's concurrence in *McDonald* reinforced this framing through particularly evocative language. Seeking incorporation through the Privileges or Immunities Clause, Thomas argued that firearms were often the only means by which Black citizens could defend themselves against lynching and racial violence.¹⁶² He quoted a Black man reflecting on his father standing guard outside a jail to protect a prisoner from a lynch mob: The sight conveyed "the possibilities of salvation."¹⁶³ Most symbolically, Thomas encouraged the Court to repudiate *Cruikshank*, the 1875 case which arose from the Colfax Massacre, and which declared that the right to bear arms was not a privilege or immunity of national citizenship, enabling "private forces . . . to subjugate the newly freed slaves and their descendants through a wave of private violence."¹⁶⁴ That decision, Thomas argued, was intimately connected to the lynching of Emmitt Till nearly a century later: Till, like generations of Black people since Reconstruction, was unarmed.¹⁶⁵

Though the plurality and Justice Thomas disagree on method, the thrust of the latter's concurrence finds quarter in the closing lines of the Court's opinion. *McDonald*'s pursuit of self-defense stems from violence plaguing his community—Black people, still underserved by the State, need guns; and modern regulations mimic the facially neutral gun control laws of the past.¹⁶⁶ That claim marks the convergence of racial memory and libertarian constitutionalism that set the stage for the competing amicus briefs in *Bruen*.

C. Racial Memory and the Staging of Black Disarmament in *Bruen*

The Court's invocation of Black disarmament history in its modern Second Amendment jurisprudence offers a glimmer of a doctrinal door long thought closed. By treating racial subordination during Reconstruction as doctrinally relevant to the scope of Second Amendment rights under its

¹⁶² *Id.* at 856-58.

¹⁶³ *Id.* at 857-58.

¹⁶⁴ *Id.* at 855.

¹⁶⁵ *Id.* at 857; see also Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2027, 2069-71 (2021). Murray, alongside other scholars, have articulated what they consider inconsistencies in Justice Thomas's deployment of race across his jurisprudence—particularly his tendency to invoke racial harm in contexts that advance conservative outcomes, while resisting race-conscious remedies in others. See, e.g., Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787 (2005). These critiques are well taken. Still, it would be too easy—and too convenient—to dismiss his *McDonald* concurrence as mere pretensions. Whatever one makes of his broader judicial philosophy, Thomas's historical account here is detailed and at moments, morally resonant. If it advances a conservative vision of gun rights, it still channels a history of racial violence that legal discourse has too often ignored.

¹⁶⁶ *McDonald*, 561 U.S. at 779 ("In the years immediately following the Civil War, a law banning the possession of guns by all private citizens would have been nondiscriminatory only in the formal sense. Any such law—like the Chicago and Oak Park ordinances here—presumably would have permitted the possession of guns by those acting under the authority of the State and would thus have left firearms in the hands" of those "widely involved in harassing [B]lack[] [people] in the South").

history-and-tradition methodology, the Court has implicitly endorsed race, racism, and reparations as integral to rights-making. The amicus briefs filed in *Bruen* provide a rare opportunity to observe how advocates have seized upon that opening in real time.¹⁶⁷

Of the forty-nine amicus briefs in support of the petitioner, nearly a quarter discussed the discriminatory impact of gun regulation on marginalized communities,¹⁶⁸ while several respondent-side briefs offered competing historical accounts defending regulation as actually comporting with racial justice.¹⁶⁹ This section focuses on two paradigmatic submissions. First, a brief filed by a coalition of New York public defenders and Black legal aid attorneys (“the BALA brief”), which does not engage in originalist excavations but instead translates the Court’s race-conscious turns in *McDonald* into a structural, anti-carceral critique of discretionary licensing as racialized criminalization. On the other hand, a second brief filed by the NAACP Legal Defense Fund *does* invoke Reconstruction history to defend regulation as protective of Black communities.

Examining these briefs as doctrinal experiments reveals a critical asymmetry: only one of these racial justice frameworks appears capable of gaining traction under the Court’s post-*Bruen* constitutional logic. Part IV develops this understanding by marrying the BALA brief’s persuasive narrative with the Reconstruction-era historical analysis *Bruen* privileges.

1. The BALA Brief’s Anti-Carceral Turn

The BALA brief has attracted significant scholarly attention¹⁷⁰ for how it traverses conventional ideological boundaries: traditionally progressive public defenders deploying gun rights arguments to challenge discretionary licensing as a tool of mass incarceration and racialized state action.¹⁷¹ The BALA brief argues that New York’s licensing regime functions primarily to

¹⁶⁷ Indeed, as one commentator put it, the *Bruen* litigation “represents a highwater mark in the expression and deployment of racial justice claims in the Second Amendment context.” Li, *supra* note 114, at 1860.

¹⁶⁸ Alexys Ogorek, *Breaking Down the Initial Amicus Briefs in Bruen*, DUKE CTR. FOR FIREARMS L., (Aug. 11, 2021), <https://firearmslaw.duke.edu/2021/08/breaking-down-the-initial-amicus-briefs-in-bruen/> [https://perma.cc/4FXA-PF47].

¹⁶⁹ Ellena Erskine, *We Read All the Amicus Briefs in New York State Rifle So You Don’t Have To*, SCOTUSBLOG (Nov. 2, 2021), <https://www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-new-york-state-rifle-so-you-dont-have-to/> [https://perma.cc/R2M4-3MUT] (describing respondent-side briefs arguing that historical tradition of firearm regulation comported with racial justice by protecting Black communities from private violence).

¹⁷⁰ See, e.g., Joseph Blocher & Reva Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449 (2022); Bridges, *supra* note 5, at 73-74.

¹⁷¹ See Mystal, *supra* note 24 (conceding that the BALA brief correctly diagnoses the racialized consequences of New York’s then-existing licensing regime); Damon Root, *Public Defenders vs. Gun Control*, REASON (Nov. 2021), <https://reason.com/2021/10/17/public-defenders-vs-gun-control/> [https://perma.cc/8XHL-ZVV2] (arguing that BALA brief would be a victory for both the Second Amendment and criminal justice reform).

entrench racial disparities and criminalize poverty. Drawing on decades of client representation, it contends that the state's regulatory framework rendered the Second Amendment a "legal fiction" for the Black and Brown men routinely prosecuted for unlicensed firearm possession.¹⁷²

The harm, it argues, is not merely theoretical. The BALA brief notes that obtaining a gun permit in New York costs over \$400—excluding the additional temporal and bureaucratic burdens—placing constitutional access out of reach for many indigent residents.¹⁷³ Those who persist face an opaque and discretionary "moral character" assessment administered by the New York Police Department ("NYPD"), which effectively determines whose possession is criminal or protected.¹⁷⁴

This regime enabled stratified enforcement. While police routinely denied licenses to working-class Black and Hispanic families in the Bronx seeking self-protection, they regularly approved licenses for affluent, high-profile individuals like Robert De Niro.¹⁷⁵ Meanwhile, enforcement practices centered on "tak[ing] firearms away from minority men,"¹⁷⁶ with stop-and-frisk tactics driving disproportionate arrests: in 2020, Black New Yorkers comprised 78% of the state's felony gun possession cases, despite only being 18% of its population.¹⁷⁷ In the words of one of the brief's authors, "[w]hat's actually happening is that the NYPD is marching around the city taking firearms from Black and [B]rown people every single day."¹⁷⁸

The brief also roots these dynamics in historical context, tracing New York's licensing laws to the 1911 Sullivan Act, enacted amid elite panic over Black gun ownership and immigrant unrest.¹⁷⁹ Later regulatory expansions, such as the targeting of "Saturday Night specials," clashed with renewed demands for Black civil rights.¹⁸⁰ The racial violence of gun regulation is thus historical and ongoing, enforced through the carceral state.¹⁸¹ What emerges is a justice argument that is immediate and structural: police,

¹⁷² Brief of the Black Attorneys of Legal Aid et al. as Amici Curiae Supporting Petitioners, at 5, *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022) (No. 20-843).

¹⁷³ *Id.* at 8.

¹⁷⁴ *Id.* at 8-9, 12. At the same time, the NYPD's licensing process favors former NYPD officers. "It explicitly waives their license application fee. And upon leaving the force, the NYPD also issues its officers a special certification so they can more easily obtain a firearm license—what the NYPD's licensing division calls a 'Good Guy letter.'" *Id.* at 11.

¹⁷⁵ *Id.* at 12.

¹⁷⁶ *Id.* at 12-13.

¹⁷⁷ As the Brief notes, between 2014 and 2017, 84% of frisks were of Black or Latino people. Still, they were "less likely to be found with a weapon" than others. *Id.* at 13; *see also supra* Part I.

¹⁷⁸ Avinash Samarth, Michael Thomas & Christopher Smith, "Second Class," INQUEST (Nov. 5, 2021), <https://inquest.org/nyc-public-defenders-amicus-second-class> (quoting Avinash Samarth).

¹⁷⁹ BALA et al., *supra* note 41, at 9-10.

¹⁸⁰ *Id.* at 11.

¹⁸¹ *See Bridges, supra* note 5, at 74.

prosecutors, and courts enforce gun control through racialized surveillance and punishment, turning the illusory promise of protected armament into a trapdoor for the city's most vulnerable populations.

2. *The NAACP's Defense of Discretionary Regulation*

In contrast to the BALA brief's critique, the amicus brief filed by the NAACP Legal Defense Fund defends public carry restrictions as an essential means of protecting Black lives. The brief argues that concealed carry laws have long safeguarded vulnerable communities from state-inflicted and vigilante violence.¹⁸²

The NAACP's brief reorients the historical lens: the core, traditional constitutional harm is not the denial of gun rights *per se*, but the state's abdication of its duty to protect Black life. The brief similarly situates gun regulation within a racial justice framework, arguing that Reconstruction-era carry restrictions were adopted to safeguard Black communities from racial terror. In other words, gun regulation is a protective, not punitive, state function. The brief thus elevates an alternative memory wherein the state's failure to control white supremacist violence, rather than its regulation of arms, constituted a greater betrayal of Black citizenship.¹⁸³

This historical framing bleeds into the brief's modern doctrinal position. The LDF argues that permissive concealed carry regimes exacerbate violence in urban Black communities, with empirical data showing widespread public carry leads to more firearm homicides.¹⁸⁴ The murders of Trayvon Martin and Jordan Davis are highlighted as contemporary examples of a longer pattern: the persistent exposure of Black life to private violence.¹⁸⁵ Paramilitary terror, rather than Black disarmament, remains the throughline from Reconstruction to the present.

The brief ends by directly addressing the BALA's concerns about racially discriminatory enforcement, insisting that those concerns are best

¹⁸² Brief of the NAACP Legal Defense & Educational Fund, Inc., and the National Urban League as Amici Curiae in Support of Respondents, at 3-5, No. 20-843 (Sept. 21, 2021) [hereinafter NAACP].

¹⁸³ The brief also details how the Fourteenth Amendment was written as white Southerners "stoked fear among Black freedmen . . . including through mass lynchings." *Id.* at 9. At the heart of this racial terrorism was the firearm. *Id.* at 9-11. Republican-led state governments in the South, including multiracial legislatures in Texas and South Carolina, passed public carry restrictions to safeguard Black communities. *Id.* at 11-14. These laws, the brief argues, were recognition that equal citizenship required both freedom from bondage and from terror.

¹⁸⁴ *Id.* at 17-19 (noting, for instance, that "[i]n general, U.S. residents are 128 times more likely to be killed by everyday gun violence than by international terrorism; Black people specifically are 500 times more likely to die this way," that "Black Americans are ten times more likely than white Americans to die from gun violence," and that Black men and teens aged 15 to 34 make up 2 percent of the Nation's population but were 37 percent of gun homicides, a rate that is 20 times higher than white males of the same age group) (internal citations omitted).

¹⁸⁵ *Id.* at 20-24.

addressed through the Equal Protection Clause.¹⁸⁶ In this way, the LDF expresses a dual commitment to racial justice and to regulatory authority, seeking to preserve the state's power to respond to community harm, even as it acknowledges the long shadow of unequal enforcement.

3. *Race and the Bruen Decision*

If the *Bruen* briefs made a strategic calculation that the Supreme Court would be receptive to arguments rooted in Black historical experience, they bet correctly. Understanding the Court's logic requires understanding how it mobilizes racialized constitutional memory.

Much of this history is well-worn. Writing for the majority, Justice Thomas began by referring to *Dred Scott*, noting that “even Chief Justice Taney recognized (albeit unenthusiastically in the case of [B]lacks), that public carry was a component of the right to keep and bear arms—a right free [B]lacks were often denied in antebellum America.”¹⁸⁷ The opinion continues, drawing on postbellum congressional reports, Freedmen's Bureau records, and Black newspaper editorials, to narrate a vivid history of Black disarmament and self-defense.¹⁸⁸ Firearms emerge in this retelling as, one may expect, tools of survival and political agency, invoked inasmuch as the “government was inadequately protecting” Black communities.¹⁸⁹ But while the history recounted is largely accurate, its rhetorical function is complex, serving both to validate originalism grounded in the Reconstruction Amendments as a doctrinal method and to cast it in aspirational, even redemptive, terms.¹⁹⁰

While Justice Thomas does not cite the BALA brief, he flirts with its remonstrations by observing that “Southern prohibitions on concealed carry were not always applied equally.”¹⁹¹ In a footnote, the Court quotes a Reconstruction-era officer who questioned why a Black man was fined for carrying a concealed weapon while “every other white man” in town did

¹⁸⁶ *Id.* at 24-25 (agreeing that “the racially discriminatory enforcement of criminal laws is a nationwide epidemic that denies full citizenship to Black people” but that “the constitutional solution to any evidence of discrimination in the adoption or enforcement of New York's . . . gun laws and regulations is . . . under the Equal Protection Clause of the Fourteenth Amendment” rather than the Second Amendment).

¹⁸⁷ *Bruen*, 597 U.S. at 52.

¹⁸⁸ *Id.* at 53-55.

¹⁸⁹ *Id.* at 54. Justice Thomas also articulates that Congress extended the 1866 Freedmen's Bureau Act so as to affirm the freedman's equal entitlement to “the constitutional right to keep and bear arms.” *Id.* (quoting Freedmen's Bureau Act of 1866, ch. 200, § 14, 14 Stat. 173, 176).

¹⁹⁰ As Li astutely writes, “*Bruen* is the latest culmination in the story of how racial-justice frames have always been fundamental to understanding the evolution of the modern Second Amendment from both a social-movement and a jurisprudential perspective.” Li, *supra* note 114, at 1868.

¹⁹¹ *Bruen*, 597 U.S. at 63, n.27.

so with impunity.¹⁹² Though understated, this gesture mirrors the concerns raised by BALA, suggesting an openness to the idea that racially selective policing undermines the legitimacy of gun regulation and contravenes the spirit of the Reconstruction Amendments.

For his part, Justice Alito's concurrence provides an interesting addendum to his *McDonald* plurality opinion; while the latter ushered in a trend of postbellum historiography, his *Bruen* opinion more directly engages with the disparate impact of contemporary gun regulations and what he sees as the grim realities of living in New York today.¹⁹³ And unlike the majority, Justice Alito directly cites the BALA brief, noting that "a law-abiding person was driven to violate the Sullivan Law because of fear of victimization and as a result was arrested, prosecuted, and incarcerated."¹⁹⁴ This citation helps accord the BALA brief a measure of doctrinal legitimacy within the Court's Second Amendment analysis.

In the end, six Justices signed on to an opinion that drew heavily on the history of Black disarmament, the value of Black self-defense, and the disparate enforcement of concealed-carry regulation.¹⁹⁵ At the same time, the Court's engagement with racial history is undeniably nuanced. For some observers, there is a jarring dissonance between the reparative modality of *McDonald* and the silence of gun rights advocates to condemn the murder of Philando Castile. As Christina Mulligan writes, one would be justified in considering the "dark prospect that *McDonald*'s emphasis on protecting the rights of historical (and now dead) [B]lack people merely served as a convenient way to protect the rights of living white people today."¹⁹⁶

Taking these criticisms in stride, it would still be a mistake to dismiss the trio of Second Amendment opinions outright. Even if instrumental, the Court's invocation of Black disarmament history has altered the terrain of Second Amendment argumentation by rendering racialized state violence legally legible. *Bruen* confirms that this recognition operates within a distinctly procrustean framework—racial history appears to gain doctrinal purchase most readily when deployed to critique discretionary criminalization, not when it is marshaled to defend regulatory authority. This imbalance is decisive. It explains why anti-carceral challenges to licensing regimes found

¹⁹² *Id.*

¹⁹³ As he writes, some New Yorkers "must traverse dark and dangerous streets in order to reach their homes after work" and without a firearm "ordinary citizens" will fear they may be "murdered, raped, or suffer some other serious injury." *Bruen*, 597 U.S. at 74, 4 (Alito, J., concurring). Bridges observes that what connects his opinions in *McDonald* and *Bruen* is that in both, he sees "[B]lack disarmament [as] consistent with [B]lack injury and death, and gun possession [as] vital to [B]lack people's well-being." Bridges, *supra* note 5, at 83.

¹⁹⁴ *Bruen*, 597 U.S. at 75 (Alito, J., concurring).

¹⁹⁵ Li, *supra* note 114, at 1868.

¹⁹⁶ Christina Mulligan, *Diverse Originalism, History & Tradition*, 99 NOTRE DAME L. REV. 1515, 1536-37 (2024).

traction in *Bruen* and suggests, without resolving, how far similar arguments can travel. Part IV takes up that question in the felon-in-possession context.

IV. TOWARDS AN ANTI-SUBORDINATED SECOND AMENDMENT

The Court has created an analytical space it may not fully understand. By infusing the Second Amendment with the emancipatory logic of the Fourteenth, it forces attention to racial structures it has refused to confront elsewhere—demonstrating, as Theodor Adorno once wrote, that “the splinter in your eye is the best magnifying glass.”¹⁹⁷ This Part asks whether a doctrine predicated on individual gun ownership can be read to check enforcement practices that produce disparate burdens. Section A engages with scholarly critiques of the Court’s historical turn and emphasizes *Bruen*’s strategic promise. Section B finally turns to felon-in-possession statutes and how the fault lines emerging from the Court’s jurisprudence may leave such regulations assailable.

A. *The Antisubordination Critique*

As the dust has settled on *Bruen*, scholars worry it resembles the worst of Derrick Bell’s “interest convergence” theory¹⁹⁸: the Court aligns itself with the interests of Black people from a time *prior* to advance the deregulatory aims of a predominantly white gun constituency *today*.¹⁹⁹ In this sense, the BALA brief sets the doctrinal stage, but the NAACP’s intervention furnishes the normative template many progressive scholars have embraced. Danny Li’s thoughtful work exemplifies this response. Rejecting the cession of the Second Amendment to the political Right, Li reframes the Amendment around “equal public safety” as a civil right, arguing that the equitable maintenance of bodily security “is itself a social condition for democracy and the realization of free and equal political status.”²⁰⁰

Li’s intervention is compelling. Black Americans are 11.5 times more likely to die by gun homicide than white Americans, and gun violence inflicts enduring harm on Black communities.²⁰¹ But Li leaves the institutional

¹⁹⁷ THEODOR W. ADORNO, MINIMA MORALIA: REFLECTIONS ON A DAMAGED LIFE 50 (E. F. N. Jephcott trans., Verso 2005).

¹⁹⁸ Bell, *supra* note 149.

¹⁹⁹ Harawa, *supra* note 20, at 171.

²⁰⁰ Li, *supra* note 114, at 1885.

²⁰¹ Brady United Against Gun Violence, *The Disproportionate Impact of Gun Violence on Black Americans*, <https://www.bradyunited.org/resources/research/disproportionate-impact-gun-violence-black-americans>. Moreover, on average, thirty-seven Black people are killed each day with guns. Everytown for Gun Safety Support Fund, *Black History Month: Key Research Stats*, EVERYTOWN SUPPORT FUND (Jan. 17, 2025), <https://everytownsupportfund.org/report/black-history-month-key-research-stats/>. See also, Ijeoma Opara, David T. Lardier, Jr., Isha Metzger, Andriana Herrera, Leshelle Franklin, Pauline Garcia-Reid & Robert J. Reid, “Bullets Have No Names”: A Qualitative Exploration of Community Trauma Among Black and Latinx Youth, 29 J. CHILD & FAM. STUDS. 2117, 2118 (2020).

question unexamined: how the state defines “public safety” and whether that definition channels regulatory effort through punitive enforcement. Antisubordination theory demands attention to the full range of state power that structures control.

Properly understood, antisubordination theory is an egalitarian constitutional concept. It asks that the law interrogate not just formal equality, but whether state power and laws functionally reinforce racial caste.²⁰² As such, antisubordination resists legitimizing state violence, even when deployed in the name of a greater public good,²⁰³ and insists that legal remedies be evaluated by their structural effects.²⁰⁴ From this perspective, Li’s emphasis on public safety risks narrowing the concept of subordination to a deficit of protection while overlooking a parallel current in Black political thought attuned to the carceral harms of overenforcement and surveillance.²⁰⁵ Li’s account thus fails to grapple with the internal mechanisms that produce marginalization, reinscribing the very structures of domination it seeks to dismantle.

The concern about carceral overenforcement is concrete. Disparities in stand-your-ground²⁰⁶ and justifiable homicide cases²⁰⁷ expose racially selective enforcement: white-on-Black violence is excused while Black resistance is criminalized. High-profile acquittals coexist with the routine denial of justification defenses to Black men, many of whom are killed before they can speak.²⁰⁸ Black communities thus experience a double bind: aggressive policing for gun possession yet systematic denial of Second Amendment protections for self-defense. These patterns do not counsel in favor of narrowing Second Amendment rights, but rather skepticism toward the state’s claim to protect Black life.²⁰⁹

²⁰² See Owen Fiss, *Another Equality*, 2 ISSUES IN L. SCHOLARSHIP 3-4 (2012).

²⁰³ See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV L. REV. 1331, 1381-83 (1988).

²⁰⁴ See Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1473, n.8 (2004) (collecting examples defining the theory).

²⁰⁵ See, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); James Baldwin, “A Report from Occupied Territory,” THE NATION (July 11, 1966).

²⁰⁶ D. Marvin Jones, “He’s a Black Male . . . Something Is Wrong With Him!” *The Role of Race in the Stand Your Ground Debate*, 68 U. MIAMI L. REV. 1025 (2014).

²⁰⁷ As Li writes, white-on-Black homicides have justifiable homicide determinations thirty-three percentage points more frequently than Black-on-white homicides and determinations of justifiable homicide are sixty-five percent more likely in stand-your-ground states. Li, *supra* note 114, at 1895.

²⁰⁸ Daniel S. Harawa, *The Racial Justice Gambit*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 5, 2022), <https://firearmslaw.duke.edu/2022/01/the-racial-justice-gambit>; see, e.g., Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), <https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html>.

²⁰⁹ As a final consideration, Li’s account selectively foregrounds public safety as a Reconstruction value while sidelining the Black radical tradition of armed self-defense (a tradition he nevertheless acknowledges exists). But if the lesson of the *Bruen* era is that

An antistatist Second Amendment therefore asks not only whether gun violence devastates Black communities, but whether they are being targeted by the legal systems responsible for regulating them. It is precisely the second question that the Court has opened in this new era of Second Amendment litigation. While well-founded concerns remain that race-conscious arguments may be selectively absorbed, courts now sit at the center of defining how racial history figures into Second Amendment law.

Read in this light, the BALA brief gestures towards a different antistatist paradigm than the one Li embraces, one that directs judicial attention to how gun regulations themselves produce and justify violence against Black people *today*. Antistatist theory emerges both as a moral critique and a constitutional method that directs courts to examine the racial structures their doctrines entrench. Above all, this theory resists privileging state intervention in the name of public order.

B. *Dangerousness and Dispossession: Federal Felon-in-Possession Laws*

Although courts have begun to grapple with how *Bruen*'s historical test applies to modern gun laws, felon-in-possession statutes remain surprisingly resilient.²¹⁰ Even as *Bruen* dismantled New York's licensing regime and invited constitutional challenges to a wide range of modern gun laws,²¹¹ felon-in-possession laws have been affirmed. Justice Kavanaugh took care to remind lower courts in his *Bruen* concurrence, reminding lower courts that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."²¹² Yet the doctrinal

history is always constructed, Li's invocation of "equitable public safety" as Reconstruction's central legacy is no less strategically curated. It oversimplifies the multiplicity of Black historical responses to state violence. Reconstruction involved both establishing safety through law and resisting the state's betrayal of its promises. A richer antistatist theory would reckon with both legacies, not just the half that validates state-led regulation. Li, *supra* note 114, at 1895.

²¹⁰ As a threshold matter, one might ask why this analysis focuses on the *federal* felon-in-possession statute when *Bruen*'s emphasis on Reconstruction history applies most directly to state regulations challenged under the incorporated Second Amendment. Two practical reasons justify the federal focus at this stage. First, federal prosecutions under § 922(g) produce the most comprehensive data on racial disparities and constitute the majority of felon-in-possession prosecutions nationwide. Second, federal circuit courts' engagement with § 922(g) provides the most developed doctrinal landscape for examining how history-and-tradition analyses handle analogues rooted in racial subordination. The doctrinal question—whether Reconstruction history should inform federal Second Amendment constraints—is further addressed *infra* Section IV.B.2. State felon-in-possession laws warrant similar scrutiny and may face lower constitutional barriers given *Bruen*'s explicit focus on constraining *state* power.

²¹¹ See, e.g., *Snope v. Brown*, 605 U.S. ___, slip op. at 3 (2025) (Kavanaugh, J., statement respecting denial of certiorari) (opining that upon percolation among the lower courts, the Supreme Court "should and presumably will address the AR-15 issue soon.").

²¹² *New York City Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 81, 3 (2022) (Kavanaugh, J., concurring).

foundations for these laws may be less secure than they initially appear.²¹³ Courts upholding § 922(g) increasingly rely on historical analogues rooted in the disarmament of enslaved people, freedmen, and Native Americans, while simultaneously acknowledging this pernicious history.²¹⁴ Building on the BALA brief's demonstration that anti-carceral challenges resonate under *Bruen*, this section examines whether felon-in-possession laws—which disproportionately burden Black Americans²¹⁵—can withstand scrutiny when courts are forced to confront the racial origins of the analogues they invoke.²¹⁶

Proponents of felon-in-possession laws justify them under the precepts of public safety. They target legal status, presuming that a person with a felony conviction is *per se* dangerous (or irresponsible) and should therefore be excluded from the core protections of the Second Amendment.²¹⁷ This status-based approach produces stark racial disparities when one considers that “the federal government has purposefully established gun-focused prosecution programs in cities across the country with large minority populations.”²¹⁸ In practice, these laws function as backdoor extensions of the carceral state, transforming past convictions into a latent ground for renewed imprisonment. An anodyne law framed as a victory for public safety becomes a mechanism for further racial classification, with the state deciding, without historical accountability, who is too dangerous (or irresponsible) to possess rights in the first place.

Central to attacking felon-in-possession laws is a question *Bruen* left unanswered:²¹⁹ may the state disarm people solely based on their status as “felon” or must it show that the person is, in fact, dangerous?²²⁰

²¹³ Cf. Laura G. Abelson, *Reevaluating Felon-in-Possession Laws After Bruen and the War on Drugs*, 15 U.C. IRVINE L. REV. 871, 872 (2025) (noting that *Bruen* has been used to strike down nearly all types of firearm regulations *except* felon-in-possession statutes).

²¹⁴ See *infra* p. 719.

²¹⁵ In 2022, Black Americans made up 58% of all § 922(g) felon-in-possession convictions; three-quarters of all sentencing were defendants of color. QUICK FACTS: 18 U.S.C. § 922(G) FIREARM OFFENSES, U.S. SENT’G COMM’N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY22.pdf.

²¹⁶ See Alice Ristorph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 204, 214 (2021) (expressing that enslaved persons constituted a class of inherently dangerous people for the purposes of American criminal law).

²¹⁷ See *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (articulating that the federal felon-in-possession law is ostensibly predicated on the theory that those previously convicted of a felony “may not be trusted to possess a firearm without becoming a threat to society”) (quoting 114 Cong. Rec. 13868, 14773 (1968)).

²¹⁸ Daniel S. Harawa, *Between a Rock and a Gun*, 134 YALE L.J.F. 100, 119 (2024); see also Daniel S. Harawa, *The Second Amendment’s Racial Justice Complexities*, 108 MINN. L. REV. 3325, 3233-34 (2024).

²¹⁹ See Greene, *supra* note 10, at 954 (noting that the *Bruen* majority opinion was silent on whether the plain text of the Second Amendment applies to felons).

²²⁰ For at least one influential circuit court judge, the answer is clear: “The Constitution’s text, at least, has as little to say about restrictions on firearm ownership by felons as it does about the trimesters of pregnancy. The *Heller* majority seems to want to have its cake and eat it,

United States v. Rahimi addressed this partially but left the core question open.²²¹ Seeking to clean up misunderstandings about *Bruen*, Chief Justice Roberts clarified that the historical-analogue test “permits more than just those regulations identical to ones that could be found in 1791.”²²² Rather, the correct level of inquiry is whether the current law comports with the *principles* that underpin the regulatory tradition.²²³ With this in mind, the Court upheld § 922(g)(8), which disarms individuals subject to domestic violence restraining orders, emphasizing that the statute applied only where a court found the individual posed “a clear threat of physical violence to another.”²²⁴ While § 922(g)(8) did not have a historical Founding-era twin, it had historical cousins in the form of surety and “going armed” laws.²²⁵

Rahimi complicates this paper’s thrusts. When the cause of gun rights coalesces with the cause of a criminal defendant, the Court grows quiet, retreating from the racialized history it once welcomed. This is especially notable given that there were plenty of racial-justice narratives to be excavated.²²⁶ But all is not lost. *Rahimi* is notably narrow, leaving untouched a number of questions.²²⁷ The Court upheld § 922(g)(8) only as applied to individuals subject to a protective order and found by a court to pose “a credible threat of [physical] violence.”²²⁸ That left open the constitutionality of broader disarmament laws untethered to such judicial findings. To be sure, a felony conviction involves judicial proceedings, but it establishes past criminal conduct, not present dangerousness.²²⁹ *Rahimi* required a contemporaneous judicial finding that the individual currently poses a threat.²³⁰

too—to recognize a right to bear arms without having to deal with any of the more unpleasant consequences of such a right.” J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 254, 273 (2009).

²²¹ 602 U.S. at 702.

²²² *Id.* at 691-92.

²²³ *Id.* at 692.

²²⁴ *Id.* at 698.

²²⁵ *Id.* at 698-99.

²²⁶ Harawa, *supra* note 20, at 104. Compare this to *Heller*, *McDonald*, and *Bruen*, all of which were civil cases; in this manner, “the Court essentially endorsed the use of the criminal legal system, with all its built-in biases, as a tool to regulate firearms.” *Id.* at 120-21.

²²⁷ *Id.* at 114.

²²⁸ *Rahimi*, 602 U.S. at 702 (concluding circumspectly that individuals found by a court to pose a credible threat to another’s physical safety may be temporarily disarmed, leaving open the constitutionality of broader gun restrictions not tied to judicial findings of dangerousness); see also *id.* at 703 (Sotomayor, J., concurring).

²²⁹ *Kanter v. Barr*, 919 F.3d 437, 454 (Barrett, J., dissenting) (7th Cir. 2019) (“The historical evidence . . . support[s] a . . . proposition: that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety. This is a category simultaneously broader and narrower than ‘felons’—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness.”).

²³⁰ *Rahimi*, 602 U.S. at 13 (holding that § 922(g)(8)’s historical analogues were predicated on an individualized judicial finding that the person posed a credible threat to another); see also *id.* at 6 (Gorsuch, J., concurring) (leaving open “whether the government may disarm a person without a judicial finding that he poses a ‘credible threat’ to another.”).

By contrast, and as it will be shown below, § 922(g)(1) imposes lifetime disarmament based solely on historical status, without any mechanism to assess whether someone convicted decades ago of an offense remains dangerous today. And because *Rahimi* was a facial challenge, it preserved the possibility that defendants could bring as-applied challenges to other gun restrictions, such as those tied to past felony convictions.²³¹

Justices Barrett and Thomas identify these fissures. In her oft-cited *Kanter v. Barr* dissent, then-Judge Barrett argued that categorical bans on nonviolent felons lack a historical foundation.²³² Founding-era legislatures disarmed those who posed threats to the state, not those convicted of minor offenses.²³³ Justice Thomas, the sole dissenter in *Rahimi*, went further, warning that modern notions of “dangerousness” are too easily shaped by “majoritarian interests” and moral panic.²³⁴ Once again invoking the treatment of freed Black people following the Civil War, he highlighted that when majoritarianism “alone dictate[s] who is ‘dangerous,’ disfavored groups become easy prey.”²³⁵ Thomas criticized the government for citing disarmament laws targeting enslaved persons and Native Americans, calling such analogues “cautionary tales,” not precedents.²³⁶

Justice Thomas’s observation exposed *Rahimi*’s missed opportunity. The state’s reliance on laws disarming enslaved Black people is, as one commentator wrote, “particularly galling.”²³⁷ Yet neither the briefing nor the oral argument meaningfully addressed how race continues to shape the tenets of “dangerousness”²³⁸ or how discriminatory practices shaped § 922(g)’s

²³¹ *Rahimi*, 602 U.S. at 713 (Gorsuch, J., concurring) (“Our resolution of Mr. Rahimi’s facial challenge to § 922(g)(8) necessarily leaves open the question whether the statute might be unconstitutional as applied in particular circumstances.”) (citation modified); see also George A. Mocsary, *In Denial about the Obvious: Upending the Rhetoric of the Modern Second Amendment*, 2024 CATO SUP. CT. REV. 201, 213-14 (“The majority’s analysis also strengthened the perhaps-obvious intuition that as-applied challenges can rebut *Heller*’s ‘presumptively lawful’ regulations.”).

²³² *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting).

²³³ *Id.* Justice Barrett’s concurrence in *Rahimi* is best read as narrowing rather than repudiating her position in *Kanter*. She endorses *Bruen*’s principle-based analogical method, emphasizing that historical disarmament targeted those deemed dangerous, not individuals defined by status alone. *Rahimi*, 602 U.S. at 739-40 (Barrett, J., concurring). While rejecting overly particularized historical “twins,” she stops short of endorsing categorical status-based bans and stresses the need for the “right level of generality.” *Id.* at 740. Her concurrence thus preserves, though constrains, the reasoning articulated in *Kanter*.

²³⁴ *Rahimi*, 602 U.S. at 774, 776 (Thomas, J., dissenting).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See Jacob D. Charles, Essay, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 31 (2023).

²³⁸ The oral arguments in *Rahimi* touched on this issue only briefly. Justice Thomas asked why the government had “dropped” laws disarming enslaved people and Native Americans from its list of analogues. Tr. of Oral Arg. at 6-7, *United States v. Rahimi*, 602 U.S. 680 (2024). Solicitor General Elizabeth Prelogar responded that such laws, though “an odious classification,” applied to those “not among the people protected by the Second Amendment,” making them not “directly relevant” to the restrictions on those “indisputably among the people.” *Id.* at 7, 54. Justice Jackson later questioned whether the history-and-tradition framework is flawed

historical foundations.²³⁹ Yet in signaling that such analogues should not be salutary within our legal architecture, Justice Thomas may be laying the foundation for a future line of reasoning: one that, as with many of his dissents, begins as an outlier but later reshapes the Court's center of gravity.

At bottom, the absence of race from *Rahimi* is symptomatic of a deeper pathology within Second Amendment jurisprudence. "History-and-tradition" is caught in a schism where it, at times, signals to the emancipatory vision of the Reconstruction Amendments while still inviting arguments rooted in the exclusions and racial hierarchies of the Founding. The method provides no principled basis for excluding such laws, reflecting a tacit willingness to permit modern regulation to rest on laws that disarmed subordinated communities.²⁴⁰ In such a world, racial critiques force judges to bring to the fore a question they may rather elide: whether this pernicious history comports with the originalist ideal itself.

The Third Circuit's decision in *Range v. Attorney General (Range II)*²⁴¹ is instructive. Though initially decided before *Rahimi* and later vacated by the Court,²⁴² the case returned on remand, wherein the court again held that disarming Bryan Range—convicted nearly thirty years ago for food stamp fraud—violated the Second Amendment.²⁴³ The court rejected the argument that status alone could justify permanent disarmament, finding no historical tradition of barring individuals "like Range" from gun ownership.²⁴⁴

Critically, the opinion expressly declined to analogize Range's disarmament to Founding-era laws targeting Loyalists, Native Americans, and Black Americans, calling such comparisons overly broad and, under modern constitutional norms, indefensible.²⁴⁵ In doing so, *Range II* demonstrates that courts applying *Bruen* need not treat racially exclusionary laws as binding analogues, preserving a distinction between historical tradition and historical subjugation.

insofar as courts consider the history of "only some of the people." *Id.* at 53. Prelogar maintained that such laws speak to a "separate principle" not tied to dangerousness. *Id.* The Court did not pursue this reasoning further, leaving unresolved how courts should treat historical analogues rooted in racial subordination when evaluating modern regulations.

²³⁹ Kami Chavis, *Rahimi Oral Arguments Ignore Racial Implications of Gun Violence*, BLOOMBERG L. (Nov. 21, 2023, at 04:30 ET), <https://news.bloomberglaw.com/us-law-week/rahimi-oral-arguments-ignore-racial-implications-of-gun-violence> [<https://perma.cc/4J5C-DKUA>].

²⁴⁰ Li, *supra* note 114, at 1901.

²⁴¹ 124 F.4th 218 (3d Cir. 2024).

²⁴² See generally *Range v. Att'y Gen. (Range I)*, 69 F.4th 96 (3d Cir. 2023), *cert. granted*, *judgment vacated sub nom.*, *Garland v. Range*, 144 S. Ct. 2706 (2024).

²⁴³ *Range II*, 124 F.4th at 5.

²⁴⁴ *Id.* at 25; see also *Range I*, 69 F.4th at 98.

²⁴⁵ *Range II*, 124 F.4th at 19-20. Compare this with the dissent in *Range II*, arguing that even if Founding-era laws disarming Native Americans, Black people, and Catholics are now constitutionally repugnant, they remain valid analogues under *Bruen* because they were justified by perceived disloyalty to the sovereign. *Id.* at 6-7 (Shwartz, J., dissenting). On this view, disarmament was not about race *per se* but about political trustworthiness, and modern felon bans—especially for offenses like fraud against the government—serve a similar function. *Id.* at 7-8.

At the same time, *Range II* may also appear narrow: a white petitioner, a sympathetic fact pattern, and an as-applied challenge that skirts the broader questions of racial equity. Yet therein lies its relevance. If someone like Range cannot be disarmed without the government offering a concrete historical analogue—and certainly not one seeped in racial animus—then the constitutional bar for upholding felon-in-possession laws may be higher than previously assumed. *Range II* reframes the inquiry: legislatures may no longer rely on broad, status-based prohibitions without historically grounded, context-specific justifications. That shift invites scrutiny of whether modern disarmament laws reinscribe proxies of race and poverty that have long shaped the criminal legal system. Once those premises are made visible, they ought to be harder to justify.

Yet that space can also feel quite illusory. Courts have proven willing to sidestep the logic that *Range* demarcates as constitutionally acceptable. Some have rejected as-applied challenges outright.²⁴⁶ Others have nominally preserved room for individualized assessment but consistently uphold disarmament in practice.²⁴⁷ The result is a doctrinal landscape that increasingly reaffirms status-based exclusions with renewed confidence, wherein the analogies that circuit courts use to uphold felon-in-possession laws are rooted in caste and conquest.

Take *Zherka v. Bondi*, the most recent circuit pronouncement about the constitutionality of § 922(g).²⁴⁸ Selim Zherka challenged his lifetime disarmament based on a nonviolent fraud conviction, arguing that it lacked historical foundation and that there was no individualized assessment of his dangerousness.²⁴⁹ The Second Circuit rejected his challenge by invoking the broadest and most troubling strands of historical analogy: colonial and early American laws that disarmed Native Americans, Black people, mixed-race individuals, religious dissenters, and the poor.²⁵⁰ Acknowledging that such precedents are “offensive to contemporary morals and rooted in . . . racial, religious, or class bigotry,” they were nevertheless deemed valid under *Bruen* and *Rahimi*, thereby justifying the categorical disarmament of all felons.²⁵¹

²⁴⁶ See *Range*, 124 F.4th.

²⁴⁷ See *United States v. Diaz*, 116 F.4th 458, 471 (5th Cir. 2024) (rejecting an as-applied challenge because the defendant’s underlying felony was sufficiently similar to a death-eligible felony at the founding); *United States v. Williams*, 113 F.4th 637, 661-62 (6th Cir. 2024); see generally *United States v. Contreras*, 125 F.4th 725 (5th Cir. 2025). To date, the First Circuit has declined to address constitutional challenges to § 922(g)(1) on the merits while the Seventh Circuit has yet to definitively resolve an as-applied challenge. Compare *United States v. Langston*, 110 F.4th 408, 419-20 (1st Cir. 2024), with *United States v. Gay*, 98 F.4th 843, 846-47 (7th Cir. 2024).

²⁴⁸ 140 F.4th 1 (2d Cir. 2025).

²⁴⁹ *Id.* at 3.

²⁵⁰ *Id.* at 38.

²⁵¹ *Id.* at 39. Other circuits are running parallel, though they express dissatisfaction with navigating a “confus[ing]” and “frustrat[ing]” history-and-tradition test. *United States v. Brown*, 764 F. Supp. 3d 456, 465 (S.D. Miss. 2025); see also *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024) (Pryor, C.J., concurring), cert. granted, judgment vacated sub nom. *Dubois v. United States*, 145 S. Ct. 1041 (2025), and reinstated by 139 F.4th 887 (11th Cir. 2025).

While such developments may be disheartening for those concerned about the carceral impact of felon-in-possession laws on Black communities, the outcome reached is not foreordained by *Bruen* or *Rahimi*. Both opinions leave room for judges to reject racist precedents as constitutionally binding. At least four considerations undermine the necessity of upholding § 922(g) through group-based disarmament laws.

1. *Bruen requires judgment, not mechanical advocacy.*

The “history-and-tradition” test is not self-executing. Courts must exercise judgment in deciding what qualifies as “relevantly similar.”²⁵² That process is value-laden. As Siegel observed shortly after *Heller*, Justice Scalia’s confident endorsement of felon-disarmament laws reflected a normative vision more than rigorous historical method.²⁵³ Judge Carlton Reeves, rejecting a felon-in-possession challenge for a “violent” offense, noted that “[a]ll we have are appellate judges’ interpretations of the historical record. And (some of) those interpretations are credibly accused by actual historians as being a cherry-picked ideological fantasy.”²⁵⁴ Courts already disregard postbellum or misogynistic laws, recognizing that not all traditions deserve constitutional elevation.²⁵⁵ Group-based racial disarmament laws should be treated no differently.

2. *Reconstruction transformed the Second Amendment.*

Because § 922(g) is a federal statute, its constitutional footing rests not only in 1791 but also in 1868—the moment of the Second Amendment’s incorporation through the Fourteenth. Admittedly, incorporation doctrine does not formally change the substance of incorporated rights; it renders them applicable to states with the same content they had against the federal government. Yet *Bolling v. Sharpe*²⁵⁶ recognized that reading the

Frustration aside, judges feel bound to an archive with no opt-out for twenty-first century conscience; history must be taken holistically to minimize judicial discretion. The Sixth and Ninth Circuits reaffirmed Congress’s authority to disarm felons because “legislatures were permitted to categorically disarm those they deemed dangerous,” such as enslaved people. *United States v. Duarte*, 137 F.4th 743, 760 (9th Cir. 2025), *cert. denied*, 223 L. Ed. 2d 556 (Jan. 20, 2026); *Williams*, 113 F.4th at 657. That these courts have reached such conclusions reflects the constraining force of the Court’s interpretive demands, even where those demands sit in tension with the egalitarian ideals many hope the Second Amendment might serve.

²⁵² *Bruen*, 597 U.S. at 20; *see also* *United States v. Hemani*, 608 U.S. ___, 5 (2026).

²⁵³ Siegel, *supra* note 133, at 242-43; *see also* Pamela S. Karlan, *Founding Firearms: Originalism and the Second Amendment*, BOS. REV. (May 22, 2013), <https://www.bostonreview.net/articles/pamela-karlan-founding-firearms/> [https://perma.cc/A2QM-Q68D].

²⁵⁴ *United States v. Bullock*, 679 F. Supp. 3d 501, 508 (S.D. Miss. 2023), *rev’d and remanded*, 123 F.4th 183 (5th Cir. 2024).

²⁵⁵ *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (rejecting a statutory scheme favoring men in military benefits even though the United States had a long history of sex discrimination).

²⁵⁶ 347 U.S. 497 (1954).

Fifth Amendment's Due Process Clause in isolation from the Fourteenth's egalitarian commitments would produce incoherent results. A similar logic applies here. If the Second Amendment's meaning is fixed in 1791—when the polity systematically excluded Black and Indigenous people from “the people” entitled to bear arms—then incorporation merely extends that exclusionary vision to constrain state action.²⁵⁷ But that reading contradicts incorporation's purpose: to ensure federal and state power are constrained by Reconstruction's egalitarian transformation, not the Founding's demarcations. Relying solely on the practices of the first Founding is to ignore that transformation, and accepting such practices sits uneasily with the Second Amendment's post-1868 association with equal citizenship.²⁵⁸

3. *Constitutional consistency requires rejecting invidious analogues.*

Multiple federal circuit courts concede that restrictions based on classifications like race and religion would “be unconstitutional under the First and Fourteenth Amendment today.”²⁵⁹ Yet the courts did not explain why the Second Amendment should be insulated from those same constitutional constraints. If Reconstruction repudiated racial exclusions in voting and speech, then that repudiation should also extend to the right to keep and bear arms. And if the Second Amendment analogues are truly “abhorrent,”²⁶⁰ then courts should adopt a limiting principle: laws that would be unquestionably unconstitutional today should not supply the historical foundation for modern disarmament.²⁶¹ As Justice Sotomayor eloquently put it in her concurrence in *Rahimi*, “history predating the inclusion of . . . people of color as

²⁵⁷ Some litigators argue that 1791 remains the proper controlling date without thereby entrenching the Founder's exclusionary demarcations. On this view, the Second Amendment's reference to “the people” should be understood as encompassing today's full political community, just as *Heller* read “arms” to extend to modern weapons rather than only those in existence at the Founding. Under that reading, Black Americans as full members of the contemporary polity enjoy the same Second Amendment rights as white men did at the Founding, even with 1791 as the anchor date. This Note does not dispute that conclusion; rather, it argues that the 1868 incorporation moment provides an independent and underutilized textual basis for resisting originalist readings that would smuggle the Founding's racial exclusions into modern doctrine.

²⁵⁸ This interpretive approach draws heavily on Professor Akhil Reed Amar. See AMAR, *supra* note 83, at 243 (arguing that courts have overlooked Reconstruction as a doctrinal re-founding, treating it as mere “incorporation” rather than a substantive transformation). The Second Amendment itself underwent a profound reorientation: at the Founding it was a paradigmatic *political* right tied to militia service; by Reconstruction, it had become a core *civil* right focused on individual security for freedmen and their families. *Id.* at 259-66. While the Roberts Court has not fully embraced this methodology, its inconsistent use of both Founding-era and Reconstruction-era history in *Heller*, *McDonald*, and *Bruen* suggests doctrinal instability that this approach could resolve.

²⁵⁹ See, e.g., *Williams*, 113 F.4th at 654 n.10.

²⁶⁰ *Duarte*, 137 F.4th at 760.

²⁶¹ *Bruen*, 597 U.S. at 34 (“[N]ot all history is created equal.”); see also *Baird v. Bonta*, 163 F.4th 723, 738 (9th Cir. 2026) (noting that “racist or explicitly xenophobic” analogues in the Second Amendment context are “‘part of the history that the Constitution left behind’ . . . and are thus not appropriate analogues in the *Bruen* inquiry”) (quoting *Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring)) (citation modified).

full members of the polity[] impoverishes constitutional interpretation.”²⁶² Or as Justice Gorsuch stated more colorfully at oral arguments in *Wolford v. Lopez*,²⁶³ the Court’s most recent Second Amendment case, racially discriminatory Black Codes should repel, not attract constitutional reliance—that while such laws ought to function “like garlic in front of a vampire,” advocates who would otherwise find them to be anathema “embrace them.”²⁶⁴ The implication is that discriminatory outliers cannot supply the “mainstream” tradition that *Bruen* demands.²⁶⁵

4. *Some historical laws lack meaningful similarity.*

Even if courts allow group-based disarmament without individualized findings,²⁶⁶ the connection between § 922(g) and the chosen analogues remains awkward. The rationale behind disarming enslaved people and Native Americans was social control through racial exclusion, which differs too sharply from modern claims of public safety or civic irresponsibility. “Mistrust” alone is too broad and abstract to satisfy that standard. If the principle underlying disarmament was historical racial subordination, on the notion that both are “outside the political community,” then analogizing to modern felon disarmament requires demonstrating that felons are permanently excluded from citizenship. But that conclusion contradicts the possibility of rehabilitation and sits in tension with other restored rights, from voting to jury service, that many states extend to individuals with past convictions.²⁶⁷

* * *

As a concluding note, it would be remiss not to confront what the Second Circuit openly admitted in *Zherka*: “We acknowledge and are

²⁶² *Rahimi*, 602 U.S. at 706 (Sotomayor, J., concurring).

²⁶³ Transcript of Oral Argument, No. 24-1046 (argued Jan 20, 2026).

²⁶⁴ *Id.* at 98; *see also* *Wolford v. Lopez*, 609 U.S. ___, slip op. at 23-24 (2026) (affirming that an attempt to root a historical analogue from the Black Codes as “remarkable” and contrary to the expectations of the drafters of the Fourteenth Amendment).

²⁶⁵ Transcript of Oral Argument at 98, No. 24-1046 (argued Jan 20, 2026); *see also* Pete Patterson, *The Black Codes must not define America’s fundamental freedoms*, SCOTUSBLOG (Feb. 4, 2026, 10:00 AM), <https://www.scotusblog.com/2026/02/the-black-codes-must-not-define-americas-fundamental-freedoms/> (“if a provision of the Black Codes truly were consistent with the nation’s history of firearms regulation, then a state . . . would have no reason to rely on it. Instead, it could point to that broader historical practice to support its law.”).

²⁶⁶ *United States v. Jackson*, 110 F.4th 1120, 1128 (8th Cir. 2024).

²⁶⁷ Further, as the *Williams* court noted, “[f]elons, after all, don’t lose other rights guaranteed in the Bill of Rights even though an offender who committed the same act in 1790 would have faced capital punishment. No one suggests that such an individual has no right to a jury trial” 113 F.4th at 658. If the greater penalty (death) does not strip felons of other constitutional protections, it is unclear why firearms rights should be uniquely subject to permanent forfeiture based on historical practices. *See also* *Duarte*, 137 F.4th at 52-61 (Collins, J., concurring).

sympathetic to the fact that felon-in-possession laws have contributed to the mass incarceration crisis and its associated racial inequalities.”²⁶⁸ The court even expressed that restoring individual relief might “be sound policy,” but ultimately, “that judgment is for Congress. The test that *Bruen* requires us to apply uses history as its guide”²⁶⁹ It is difficult to imagine a clearer articulation of the problem: a constitutional method that concedes its racist origins and modern inequalities and nonetheless deems them legally irrelevant.

At this point, one may ask what relevance this Note can claim. After all, if courts acknowledge racial harm yet uphold firearm restrictions, what purpose is served by reiterating the critique? That framing, however, overstates the foreclosure. The Supreme Court has not definitively resolved whether categorical, status-based disarmament laws can survive without individualized findings of dangerousness, and its recent decisions leave that question contested, not closed.²⁷⁰ Even so, the persistence of racial critique remains essential. Courts do not simply apply doctrine; they shape it over time. As Professor Re has argued, even within a constraining framework, judges can “narrow from below” and interpret precedent in ways that gradually reorient constitutional meaning.²⁷¹ Thus, racial critiques retain doctrinal force—shaping trial-level reasoning, concurrences, dissents, and the historical record itself—by preventing the law’s reliance on exclusionary history from hardening into rote acceptance.

CONCLUSION

For many commentators, courts will not be the vanguards for racial justice. As two prominent voices have expressed, idealizing the judiciary as the most important actor to deliver justice is “foolish and irresponsible.”²⁷² Yet even skeptics must acknowledge the judiciary’s utility in moments of doctrinal flux. When the law becomes unsettled—as *Bruen* has made it—constitutional interpretation becomes a terrain of struggle where marginalized narratives can gain purchase. This Note has argued that the Second

²⁶⁸ *Zherka*, 140 F.4th at 56.

²⁶⁹ *Id.*

²⁷⁰ See *Bruen*, 597 U.S. at 82 (Barrett, J., concurring) (expressing it is unclear whether the locus of analysis is rooted in when the Bill of Rights was ratified in 1791 or when the Fourteenth Amendment was ratified in 1868, and affirming that the majority opinion does not resolve the debate); see also Amanda L. Tyler, *Levels of Generality, the Limits of Originalism, and the Supreme Court’s Second Amendment Jurisprudence*, 78 SMU L. REV. 265, 285 (2025) (“*Rahimi* lays bare that the Justices are far from one mind on the appropriate specific approach to constitutional interpretation.”).

²⁷¹ Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

²⁷² Ryan D. Doerfler & Samuel Moyn, Opinion, *Don’t Count on the Courts to Save Democracy*, WASH. POST (Mar. 20, 2025), <https://www.washingtonpost.com/opinions/2025/03/20/supremecourt-trump-democracy-crisis/> [https://perma.cc/FF3M-UYGL].

Amendment, properly contested, can unsettle legal categories equating Blackness with criminality and dangerousness. It does so by showing that *Bruen*'s historical-analogue test cannot be satisfied by racialized disarmament regimes, and by reframing modern status-based prohibitions as resting on the very caste logics Reconstruction repudiated. More ambitiously, it argued that Reconstruction's egalitarian spirit lies dormant within the Second Amendment, ready to be excavated as a modality for courts to become accustomed to and, eventually, conditioned by.

To be clear, this is not a triumphalist account. The same doctrinal cracks that invite strategic litigation also reveal how rights are rationed—expanded for some, withheld for others. Yet within these contradictions lies opportunity. As the history-and-tradition test evolves, advocates can leverage its instabilities to challenge disarmament regimes that obscure racial effects under the guise of public safety. The Second Amendment, like all constitutional provisions, is what the nation's people make of it. The legal system remains a site of contestation, where new modes of protection might yet be realized. And in this light, any legal aspirations for justice worth their salt must begin by asking what the law could be if shaped by those who have suffered most under it.²⁷³

²⁷³ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).