RACIST HISTORY AND THE SECOND AMENDMENT: A CRITICAL COMMENTARY

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To say that the moral stain of racism pervades American history would be an understatement. One does not have to look hard to find examples where people of color were treated disparagingly or disparately.[1] Thus, it should come as no surprise that throughout much of American history there are examples where race played a role in lawmakers deciding who may and may not acquire, own, and use firearms for lawful purposes, or where race was the principal factor in

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1 *See, e.g.*, KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010); MANNING MARABLE, RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945–1982 (1984); JAMES OLIVER HORTON & LOIS E. HORTON, IN HOPE OF LIBERTY: CULTURE, COMMUNITY AND PROTEST AMONG NORTHERN FREE BLACKS, 1700–1860 (1997); SYLVIA R. FREY, WATER FROM THE ROCK: BLACK RESISTANCE IN A REVOLUTIONARY AGE (1991).

orchestrating state- and nonstate-sponsored armed violence against people of color.[2] The painful and often tragic historical intersection between race and firearms is indeed a complex and multifaceted narrative worthy of examination and reflection,[3] including in the area of history-in-law[4]—that is, the study of how the law has evolved in a particular area; what events and factors caused the law to evolve; and how, if at all, this history is important when adjudicating legal questions.[5]

Yet in the ongoing discourse over the purpose, meaning, and protective scope of the Second Amendment, the historical narrative of race and firearms is becoming increasingly misappropriated and hyperbolized. There are indeed numerous examples, but two are particularly concerning and exist at the extreme opposites of the Second Amendment political spectrum. The first—often stated by gun rights proponents—is history shows that gun control is inherently racist.[6] The second—sometimes stated by gun control proponents—is that the Second Amendment itself is inherently racist,[7] with some going so far to claim the right to "keep and bear arms" is historically on par with the

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2 *See, e.g.*, KELLIE CARTER JACKSON, FORCE AND FREEDOM: BLACK ABOLITIONISTS AND THE POLITICS OF VIOLENCE (2019); CHARLES E. COBB, JR., THIS NONVIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE (2014); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (2014); TIM MADIGAN, THE BURNING: THE TULSA RACE MASSACRE OF 1921 (2003).

3 *See, e.g.*, NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS (2014); AKINYELE OMOWALE UMOJA, WE WILL SHOOT BACK: ARMED RESISTANCE IN THE MISSISSIPPI FREEDOM MOVEMENT (2013); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

4 *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

5 *See generally* Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEV. ST. L. REV. 23 (2014).

6 *See, e.g.*, Bess Levin, *Republicans' Latest Anti-Gun-Control Excuse: It Hurts Minorities*, VANITY FAIR (Mar. 24, 2021), https://www.vanityfair.com/news/2021/03/republicans-gun-control-racism [https://perma.cc/UN3R-39DH]; David Kopel & Joseph Greenlee, *The Racist Origin of Gun Control Laws*, HILL (Aug. 22, 2017, 11:00 AM), https://thehill.com/blogs/pundits-blog/civil-rights/347324-the-racist-origin-of-gun-control-laws [https://perma.cc/5896-SXLS]; Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R.L.J. 67 (1991).

7 *See, e.g.*, Renée Graham, *The Second Amendment's Anti-Blackness*, BOS. GLOBE (May 30, 2021, 3:00 AM), https://www.bostonglobe.com/2021/05/30/opinion/second-amendments-anti-blackness [https://perma.cc/ZP92-K6HH]; Jonathan P. Baird, *My Turn: The Racist Roots of the Second Amendment*, CONCORD MONITOR (Apr. 21, 2019, 12:20 AM), https://www.concordmonitor.com/A-different-perspective-on-the-Second-Amendment-24863978 (last visited Mar. 15, 2022); Patrick Blanchfield, *The Brutal Origins of Gun Rights*, NEW REPUBLIC (Dec. 11, 2017), https://newrepublic.com/article/146190/brutal-origins-gun-rights [https://perma.cc/JJX7-X6MW]; Stephanie Mencimer, *Whitewashing the Second Amendment*, MOTHER JONES (Mar. 20, 2008), https://www.motherjones.com/politics/2008/03/whitewashing-second-amendment (last visited Mar. 15, 2022).

Constitution's morally indefensible three-fifths clause—the clause that stipulated slaves would account for three-fifths of a person for the purpose of congressional apportionment.[8]

This Article seeks to examine and unpack these extreme historical opposites and explain why their "racist" claims ultimately do more societal harm than good. This Article is broken into three Parts. Part I critically examines how and why the "gun control is racist" narrative came to be. Part II then critically examines how (and the elusive why) the "Second Amendment is racist" narrative came to be. Lastly, Part III outlines why accepting either of these "racist" narratives does more harm than good, particularly in the confines of history-in-law.

I. A CRITICAL EXAMINATION OF HOW AND WHY THE "GUN CONTROL IS RACIST" NARRATIVE CAME TO BE

When exactly the first law or laws racially restricting firearms access, ownership, and use appeared within the American colonies is up for debate.[9] What is for certain is that by the mid-eighteenth century laws restricting the access, ownership, and use of firearms by people of color, both free and enslaved, were commonplace.[10] Even after the ratification of the Constitution (1789) and the Bill of Rights (1791), these laws remained prevalent throughout the United States,

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8 *Historian Uncovers the Racist Roots of the 2nd Amendment*, NPR (June 2, 2021, 11:40 AM), https://www.npr.org/transcripts/1002107670 [https://perma.cc/4THC-TRBK] ("I see the Second Amendment in the same way that I see the three-fifths clause—indefensible.").

9 *See, e.g.*, LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA 50 (1975) (stating that 1640 was when "the first recorded restrictive [firearms] legislation passed concerning blacks in Virginia"); Act of Jan. 6, 1639, Laws of Va., *reprinted in* 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 224, 226 (William Waller Hening ed., William Brown 1823) (§ 10) (1639 Virginia law excepting "negroes" from being "provided with arms and am[m]unition").

10 *See, e.g.*, Ch. 112, N.J. Acts (restraining tavern-keepers and others from selling strong liquors to servants, negroes, and mulatto slaves and preventing negroes and mulatto slaves from meeting in large companies, from running about at nights, and from hunting or carrying a gun on the Lord's day), *reprinted in* THE ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY 443, 444 (Samuel Nevill ed., William Bradford 1752) (§ 4) ("That if any Negro or Mulatto Slave or Slaves . . . shall be seen to hunt, or carrying a Gun on the Lord's Day; the Constable or Constables . . . shall . . . carry such Negro and Mulatto Slaves before the next Justice of the Peace, who shall order such Negro or Mulatto Slave or Slaves, if found Guilty, to be whipped . . . ."); Act of Apr. 4, 1741, ch. 24, Acts of N.C. (concerning slaves and servants), *reprinted in* A COLLECTION OF ALL THE PUBLIC ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA: NOW IN FORCE AND USE 161, 170 (James Davis 1751) (§ 40) ("That no Slave shall go armed with Gun, Sword, Club, or other Weapon, or shall keep any such Weapon, or shall hunt or range with a Gun in the Woods, upon any Pretence whatsoever, (except such Slave or Slaves who shall have a Certificate, as is herein after provided) . . . ."); *see also* Cottrol & Diamond, *supra* note 3, at 325–27.

particularly in the slaveholding South.[11] In 1792 Virginia, for instance, the law prescribed that with the exception of any "free negro or mulatto[] being a housekeeper," "[n]o negro or mulatto whatsoever shall keep or carry any gun, powder, shot, club, or other weapon whatsoever, offensive or defensive."[12] Come 1806, the law was amended by removing the allowance for "free negro or mulatto" housekeepers, and prescribed that every "free negro or mulatto" wanting to "keep or carry any fire-lock of any kind, any military weapon, or any powder or lead" first needed to obtain "a license from the court of the county or corporation in which he resides."[13]

Given that throughout the Early Republic, people of color, free and enslaved, were often prohibited from accessing, owning, and using firearms, it should come as no surprise that they were also often excluded from service in the militia.[14] Indeed, by the close of the

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[11] *See, e.g.*, Ch. 17, Miss. Laws (respecting Slaves), *reprinted in* 1 THE STATUTES OF THE MISSISSIPPI TERRITORY 378, 379 (Harry Toulmin ed., Samuel Terrell 1807) (§ 4) ("That no slave shall keep or carry any gun, powder, shot, club, or other weapon whatsoever, offensive, or defensive, except the tools given him to work with, or that he is ordered by his master, mistress, or overseer, to carry the said articles from one place to another . . . ."); Act of Nov. 21, 1828, 1828 Fla. Laws (relating to crimes and misdemeanors committed by slaves, free negros, and mulattoes), *reprinted in* COMPILATION OF THE PUBLIC ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA, PASSED PRIOR TO 1840, at 216, 225 (John P. Duval ed., Samuel S. Sibley 1839) (§ 47) ("That if a slave shall use, carry, or keep any fire-arms, ammunition, or any weapon, except by special license from his master, owner, or overseer, for the purpose of killing game, birds, or beasts of prey, or for any other necessary and lawful purpose, and such license shall be received weekly . . . ."); Act of Oct. 1, 1804, 1804 La. Acts (respecting Slaves), *reprinted in* THE LAWS OF THE TERRITORY OF LOUISIANA 13, 13–14 (Joseph Charles 1808) (§ 4) ("That no slave or mulatto whatsoever, shall keep or carry any gun, powder, shot, club, or other weapon whatsoever, offensive or defensive; but all and every gun, weapon and ammunition found in the possession or custody of any negro or mulatto, may be seized by any person . . . ."); Ch. 43, Del. Laws (providing for the trial of negroes), *reprinted in* 1 LAWS OF THE STATE OF DELAWARE 102, 104 (Samuel & John Adams 1797) (§ 6) ("That if any Negro or Mulatto slave shall presume to carry any guns, swords, pistols, fowling-pieces, clubs, or other arms and weapons whatsoever, without his master's special licence for the same, and be convicted thereof before a Magistrate, he shall be whipt with twenty-one lashes, upon his bare back.").

[12] Act of Dec. 17, 1792, ch. 41, 1792 Va. Acts (reducing into one, the several acts concerning slaves, free negroes, and mulattoes), *reprinted in* 1 THE STATUTES AT LARGE OF VIRGINIA 122, 123 (Samuel Shepherd 1835) (§§ 8–9). In Virginia, laws restricting people of color, free and enslaved, from accessing, owning, and using firearms date back as early as 1680. *See* JOHN HENDERSON RUSSELL, THE FREE NEGRO IN VIRGINIA 1619–1865, at 95–96 (1913).

[13] Act of Feb. 4, 1806, ch. 94, 1805 Va. Acts (concerning free negroes and mulattoes), *reprinted in* 3 THE STATUTES AT LARGE OF VIRGINIA, at 274, 274–75 (Samuel Shepherd 1836) (§ 1).

[14] *See, e.g.*, Act of May 8, 1746, ch. 200, 1746 N.J. Acts (providing for better settling and regulating the militia of this colony of New-Jersey, for the repelling invasions, and suppressing insurrections and rebellions), *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY 139, 139–40 (Samuel Allinson ed., Isaac Collins 1776) (§ 1) (excepting "bought white Servants and Slaves" from New Jersey's militia enrollment); The Militia Act, ch. 1.,

Revolutionary War, people of color serving as militiamen, soldiers, sailors, and marines, free and slave, composed roughly one-fifth of the American military forces.[15] However, when it came time for Congress to decide which classes of persons were suitable for constituting the national militia,[16] it was made clear that only "free able-bodied white male citizen[s]" could enroll.[17] Although there is nothing in the historical record that expressly informs why Congress stipulated that only the "free able-bodied white" men were eligible for enrollment in the national militia, it was most likely at the request of Southern

reprinted in THE MILITIA ACT; TOGETHER WITH THE RULES AND REGULATIONS FOR THE MILITIA 2, 3 (J. Gill 1776) (§ 1) (excepting "Negroes, Indians and Mulattoes" from Massachusetts's militia enrollment); Act of Apr. 21, 1775, ch. 2, 1775 Va. Acts (providing for the better regulating and training the militia), *reprinted in* 6 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 530, 533 (William Waller Hening ed., Franklin Press 1819) (§ 7) ("[F]ree mulattoes, negroes, and Indians . . . shall appear [to militia drills] without arms, and may be employed as drummers, trumpeters or pioneers, or in such other servile labor as they shall be directed to perform."); Act of Mar. 25, 1756, ch. 3, 1756 Va. Acts (providing for the better regulating and disciplining the militia), *reprinted in* 2 MILITARY OBLIGATION: THE AMERICAN TRADITION (PART 14) 205, 207 (Selective Service System, 1947) (§ 7) (stipulating that "free mulattoes, negroes, and Indians" are prohibited from enrolling in the Virginia militia); Act of Apr. 26, 1715, 1715 Md. Acts (providing for ordering and regulating the militia of this province, for the better defense and security thereof), *reprinted in* THE MARYLAND GAZETTE (Annapolis, Md.), Apr. 27, 1758, at 1 (stipulating that "all Negroes and Slaves whatsoever, shall be exempted the Duty of Training, or other Military Service"); Act of Nov. 27, 1702, ch. 114, 1702 N.Y. Acts (providing for the better settling the militia of this province and making it more useful for the security and defense thereof and for the repealing of all former acts heretofore made in this province relating to the same), *reprinted in* 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 500, 506 (James B. Lyon 1894) (stipulating that nothing in the law "shall be Construed or taken to allow or give Liberty unto any Negro, or to any Indian Slave or Servant to be Listed or to do any Duty in the Militia of this Province"); 3 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 397 (Nathaniel B. Shurtleff ed., William White 1854) (quoting a 1656 order that "no negroes or Indians . . . shall be armed or permitted to [train]" in the militia). *But see* 2 MILITARY OBLIGATION: THE AMERICAN TRADITION (PART 1) 82 (Selective Service System, 1947) (noting that in 1652 Massachusetts law required "all Scotchmen, Negroes, and Indians, inhabiting with or servants to the English, [to] attend [militia] trainings").

15 *See, e.g.*, GARY B. NASH, THE FORGOTTEN FIFTH: AFRICAN AMERICANS IN THE AGE OF REVOLUTION (2006); BENJAMIN QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION (1961); PHILIP S. FONER, BLACKS IN THE AMERICAN REVOLUTION (1976); HERBERT APTHEKER, THE NEGRO IN THE AMERICAN REVOLUTION (1940).

16 For the legislative history of the 1792 National Militia Act, see Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J.L. & PUB. POL'Y 323 (2011); PATRICK J. CHARLES, THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT 72–77 (2009) [hereinafter CHARLES, INTENT AND INTERPRETATION].

17 Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271 (1792) (mandating to more effectively provide for the national defense by establishing a uniform militia throughout the United States).

delegates—delegates who, since the 1739 Stono Rebellion,[18] had grown fearful of arming and militarily training people of color.[19]

Not even the threat of losing the Revolutionary War to the British was enough to calm the slave revolt fears of South Carolina and Georgia. For throughout the Revolutionary War, despite the repeated requests from the likes of Henry Laurens, James Madison, Benjamin Lincoln, and Nathaniel Greene, each of whom urged the Southern states to accept the arming and training of slaves to fight the British, the idea was always rejected by South Carolina and Georgia.[20] This is not to say that over the course of the Revolutionary War every Southern slaveholding state was opposed to arming and training its slave population. The State of Maryland, for one, accepted slave militia enrollments and military enlistments, but only so long as the slave had first obtained their master's consent.[21] There is also the State of Virginia, which late in the war agreed to allow free people of color to stand in as militia substitutes for whites.[22] It did not take long, however, before slave owners who were called to militia service began forcibly sending their slaves in their stead. After the war, many of these slave owners tried to reclaim their property.[23] The Virginia Assembly responded much like that of other state assemblies—by declaring that every slave to have served in the war was fully emancipated.[24]

The noble military service provided by people of color, free and slave, during the Revolutionary War cannot be overstated. Without their contribution, it is highly unlikely the United States would even exist. It is also worth noting that while the average tour of service for

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18 Like other American colonies, prior to the 1739 Stono Rebellion, South Carolina at times permitted people of color, free and slave, to enroll in the militia during times of alarm. *See* LAURA E. WILKES, MISSING PAGES IN AMERICAN HISTORY: REVEALING THE SERVICES OF NEGROES IN THE EARLY WARS IN THE UNITED STATES OF AMERICA 1641–1815, at 11–15 (1919). And any slave that "in actual invasion, kill or take one or more of our enemies, and the same shall prove, by any white person, to be done by him . . . shall . . . at the charge of the public, have and enjoy his freedom." *Id.* at 13.

19 JAMES OLIVER HORTON & LOIS E. HORTON, SLAVERY AND THE MAKING OF AMERICA 37–38 (2004).

20 PATRICK CHARLES, WASHINGTON'S DECISION: THE STORY OF GEORGE WASHINGTON'S DECISION TO REACCEPT BLACK ENLISTMENTS IN THE CONTINENTAL ARMY, DECEMBER 31, 1775, at 131–34 (2005).

21 WILKES, *supra* note 18, at 44.

22 CHARLES, *supra* note 20, at 130.

23 *Id.* at 131.

24 WILKES, *supra* note 18, at 47–49; Act of Oct. 1783, ch. 3, 1783 Va. Acts (providing for directing the emancipation of certain slaves who have served as soldiers in this state, and for the emancipation of the slave Aberdeen), *reprinted in* 11 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 308, 308–09 (William Waller Hening ed., George Cochran 1823).

white militiamen, soldiers, sailors, and marines was three to six months, the average tour of service for people of color was three to five years.[25] Needless to say, people of color provided more than their fair share of military service during the Revolutionary War. Lastly, one must not forget that while white American colonists were fighting to free themselves from the yoke of British political slavery, many people of color were fighting to free themselves from the physical shackles of actual slavery.[26]

Yet despite the valiant military service provided by people of color during the Revolutionary War, as well as the valiant service they provided during subsequent wars and conflicts through the mid-nineteenth century,[27] in times of peace and prosperity the general rule was that people of color need not enroll in their respective state militias.[28] This was particularly true in the South,[29] where since the early

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25 CHARLES, *supra* note 20, at 151.

26 *Id.*

27 For those interested in learning more about the military service provided by people of color up through the Civil War, the National Archives provides a useful starting point. *See The Negro in the Military Service of the United States, 1639–1886*, M858, 5 rolls. The Library of Congress houses a separate, but related collection. *See William A. Gladstone Afro-American Military Collection*, LIBR. OF CONG., https://loc.gov/collections/1349ladstone-african-american-military-collection/about-this-collection [https://perma.cc/WY25-GVFZ].

28 *See* Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271 (1792); HORTON & HORTON, *supra* note 19. After Congress enacted the 1792 National Militia Act, several states made sure that their militia laws contained the "white" enrollment provision. *See, e.g.*, Act of Feb. 1, 1799, ch. 42, 1799 Del. Laws (establishing a uniform militia throughout this state), *reprinted in* 3 LAWS OF THE STATE OF DELAWARE 82, 82 (M. Bradford & R. Porter 1816) (§ 2) ("That each and every free able-bodied white male citizen of this State . . . shall severally and respectively be enrolled in the militia . . . ."); Act of Apr. 11, 1793, ch. 1696, 1793 Pa. Laws (regulating of militia of the Commonwealth of Pennsylvania), *reprinted in* 14 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 454, 455 (James T. Mitchell & Henry Flanders eds., Harrisburg Publishing Co. 1909) (§ 1) ("That each and every free, able bodied, white, male citizen of this or any other of the United States, residing in this commonwealth . . . shall severally and respectively be enrolled in the militia . . . ."); Act of June 13, 1794 (regulating and governing the militia of the State of Vermont, and for repealing all the laws heretofore passed for that purpose), *reprinted in* THE VERMONT GAZETTE, June 13, 1794, at 1 ("That each and every free, able-bodied white male citizen, of this or any other of the United States . . . shall be enrolled in the militia . . . .") (§ 2); *see also* Ch. 70, 1854 N.C. Acts, *reprinted in* REVISED CODE OF NORTH CAROLINA 396, 399 (Bartholomew F. Moore & Asa Biggs eds., Little, Brown & Co. 1855) (§ 5) ("No captain or other militia officer shall enroll any free persons of color, except for musicians.").

29 *See, e.g.*, Act of Mar. 8, 1834, ch. 22, 1834 Va. Acts (providing for the better organization of the militia), *reprinted in* ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA 28, 35 (Thomas Ritchie 1834) (§ 32) ("The commandants of companies shall enrol[l] every able bodied white male citizen . . . ."); Act of Nov. 1807, ch. 128, 1807 Md. Laws (regulating and disciplining the militia of this state), *reprinted in* 3 THE LAWS OF MARYLAND 339, 339 (Philip H. Nicklin & Co. 1811) (§ 1) ("That all able bodied white male citizens between eighteen and forty-five years of age, residents in this state . . . shall be subject to do militia duty . . . ."); Act of

to mid-eighteenth century the militia rolls were frequently relied upon for assembling slave patrols.[30] Slave patrols were essentially racially oppressive versions of the common law hue and cry and *posse comitatus*.[31] And one of the principal duties of slave patrols was to search for illegal firearms and weapons in the homes of "free negroes and mulattoes, and of slaves" by "force" if necessary.[32] It was a duty included within several slave-patroller oaths.[33] But it was not only the enrolled militia who were liable to be called upon for slave patrol duty. Depending upon the state and local jurisdiction, many persons not required by law to enroll in the militia, male and female, could be compelled to serve in slave patrols.[34] In South Carolina for instance, with few exceptions, "white" residents, women included, were required to serve as slave patrol proxies and "provide . . . and keep always in readiness and carry . . . one good gun or pistol in order, a cutlass, and a

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Dec. 10, 1803, 1803 Ga. Laws (revising, amending and consolidating the several militia laws of this state, and adapting the same to the acts of Congress of the United States), *reprinted in* A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA 161, 164 (Augustin Smith Clayton ed., Adams & Duyckinck 1812) (§ 10) ("[T]he commanding officers of companies, shall enrol[l] every able bodied white male citizen . . . .").

30 *See, e.g.*, Act of Jan. 9, 1821, ch. 19, 1821 La. Acts (providing for patrols), *reprinted in* DIGEST OF THE LAWS AND ORDINANCES OF THE PARISH OF EAST FELICIANA, ADOPTED BY THE POLICE JURY OF THE PARISH 76, 76–78 (John C. White ed., 1848) (§ 3); St. Augustine, Fl., Ordinance Relating to Patrols for the City of St. Augustine (June 23, 1836), *reprinted in* 3 ORDINANCES OF THE CITY OF ST. AUGUSTINE 18, 18–20 (1941) (§§ 2–4); Act of Feb. 17, 1833, ch. 671, 1833 Fla. Laws (concerning patrols), *reprinted in* COMPILATION OF THE PUBLIC ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA, PASSED PRIOR TO 1840, at 62–65 (John P. Duval ed., Samuel S. Sibley 1839) (§§ 1–2); Act of Dec. 8, 1806, 1806 Ga. Laws (altering and amending an act for the establishing and regulating patrols), *reprinted in* A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA 333, 333–34 (Augustin Smith Clayton ed., Adams & Duyckinck 1812) (§ 1); Act of Nov. 1766, ch. 7, 1766 Va. Acts (amending the act for the better regulating and training the militia, as relates to the appointment of patrollers, their duty and reward), *reprinted in* 8 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 195, 195–97 (William Waller Hening ed., J. & G. Cochran 1821) (§ 1); Act of Nov. 1738, ch. 2, 1738 Va. Acts (proving for the better regulation of the militia), *reprinted in* 5 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 16, 19 (William Waller Hening ed., Franklin Press 1819) (§§ 2, 8).

31 SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 25–26 (2001).

32 Act of Apr. 9, 1839, ch. 31, 1839 Va. Acts (concerning patrols), *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA 24 (Samuel Shepherd 1839) (§ 1).

33 *See, e.g.*, CALVIN H. WILEY, A NEW AND PRACTICAL FORM BOOK 173 (1852); Act of Mar. 27, 1753, ch. 6, 1753 N.C. Acts, *reprinted in* A COMPLETE REVISAL OF ALL THE ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA, NOW IN FORCE AND USE 152, 153 (James Davis 1773) (§ 4).

34 HADDEN, *supra* note 31, at 2, 24–25, 33–34, 40–42, 72–79.

cartridge box with at least six cartridges in it."[35] Additionally, at times of worship, the time that many Southern whites most feared the prospects of a slave revolt, the law often required parishioners to bring their firearms to church.[36] In Virginia, every enrolled member of the militia was legally required to "go armed to their respective parish churches" to quell potential slave revolts.[37] South Carolina law was a bit more discretionary. It empowered every churchwarden, deacon, and elder within "each respective parish" to command "any person liable to bear arms" under the militia laws to bring their "gun or pair of horse pistols and ammunition" to church service as a precaution to thwart slave revolts.[38] Meanwhile, Georgia's "bring guns to church" law was the most sweeping. It required *every* able-bodied white male to comply and go armed to church to protect against the "fatal consequences" of "domestic insurrections."[39]

Throughout the Antebellum South, laws targeting and restricting people of color's access, ownership, and use of firearms, whether it be in a private or militia capacity, were the norm.[40] Even after the Civil

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35 Act of June 17, 1746, 1746 S.C. Acts (providing for the better establishing and regulating of patrols in this province), *reprinted in* 3 THE STATUTES AT LARGE OF SOUTH CAROLINA 681, 683–84 (Thomas Cooper ed., A.S. Johnston 1838) (§ 6).

36 HADDEN, *supra* note 31, at 23, 31.

37 Act of Nov. 1738, ch. 2, 1738 Va. Acts (proving for the better regulation of the militia), *reprinted in* 5 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 16, 19 (William Waller Hening ed., Franklin Press 1819) (§ 8).

38 Act of May 7, 1743, 1743 S.C. Acts (providing for the better security of this province against the insurrections and other wicked attempts of negroes and other slaves), *reprinted in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 417, 417–18 (David J. McCord ed., A.S. Johnston 1840) (§ 3).

39 Act of July 28, 1757, 1757 Ga. Laws (obliging the male white persons in the province of Georgia to carry firearms to all places of public worship), *reprinted in* 1 THE EARLIEST PRINTED LAWS OF THE PROVINCE OF GEORGIA, 1755–1770, at 15 (John D. Cushing ed., Michael Glazier, Inc. 1978). In the decade that followed, the law was revived and reenacted several times. *See, e.g.*, Act of Mar. 27, 1759, 1759 Ga. Laws (provided to continue several acts of the general assembly of this province), *reprinted in* 18 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 296, 297–98 (Allen D. Candler ed., Chas. P. Byrd 1910); 14 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 192 (Allen D. Candler ed., 1907). In 1770, the law was updated and revised, with the stated purpose of defending the "province from internal dangers and insurrections." *See* Act of Feb. 27, 1770, 1770 Ga. Laws (providing for the better security of the inhabitants, by obliging the male white persons to carry firearms), *reprinted in* 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA (PART I) 137, 137–40 (Allen D. Candler ed., Chas. P. Byrd 1911).

40 *See supra* notes 11–14 and accompanying text; *see also* JUNE PURCELL GUILD, BLACK LAWS OF VIRGINIA 198–220 (1936); CALEB PERRY PATTERSON, THE NEGRO IN TENNESSEE, 1790–1865 (1912); JAMES M. WRIGHT, THE FREE NEGRO IN MARYLAND, 1634–1860, at 496–97 (1921); H.M. HENRY, THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA (1914); Act of Sept. 13, 1837, 1837 Miss. Laws (amending and reducing into one the several ordinances appointing and

War and the ratification of the Thirteenth Amendment, through what was known as the Black Codes, Southern lawmakers continued to target newly freed people of color through inequitable firearms restrictions.[41] This was one of many documented, inequitable Southern legal abuses against newly freed people of color—abuses that prompted the Reconstruction Congress to enact the Civil Rights Act of 1866, followed by the Fourteenth Amendment.[42] What particularly disturbed the members of the Reconstruction Congress were the stories of white militias disarming Black Civil War veterans of the very rifles that Congress had offered them for their noble service, with the understanding that many of these Black veterans would be called to service once again to secure peace and order in a national or state-run militia.[43]

Ultimately, neither the Civil Rights Act of 1866 nor the Fourteenth Amendment ended up achieving the legal objective of safeguarding equal rights, privileges, and immunities for all citizens, regardless of race.[44] It would take another century before the country would lay witness to a seismic shift in the law that was emblematic of what the Reconstruction Congress originally sought to achieve, but not without people and communities of color continuing to suffer disparate

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regulating patrols within the limits of the city of Natchez), *reprinted in* NATCHEZ WEEKLY COURIER, Sept. 29, 1837, at 3; *Slaves—Free Negroes—Patrols*, DEMOCRAT, Sept. 9, 1835, at 1; Patrol Laws of the State of South Carolina, A DIGEST OF THE LAWS OF THE UNITED STATES & THE STATE OF SOUTH-CAROLINA, NOW OF FORCE, RELATING TO THE MILITIA 117–34 (Thomas D. Condy ed., A.E. Miller 1830).

41 For more on the Black Codes, see Barry A. Crouch, *"All the Vile Passions": The Texas Black Code of 1866*, 97 SW. HIST. Q. 12 (1993); Joe M. Richardson, *Florida Black Codes*, 47 FL. HIST. Q. 365 (1968); THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH (1965); James B. Browning, *The North Carolina Black Code*, 15 J. NEGRO HIST. 461 (1930).

42 *See, e.g.*, Richard L. Aynes, McDonald v. Chicago*, the Fourteenth Amendment, the Right to Bear Arms and the Right of Self-Defense*, 2010 CARDOZO L. REV. DE•NOVO 170.

43 *See* PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY 138–39 (2018). This was sometimes done under the auspices of nonracially based laws, such as the 1865 Virginia law titled "An Act Authorizing the Collection of Public Arms," which gave "all sheriffs, constables, sergeants and police officers" legal carte blanche to "make [a] diligent search for all public arms, national and state, improperly held by citizens and other persons." Act of Dec. 20, 1865, ch. 91, 1865 Va. Acts (authorizing the collection of public arms), *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF VIRGINIA, PASSED IN 1865–66, at 201, 201 (Allegre & Goode 1866) (§ 1).

44 For some useful histories, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); *see also* JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 40–41 (2018) (summarizing the continued racial disparity in the law in Second Amendment terms).

mistreatment—sometimes through armed violence, state and nonstate sponsored alike.[45]

It cannot be overemphasized that the historical intersection between race and firearms up through Reconstruction is complex and multifaceted. There is not one narrative, but many that historians will hopefully examine in the years and decades to come. For the more historians explore about this tumultuous and ugly past, the better we as a nation are informed today to fix racial injustices moving forward. Yet it is important to note that the historical intersection between race and firearms that took place from American colonization through Reconstruction was merely a subset of a substantially larger legal subjugation of people of color—a legal subjugation established for the principal purpose of safeguarding the institution of slavery.

The lives of Southern people of color, free and slave, were heavily restricted in ways that can at times be difficult to fathom, with the overwhelming bulk of the laws serving the express purpose of suppressing potential slave revolts. The laws affected virtually every facet of their lives. For instance, depending upon the state and local jurisdiction, people of color were prohibited from even speaking to their enslaved kinfolk.[46] Free people of color could not own or operate many types of businesses nor engage in even basic commerce without first obtaining a license to do so.[47] Free people of color were often given specific curfews,[48] in which it was unlawful for them to set foot anywhere but on the confines of their residence unless they obtained "a proper permit in writing from some white person authorized to give the

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45 For this reason, the 1960s civil rights movement is sometimes referred to as the "Second Reconstruction." *See, e.g.*, GARY A. DONALDSON, THE SECOND RECONSTRUCTION: A HISTORY OF THE MODERN CIVIL RIGHTS MOVEMENT (2000); *The Civil Rights Movement and the Second Reconstruction, 1945–1968*, HIST., ART & ARCHIVES OF U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Civil-Rights-Movement [https://perma.cc/66W4-4EPX].

46 *See, e.g.*, THE CODE OF THE CITY OF MONTGOMERY 90 (John W.A. Sanford ed., Gaines & Smith 1861) (§ 362); Act of Mar. 14, 1832, ch. 323, 1832 Md. Laws (relating to free negroes and slaves), *reprinted in* LAWS MADE AND PASSED BY THE GENERAL ASSEMBLY OF THE STATE OF MARYLAND 445, 449 (J. Hughes 1832) (§ 8).

47 *See, e.g.*, THE CODE OF THE CITY OF MONTGOMERY, *supra* note 46, at 90 (§ 364); *Ordinances*, THE RAYMOND GAZETTE, Jan. 30, 1846, at 3; Act of Mar. 14, 1832, ch. 323, 1832 Md. Laws (relating to free negroes and slaves), *reprinted in* LAWS MADE AND PASSED BY THE GENERAL ASSEMBLY OF THE STATE OF MARYLAND 445, 449–50 (J. Hughes 1832) (§ 9); Act of June 18, 1822, ch. 73, 1822 Miss. Laws (reducing into one, the several acts, concerning slaves, free negroes, and mulattoes), *reprinted in* THE REVISED CODE OF THE LAWS OF MISSISSIPPI 369, 388–89 (Francis Baker 1824) (§§ 83–86); Act of 1836, ch. 111, 1836 N.C. Laws (concerning slaves and free persons of color), *reprinted in* 1 THE REVISED STATUTES OF THE STATE OF NORTH CAROLINA 571, 591 (Frederick Nash, James Iredell & William H. Battle eds., Turner & Hughes 1837) (§ 85).

48 *See, e.g.*, THE CODE OF THE CITY OF MONTGOMERY, *supra* note 46, at 90 (§ 361); *Town Ordinances*, TARBOROUGH PRESS (Tarborough, N.C.), Feb. 2, 1850, at 2.

same."[49] And free people of color were generally prohibited from migrating to any of the other Southern states without first obtaining permission.[50]

Not surprisingly, enslaved people of color were faced with even more restrictive laws. For instance, slaves could not leave the confines of their master's property without first obtaining a white overseer's written permission.[51] Slaves were often prohibited from learning how to read.[52] Slaves could not attend or hold religious worship without first obtaining their master's consent.[53] And slaves were generally prohibited from owning property, even personal property that would help provide

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49 St. Augustine, Fl., Ordinance Relating to the Police of the City of St. Augustine (Mar. 10, 1845), *reprinted in* 3 ORDINANCES OF THE CITY OF ST. AUGUSTINE 20 (1941).

50 *See, e.g.*, Act of 1836, ch. 111, 1836 N.C. Laws (concerning slaves and free persons of color), *reprinted in* 1 THE REVISED STATUTES OF THE STATE OF NORTH CAROLINA 571, 587–88 (Frederick Nash, James Iredell & William H. Battle eds., Turner & Hughes 1837) (§§ 65–66); Act of Mar. 11, 1834, ch. 68, 1834 Va. Laws (amending several acts concerning slaves, free negroes and mulattoes), *reprinted in* ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA 77, 77–78 (Thomas Ritchie 1834); Act of Mar. 14, 1832, ch. 323, 1832 Md. Laws (relating to free negroes and slaves), *reprinted in* LAWS MADE AND PASSED BY THE GENERAL ASSEMBLY OF THE STATE OF MARYLAND 445, 445–46 (J. Hughes 1832) (§§ 1–2); Act of Nov. 21, 1828, 1828 Fla. Laws (relating to crimes and misdemeanors committed by slaves, free negroes, and mulattoes), *reprinted in* COMPILATION OF THE PUBLIC ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA, PASSED PRIOR TO 1840, at 216, 225–26 (John P. Duval ed., Samuel S. Sibley 1839) (§§ 48–49); Act of June 18, 1822, ch. 73, 1822 Miss. Laws (reducing into one, the several acts, concerning slaves, free negroes, and mulattoes), *reprinted in* THE REVISED CODE OF THE LAWS OF MISSISSIPPI 369, 387–88 (Francis Baker 1824) (§ 80). In North Carolina, every emancipated slave had "ninety days" to "leave the State . . . and never . . . return . . . afterwards." Act of 1836, ch. 111, 1836 N.C. Laws (concerning slaves and free persons of color), *reprinted in* 1 THE REVISED STATUTES OF THE STATE OF NORTH CAROLINA 571, 585 (Frederick Nash, James Iredell & William H. Battle eds., Turner & Hughes 1837) (§ 58). Failure to comply would result in their being arrested and sold back into slavery. *Id.* at 586 (§ 61).

51 *See, e.g.*, *Police Notice*, CHARLESTON MERCURY (Charleston, S.C.), Nov. 20, 1826, at 1; *Corporation Laws*, MISS. CREOLE (Canton, Miss.), May 26, 1848, at 2; Act of 1836, ch. 111, 1836 N.C. Laws (concerning slaves and free persons of color), *reprinted in* 1 THE REVISED STATUTES OF THE STATE OF NORTH CAROLINA 571, 578 (Frederick Nash, James Iredell & William H. Battle eds., Turner & Hughes 1837) (§ 24).

52 *See, e.g.*, Act of 1836, ch. 111, 1836 N.C. Laws (concerning slaves and free persons of color), *reprinted in* 1 THE REVISED STATUTES OF THE STATE OF NORTH CAROLINA 571, 578 (Frederick Nash, James Iredell & William H. Battle eds., Turner & Hughes 1837) (§ 27).

53 *See, e.g.*, Act of Dec. 7, 1840, ch. 18, 1821 La. Acts (resolving by the police jury of the Parish of East Feliciana), *reprinted in* DIGEST OF THE LAWS AND ORDINANCES OF THE PARISH OF EAST FELICIANA, ADOPTED BY THE POLICE JURY OF THE PARISH 67, 69 (John C. White ed., 1848); *Slave Topics*, NILES NAT'L REG. (St. Louis, Mo.), July 26, 1845, at 12; *Corporation Laws*, MISS. CREOLE (Canton, Miss.), May 26, 1848, at 2. In some Southern jurisdictions, this restriction on religious worship applied to free people of color as well. *See, e.g.*, Act of Mar. 14, 1832, ch. 323, 1832 Md. Laws (relating to free negroes and slaves), *reprinted in* LAWS MADE AND PASSED BY THE GENERAL ASSEMBLY OF THE STATE OF MARYLAND 445, 448–49 (J. Hughes 1832) (§ 7).

them basic sustenance, such as livestock, dogs (for hunting), horses, and boats.[54]

Although slavery insurmountably burdened people of color the most, there were also considerable liberty impacts on anyone—whites included—that opposed the institution, no matter whether said opposition was based on religious, moral, or legal grounds. Slave patrol duty is one example.[55] While militia laws generally provided an enrollment exception for any person religiously scrupulous to bearing arms,[56] in those state and local jurisdictions that required most persons, regardless of their legal obligation for militia duty, to serve in the slave patrols, there was no abolitionist or ideological exception.[57] Those that opposed the institution of slavery were also prohibited from doing anything that might be construed as enticing, advising, or persuading any slave to escape from their master.[58] In the State of Maryland, this included printing, publishing, distributing, or circulating any materials

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54 *See, e.g.*, THE CODE OF THE CITY OF MONTGOMERY, *supra* note 46, at 33 (§§ 38–39); Act of Dec. 7, 1840, ch. 18, 1821 La. Acts (resolving by the police jury of the Parish of East Feliciana), *reprinted in* DIGEST OF THE LAWS AND ORDINANCES OF THE PARISH OF EAST FELICIANA, ADOPTED BY THE POLICE JURY OF THE PARISH 67, 68–69 (John C. White ed., 1848) (§ 7); Act of Nov. 21, 1828, 1828 Fla. Laws (relating to crimes and misdemeanors committed by slaves, free negroes, and mulattoes), *reprinted in* COMPILATION OF THE PUBLIC ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA, PASSED PRIOR TO 1840, at 216, 225 (John P. Duval ed., Samuel S. Sibley 1839) (§§ 45–46); Act of June 18, 1822, ch. 73, 1822 Miss. Laws (reducing into one, the several acts, concerning slaves, free negroes, and mulattoes), *reprinted in* THE REVISED CODE OF THE LAWS OF MISSISSIPPI 369, 378–79 (Francis Baker 1824) (§§ 41–42); Act of 1836, ch. 111, 1836 N.C. Laws (concerning slaves and free persons of color), *reprinted in* 1 THE REVISED STATUTES OF THE STATE OF NORTH CAROLINA 571, 578 (Frederick Nash, James Iredell & William H. Battle eds., Turner & Hughes 1837) (§ 25).

55 For a useful history on slave patrol duty, see HADDEN, *supra* note 31, at 41–104.

56 *See, e.g.*, Act of Nov. 1807, ch. 128, 1807 Md. Laws (regulating and discipling the militia of this state), *reprinted in* 3 THE LAWS OF MARYLAND 339, 339–40 (Philip H. Nicklin & Co. 1811) (§ 1) (excepting from enrollment any person "conscientiously scrupulous of bearing arms" for "religious" reasons); Act of Dec. 22, 1792, ch. 146, 1792 Va. Laws (regulating the militia of this Commonwealth), *reprinted in* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA 399, 401–02 (Samuel Pleasants 1814) (§ 11) (excepting from enrollment "all quakers and menonists religiously scrupulous of bearing arms, and having a certificate from their respective societies"). *But see* Act of Feb. 9, 1827, ch. 1, 1827 Del. Laws (establishing a uniform militia throughout this state), *reprinted in* 7 LAWS OF THE STATE OF DELAWARE 3, 4 (Dover 1829) (§§ 1–2) (only religiously excepting from enrollment "ministers of religion of every denomination . . . and no other persons").

57 For a helpful history on how slave patrols were constituted, who could be called to service, and who could be exempted, see HADDEN, *supra* note 31, at 71–104.

58 *See, e.g.*, Act of Mar. 8, 1834, ch. 68, 1834 Va. Acts (providing for the better organization of the militia), *reprinted in* ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA 77, 80 (Thomas Ritchie 1834); Act of June 18, 1822, ch. 73, 1822 Miss. Laws (reducing into one, the several acts, concerning slaves, free negroes, and mulattoes), *reprinted in* THE REVISED CODE OF THE LAWS OF MISSISSIPPI 369, 380–81 (Francis Baker 1824) (§ 51).

"having a tendency to create discontent among, and stir up to insurrection . . . people of colour."[59]

The key historical takeaway is that slavery created stark legal double standards for those that supported the institution and those that opposed it. For those that supported the institution, the law was considerably beneficial. For those that opposed it, especially people of color, the law imposed devastatingly disproportionate burdens. It was this stark racial inequity that the Reconstruction Congress sought to remedy through the equal protection provisions within the Civil Rights Act of 1866[60] and the Fourteenth Amendment.[61] At no point did the Reconstruction Congress seek to topple federalism—that is, upend state and local lawmakers' authority to regulate within their respective governmental spheres on a wide range of issues.[62] Rather, the Reconstruction Congress sought to ensure that the Constitution once and for all embodied the "all men are created equal" promise within the Declaration of Independence.[63] Thus, outside and away from racially repressive and inequitable laws like the Black Codes, the Reconstruction Congress understood and accepted that the Fourteenth Amendment did not undo longstanding legal norms, nor did it undo state and local governmental authority to regulate on a wide range of issues. This included regulating the acquisition, ownership, and use of firearms. For ever since the Norman Conquest, Anglo-American law had prescribed rules, regulations, and legal requirements pertaining to dangerous

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59 Act of Dec. 1831, ch. 325, 1835 Md. Acts (relating to free negroes and slaves), *reprinted in* 141 THE GENERAL PUBLIC STATUTORY LAW AND PUBLIC LOCAL LAW OF THE STATE OF MARYLAND, FROM THE YEAR 1692 TO 1839 INCLUSIVE 1217, 1217–18 (John B. Toy 1840) (§ 1).

60 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866) ("[A]ll persons born in the United States and not subject to any foreign power . . . shall have the same right, in every State and Territory in the United States . . . to full and equal benefit of all laws and proceedings for the security of person and property . . . .").

61 U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

62 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2539 (1866) ("So far as this section [1 of the Fourteenth Amendment] is concerned, there is but one clause in it which is not already in the Constitution, and it might as well in my opinion read, 'No State shall deny to any person within its jurisdiction the equal protection of the laws.'"); H.R. REP. NO. 41-22, at 1 (1871) (noting that the Fourteenth Amendment "did not change or modify the relations of citizens of the State and nation as they existed under the original Constitution"); *see also* TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 401–02, 426 (Little, Brown & Co. 3d ed. rev. 1872); JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 151 (Hurd & Houghton 1868).

63 *See* Charles, *supra* note 5, at 43–46. For a history of the Declaration of Independence and its promise that both government and law should be based on equitable principles, see Patrick J. Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457 (2011).

weapons to protect public safety and prevent injury.[64] Simply put, the legal concept of regulating access, ownership, and use of firearms was not something unique to people of color. This area of regulation had long applied to all segments of society.[65] What was unique for people of color from American colonization through Reconstruction was that the rules, regulations, and legal requirements were always far more severe and disproportionate to what was imposed upon whites. The Fourteenth Amendment was intended to remedy this racial inequity.

From the time the Fourteenth Amendment was ratified in 1868 through most of the twentieth century, no one (at least that this author can find) appears to have espoused the view that the history of race and firearms was indicative that most, if not all, gun controls are inherently racist. Indeed, in the late 1960s and early 1970s, Black extremist political action groups, such as the Black Panther Party and Black United Front, are on record claiming that specific firearms laws were adopted with racist aforethought.[66] However, none of these Black extremist political action groups were so bold to claim that all gun controls are racist.

For most of the twentieth century, the same was true of gun rights advocates, who throughout the early to mid-twentieth century were known for proliferating any and every criminological, social, cultural, historical, and moral argument against gun controls they could muster.[67] This included proffering outlandish claims and conspiracies, such as the American public was being misled in supporting firearms restrictions by insidious actors, who were intent on disarming the entire country. In the 1920s, gun rights advocates alleged the "campaign against the pistol" was being led by "an invisible organization, apparently . . . well equipped with propaganda facilities."[68] At the same

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64 *See, e.g.*, Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS. 55, 57–59 (2017); Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. U. L. REV. 1821, 1822–23 (2011); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 489 (2004).

65 The repository of historical firearms laws put together by the Duke Center for Firearms Law illustrates this point succinctly. *See Repository of Historical Gun Laws*, DUKE CTR. FOR FIREARMS L., https://firearmslaw.duke.edu/repository/search-the-repository [https://perma.cc/7F6L-AJQR].

66 *See, e.g.*, JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 70 (1st ed. 2017); *D.C. Gun Law Said "Racist,"* TAMPA TIMES, Aug. 10, 1968, at 3A; *Black Panthers 1968 Protest Has No Guns*, SACRAMENTO BEE, May 2, 1968, at A8; *Gunmen Invade W. Coast Capitol*, CHI. TRIB., May 3, 1967, at 1.

67 CHARLES, *supra* note 43, at 179–223.

68 Editorial, *Winter Sports*, AM. RIFLEMAN, Dec. 1928, at 6; *see also* C.B. Lister, *The Remedy*, DU PONT MAG., Mar. 1924, at 10 ("This agitation to regulate the sale of pistols and revolvers has

time, up through the 1930s, gun rights advocates alleged it was gangsters.[69] During World War II, the blame was shifted to alleged fifth columnists and Nazi operatives.[70] This was followed by gun rights advocates blaming alleged communist operatives[71] and later liberal elites,[72] both of whom gun rights advocates claimed were seeking to force their antigun agenda on liberty-loving Americans. None of it proved to be true. Yet many within the gun rights community believed it and took part in spreading the unsubstantiated claims and conspiracies far and wide.[73] For, as is common with virtually all misinformation campaigns, all that is required to effectively spread the lie is that it be built on a combination of public fear and some facet of the truth.[74]

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been carried on for some years, but only within the past two years have the efforts of the anti's assumed an organized aspect. So far as is known, there is no association organized to put across anti-gun laws. The interesting question is accordingly raised: Who is financing the apparently organized propaganda?"); *Who Supplies the "Jack?*," AM. RIFLEMAN, Jan. 1, 1924, at 12 ("When sundry reformers begin an active and vindictive campaign in large cities—especially New York—it is a perfectly fair assumption that somebody is paying for it. Anti-firearm propaganda of late is becoming too recurrent, too widespread and too vitriolic . . . to warr[a]nt any assumption tenable than that there is plenty of money behind it.").

69 *See, e.g.*, Otto R. Keiter, *Anti-Legislation Plaint*, AM. RIFLEMAN, Oct. 1939, at 36; Lister, *supra* note 68, at 10; *Who Supplies the "Jack?," supra* note 68, at 12.

70 *See, e.g.*, C.B. Lister, Editorial, *The Nazi Deadline*, AM. RIFLEMAN, Feb. 1942, at 7; *Zero Hour*, AM. RIFLEMAN, Dec. 1940, at 4.

71 *See, e.g.*, Editorial, *Gun Control Makes Strange Bedfellows*, AM. RIFLEMAN, Sept. 1968, at 18; C.B. Lister, Editorial, *Simple Arithmetic*, AM. RIFLEMAN, Nov. 1949, at 10; C.B. Lister, Editorial, *Pattern in Red*, AM. RIFLEMAN, Apr. 1948, at 10.

72 *See, e.g.*, Jim Oliver, *Xerox's Blatant Anti-Gun Filmstrip Subverts Your Children!*, GUNS & AMMO MAG., May 1978, at 32, 34; Harlon Carter, *Liberalism and Gun Control: JUST WHERE DO YOU DRAW THE LINE?*, GUNS & AMMO MAG., Mar. 1975, at 28, 76; federalexpression, *Firearms and Freedom*, YOUTUBE (Sept. 8, 2016), https://youtu.be/OyxlV-RWNOk [https://perma.cc/VB32-QFEQ].

73 For a study of how gun rights advocacy groups were able to proliferate their messages to the masses, no matter whether the messages were factually true, see MATTHEW J. LACOMBE, FIREPOWER: HOW THE NRA TURNED GUN OWNERS INTO A POLITICAL FORCE (2021). *See also* CHARLES, *supra* note 43, at 205–23 (outlining the NRA's political playbook for messaging).

74 The Covid-19 pandemic has shown social scientists the ease with which misinformation can spread, particularly since the advent of social media. *See, e.g.*, Filippo Menczer & Thomas Hills, *Information Overload Helps Fake News Spread, and Social Media Knows It*, SCI. AM. (Dec. 1, 2020), https://www.scientificamerican.com/article/information-overload-helps-fake-news-spread-and-social-media-knows-it (last visited Mar. 18, 2022); Mary Blankenship & Carol Graham, *How Misinformation Spreads on Twitter*, BROOKINGS INST. BLOG (July 6, 2020), https://www.brookings.edu/blog/up-front/2020/07/06/how-misinformation-spreads-on-twitter [https://perma.cc/H6DU-HWWD]; Christa Case Bryant, *Combating an "Infodemic": When Fear and False Information Go Viral*, CHRISTIAN SCI. MONITOR (Mar. 18, 2020), https://www.csmonitor.com/USA/Politics/2020/0318/Combating-an-infodemic-When-fear-and-false-information-go-viral [https://perma.cc/WE82-72WG].

As it pertained specifically to race and gun control, beginning in the late 1960s through the mid-1970s, gun rights advocates had only advanced two claims. The first claim went like this: because crime statistics consistently showed that communities of color were more likely to experience high crime rates, gun controls disproportionately affected those communities' ability to acquire "more guns" and therefore adequately reduce the criminological consequences associated with it.[75] One gun rights advocacy group, the American Pistol and Revolver Association, went so far as to provide Black gun rights supporters with the following form letter to make this case in point, as well as frame gun rights as a broader civil rights issue:

> Dear Congressman _____:
>
> I had to wait until 1964, after the Civil Rights Act was passed, before I could buy my guns. Prior to that, gun dealers told me "We don't sell guns to [n***ers]" and they asked me "to leave." I have supported Civil Rights candidates because I now finally have my freedom. It is in the ghetto and the high crime areas where law abiding negros like myself need guns to protect our homes and our families. Now that they are talking about licensing all hand guns, will I be turned down from obtaining a license from my white Chief of Police, my white Sheriff, or my white government bureaucrat again like I was before the 1964 Civil Rights Act was passed?
>
> I consider owning firearms my most important civil right. I firmly believe in the Bill of Rights and it clearly says "the right of the people to keep and bear arms shall not be infringed." I interpret that to mean the right of all people, of all colors and creeds, being able to own and to carry firearms. If you are really for Civil Rights, you would be for this right too.
>
> I am very disappointed that an organization calling itself the American *Civil Liberties* Union would be in favor of taking away these *civil liberties!*
>
> Sincerely,
>
> (Sign your name)[76]

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75 *See, e.g.*, Harlon Carter, *Gun Owners—the True Liberals*, GUNS & AMMO MAG., Aug. 1977, at 32–33 [hereinafter Carter, *Gun Owners*]; Harlon Carter, *Crime Control=Gun Control=Race Control???*, GUNS & AMMO MAG., Feb. 1974, at 26–27, 76–78 [hereinafter Carter, *Crime Control*]; Letter from Don B. Kates to George D. Aiken, George D. Aiken Papers (Mar. 27, 1970) (on file with University of Vermont Silver Special Collections Library); William J. White, *Why Anti-Gun Laws "Hit Hardest at the Negro,"* AM. RIFLEMAN, Mar. 1968, at 21.

76 ELLIOTT GRAHAM, AM. PISTOL & REVOLVER ASS'N, INC., THE PISTOL OWNER'S LEGISLATIVE HANDBOOK 105–06 (1975). The dissemination and use of form letters were common by gun

The second gun rights advocacy claim involving race was that gun control is just another attempt at race control.[77] The claim was a modified take on the early 1970s gun rights (and John Birch Society) mantra "gun control is people control"—a mantra that implied gun control was an insidious means toward achieving both the liberals' and communists' alleged goal of a totalitarian police state,[78] and the only thing standing in the way of achieving this un-American, anti-Democratic end was an armed citizenry.[79] The "gun control is race control" claim was not all that different, albeit with the caveat that allegedly liberals and communists were insidiously using the high crime rates among communities of color to first subjugate them, which would then be followed by the subjugation of the general white population. "The black man will quickly see he is being used as a silent instrument to obtain complete gun control," wrote former NRA president Harlon B. Carter in a 1975 *Guns & Ammo* editorial, adding, "[h]e gains nothing and he is at once the victim of tyranny and the instrument by which tyranny is imposed on the white man."[80]

It was in the late 1970s—a time when gun rights advocates were diligently working to restore the Second Amendment to its constitutional pedestal[81]—that a contingent of gun rights advocates began shifting the narrative on race and firearms, and linking it to the

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rights advocates. Also, the NRA and other gun rights advocates frequently educated gun rights supporters on how to effectively write these letters and editorials. *See, e.g.*, J.J. Basil, Jr. & Daniel J. Mountin, *Firearms Legislation and the Gun Owner: A Guide to Sound Action by the Individual for Preventing Restrictive Gun Laws*, AM. RIFLEMAN, July 1964, at 30–32; Editorial, *The Positive Approach*, AM. RIFLEMAN, Aug. 1961, at 16; John F. Soubier, *Before It's Too Late…: Learn What Is Required to Fight Local Antigun Legislation, and Be Ready*, AM. RIFLEMAN, Sept. 1958, at 17–19, 32; Elizabeth T. Cornish, *Your Gun and the Non-Shooter*, AM. RIFLEMAN, Mar. 1955, at 4; Michael Nadel, *What Can We Do?*, AM. RIFLEMAN, Feb. 1954, at 19; Frank C. Daniel, *The Gun Law Problem*, AM. RIFLEMAN, Feb. 1953, at 16–18, 46.

77 *See, e.g.*, Carter, *Gun Owners*, *supra* note 75, at 26–27, 76–78.

78 *See, e.g.*, Harlon Carter, *Gun Control: Precedent for Press Control*, GUNS & AMMO MAG., June 1975, at 28–29; G. Gordon Liddy, *Gun Control as People Control*, GUNS & AMMO MAG., Apr. 1975, at 28–29; PHOEBE COURTNEY, GUN CONTROL MEANS PEOPLE CONTROL (1974); *Gun Control to Be Topic*, MUNCIE EVENING PRESS, Sept. 17, 1974, at 14; *Gun Control Is Birch Topic*, DEMOCRAT & CHRON. (Rochester, N.Y.), Feb. 23, 1974, at 5B; *"Gun Controls Are People Controls" Says Mark E. Anderson*, UTAH INDEP. (Salt Lake City, Utah), Aug. 11, 1972, at 1.

79 For decades, gun rights advocates put forward a similar argument to politically rail against firearms registration. *See, e.g.*, NAT'L RIFLE ASS'N, THE PRO AND CON OF FIREARMS REGISTRATION 5, 10 (1968) (arguing that the "only reason for registering privately owned firearms is to make it possible for the political authorities . . . to seize such weapons when . . . such seizure is necessary or desirable," and the "only practical effect of a firearms registration law is to play into the hands of unscrupulous seekers for political power").

80 Carter, *Crime Control*, *supra* note 75, at 27.

81 For a history of gun rights advocates' efforts at researching and writing on the Second Amendment to advance a broad right to "keep and bear arms," see CHARLES, *supra* note 43, at 279–95.

larger gun rights political message of firearms ownership being a *social good* and all gun control being a *social evil*.[82] To this contingent of gun rights advocates, gun control not only disproportionately burdened communities of color, but was also, historically speaking, inherently racist as well.[83] In advancing this "racist history" narrative, this gun rights contingent focused immensely on the firearms restrictions contained within the slave codes and subsequent Black Codes.[84] All other weapons and firearms restrictions, spanning from the Norman Conquest through the turn of the twentieth century, were either conveniently omitted or cast in an unfavorable historical light,[85] thus leaving the reader to conclude that gun control was primarily the tool of elitists and despots.[86] This is not true.

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82 *See, e.g.*, ALAN GOTTLIEB, THE GUN GRABBERS: WHO THEY ARE, HOW THEY OPERATE, WHERE THEY GET THEIR MONEY (1986); DAVID I. CAPLAN, CONSTITUTIONAL RIGHTS IN JEOPARDY: THE PUSH FOR "GUN CONTROL" (1981); John M. Snyder, *The Enemy*, POINT BLANK, Nov. 1977, at 1; ROBERT J. KUKLA, GUN CONTROL: A WRITTEN RECORD OF EFFORTS TO ELIMINATE THE PRIVATE POSSESSION OF FIREARMS IN AMERICA (Harlon B. Carter ed.,1973) (NRA funded and distributed); COLIN GREENWOOD, FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES (1972).

83 *See* Brendan F.J. Furnish, *The New Class and the California Handgun Initiative: Elitist Developed Law as Gun Control*, *in* THE GUN CULTURE AND ITS ENEMIES 127, 131–32 (William R. Tonso ed., 1989); William Tonso, *Gun Control: White Men's Law*, REASON, Dec. 1985, https://reason.com/1985/12/01/gun-control [https://perma.cc/36S8-ZRCM]; Raymond G. Kessler, *The Political Functions of Gun Control*, *in* FIREARMS & VIOLENCE: ISSUES OF PUBLIC POLICY 457, 460, 476–85 (Don B. Kates, Jr., ed., 1984); Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1 (1981); David T. Hardy & Kenneth L. Chotiner, *The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibition*, *in* RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 194, 209–11 (Don B. Kates, Jr., ed., 1979); Don B. Kates, Jr., *Toward a History of Handgun Prohibition in the United States*, *in* RESTRICTING HANDGUNS: THE LIBERAL SKEPTIC SPEAKS OUT, *supra*, at 7, 12–15; B. Bruce-Briggs, *The Great American Gun War*, 45 PUB. INT. 37, 50 (1976); *see also* ROBERT SHERRILL, THE SATURDAY NIGHT SPECIAL 280 (1973) (claiming, without any supporting documentation, that members of Congress were pursuing Saturday Night Special legislation to "control blacks"). For an in-depth political history of congressional efforts to regulate the Saturday Night Special, see PATRICK J. CHARLES, VOTE FOR GUN: THE POLITICS AND POLITICIZATION OF GUN RIGHTS THROUGH 1980 (forthcoming 2022) (on file with author).

84 *See supra* note 40 and accompanying text.

85 *See infra* note 97 and accompanying text.

86 Take for instance a 1984 article by Raymond G. Kessler, which lists the "five functions" of gun control as follows:

> (1) increasing citizen reliance on government and citizen tolerance of increased police powers and official abuse; (2) helping prevent opposition to government; (3) facilitating repressive action by government and its sympathizers; (4) lessening the pressure for major reform; and (5) selective enforcement against those perceived as a threat by government.

Kessler, *supra* note 83, at 485. At no point does Kessler mention any positive social or criminological purpose for gun control. This omission was intentional.

As this author and other scholars have detailed, history provides countless examples where lawmakers passed gun controls with the purposes of lowering homicide rates, preventing public injury, and protecting public safety.[87] This is particularly true regarding the law of armed carriage, where all persons, not just people of color, were often restricted from carrying dangerous weapons within the public concourse.[88] Indeed, many modern forms of gun control that are prevalent today did not appear on the statute and ordinance books until the late nineteenth and early twentieth centuries, to include laws requiring permits to purchase firearms, laws requiring firearms dealers to register and record all sales, laws prohibiting firearms sales to minors, and prohibitions on selling firearms to known criminals and other dangerous persons.[89] However, every one of these forms of gun control became generally accepted to the point that the first gun rights movement (including the NRA) embraced them.[90] These were not "racist" laws, but rather laws widely deemed "sane" and "reasonable" (by early twentieth-century gun rights advocates, no less) in the interest of the public good.[91]

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87 *See, e.g.*, *supra* note 64 and accompanying text; LOIS G. SCHWOERER, GUN CULTURE IN EARLY MODERN ENGLAND (2016); ROBERT J. SPITZER, GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS (2015); SAUL CORNELL, A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA (2006).

88 *See, e.g.*, Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel Under Anglo-American Law, 1688–1868*, 83 LAW & CONTEMP. PROBS. 73 (2020); Patrick J. Charles, *The Second Amendment and the Basic Right to Transport Firearms for Lawful Purposes*, 13 CHARLESTON L. REV. 125 (2018); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEV. ST. L. REV. 373 (2016).

89 *See* CHARLES, *supra* note 43, at 156–57, 190–92.

90 *Id.* at 190–205; *see also* C.B. Lister, *All in the Day's Work*, AM. RIFLEMAN, Dec. 1928, at 31–32 ("This Association is entirely in accord with the idea of an occasional check-up on pistol permits when it appears that an unduly large number appear to be outstanding. We have conducted a consistent campaign against the sale of junk revolvers and pistols by mail, and the bill which passed the last Congress prohibiting the mailing of pistols and revolvers had our approval. Regulations prohibiting the immediate delivery of rifles and pistols to purchasers, the handling of guns by pawn shops and similar sensible provisions looking toward the keeping of guns out of the hands of irresponsibles should certainly be enforced."); *Resisting the Anti-Gun Crank*, AM. RIFLEMAN, Apr. 1927, at 10 ("[T]he National Rifle Association is not fanatically opposed to reasonable regulation that will keep dangerous weapons out of the hands of irresponsible persons and penalize the crook, but that, on the contrary, it approves of a sensible amount of control."); *Guarding the Mails*, AM. RIFLEMAN, Nov. 1, 1926, at 8 (acknowledging that "anti-firearms laws should be amended to prohibit the use of machine-guns, howitzers, and field artillery by civilians—honest or otherwise").

91 *See, e.g.*, Merritt A. Edson, *As Allowed by Law*, AM. RIFLEMAN, Nov. 1953, at 16; NAT'L RIFLE ASS'N, THE PRO AND CON OF FIREARMS LEGISLATION: TO ASSIST LEGISLATORS WHO ARE INTERESTED IN MAKING A THOROUGH STUDY OF THE PROBLEMS INVOLVED IN REGULATING THE

Despite the "gun control is racist" narrative's lack of historical transparency, it gradually gained acceptance among gun rights writers.[92] In 1991, Robert J. Cottrol[93] and Raymond T. Diamond published what has proven to be a highly influential article, which asked jurists and scholars to reconsider the Second Amendment from an Afro-American historical viewpoint—that is, as embodying a broad, individual right to self-defense against both state and nonstate actors.[94] That same year, in a law review article titled *Gun Control and Racism*, NRA Assistant General Counsel Stefan B. Tahmassebi proclaimed that the "history of gun control in the United States has been one of discrimination, oppression, and arbitrary enforcement" against people of color.[95] A few years later, gun rights advocate and writer Clayton E. Cramer published a law review article titled *The Racist Roots of Gun Control*, wherein he boldly proclaimed that "racism underlies [all] gun control laws."[96] In the years since then, several other gun rights writers and advocates have adopted Cramer's "all gun controls are racist" decree.[97] This includes the organization, Jews for the Preservation of Firearms Ownership, which in 1999 published and distributed a twenty-

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USE, OWNERSHIP AND POSSESSION OF FIREARMS. 2 (1940); Editorial, *Merry Christmas—and Gun Laws*, AM. RIFLEMAN, Dec. 1929, at 6; U.S. Revolver Ass'n, *Sane Regulation of Revolver Sales: Why Revolver Sales Should be Uniform*, BULLETIN NO. 2, Jan. 24, 1923 (on file with Minnesota Historical Society).

92 *See, e.g.*, Don B. Kates, *A Modern Historiography of the Second Amendment*, 56 UCLA L. REV. 1211, 1219, 1224 (2009) (identifying the "gun control is racist" narrative as one of several important "milestones" in Second Amendment scholarship).

93 Before publishing this influential article, Robert J. Cottrol was advocating against gun control and for gun rights on nonracial grounds. *See, e.g.*, Robert J. Cottrol, *Want Gun Control? Enforce the Second Amendment!*, AM. RIFLEMAN, Mar. 1990, at 21; Robert J. Cottrol, Opinion, *Counterpoint: Other Means Are Sure to Be Found*, KOKOMO TRIB. (Kokomo, Ind.), Apr. 6, 1989, at 6.

94 *See* Cottrol & Diamond, *supra* note 3, at 359–61.

95 Tahmassebi, *supra* note 6, at 99.

96 Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17, 17 (1995).

97 *See, e.g.*, STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS: A CONSTITUTIONAL RIGHT OF THE PEOPLE OR A PRIVILEGE OF THE RULING CLASS? 287–309 (2021); Brief for Amicus Curiae National African American Gun Ass'n, Inc., in Support of Petitioners, N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525 (2021) (No. 18-280); David B. Kopel, *The Racist Roots of Gun Control*, ENCOUNTER BOOKS (Feb. 23, 2018), https://www.encounterbooks.com/features/racist-roots-gun-control [https://perma.cc/SQ65-LLFT]; David Kopel & Joseph Greenlee, Opinion, *The Racist Origin of Gun Control Laws*, HILL (Aug. 22, 2017, 11:00 AM), https://thehill.com/blogs/pundits-blog/civil-rights/347324-the-racist-origin-of-gun-control-laws [https://perma.cc/E9YQ-JDAQ]; DAVID B. KOPEL, THE TRUTH ABOUT GUN CONTROL 11–15 (2013) [hereinafter KOPEL, THE TRUTH]; Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity—the Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995); *see also* Robert J. Cottrol, *A Liberal Democrat's Lament: Gun Control Is Racist, Sexist & Classist*, 10 AM. ENTER. 58 (1999).

three-page illustrated pamphlet titled *"Gun Control" Is Racist!: Facts that Racists Don't Want You to Know*.[98] As the title implies, the pamphlet casts all gun controls and anyone that supports them as racist.[99] Near the end of the pamphlet, an eye-catching note reads: "If any apology is owed to slaves and their descendants, it should be from those who kept them unprotected and disarmed for years . . . THE RACIST GUN CONTROLLERS!"[100]

As a matter of historiography, the embrace of the historically distorted "gun control is racist" narrative by gun rights writers and advocates is not all that surprising. For it is not the first, and certainly not the only, time gun rights writers and advocates have flocked to support intellectually suspect and hyperbolic historical claims. The Revolutionary War was started due to British attempts at gun control,[101] one of the grievances in the Declaration of Independence was written with gun control in mind,[102] and there were no gun control laws on the books in the American colonies and later in the United States until the turn of the nineteenth century[103] (slave codes excluded). These are all examples of history gone awry in gun rights circles.[104] And this is not even considering the long list of intellectually suspect and hyperbolic

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98 Lauri Lebo, *Gun Flier Called Racist*, YORK SUNDAY NEWS (York, Pa.), June 6, 1999, at A1, A6.

99 *See* JEWS FOR THE PRESERVATION OF FIREARMS OWNERSHIP, "GUN CONTROL" IS RACIST!: FACTS THAT RACISTS DON'T WANT YOU TO KNOW! (1998) (on file with author).

100 *Id.* at 14.

101 *See, e.g.*, STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 75–108, 328–30 (2008).

102 *See, e.g.*, David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283 (2012).

103 *See, e.g.*, Nelson Lund, *Second Amendment Standards of Review in a* Heller *World*, 39 FORDHAM URB. L.J. 1617, 1620 (2012); Nelson Lund, *No Conservative Consensus Yet: Douglas Ginsburg, Brett Kavanaugh, and Diane Sykes on the Second Amendment*, 13 ENGAGE 30, 30 (2012); Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1368 (2009); *see also* Brief of Amici Curiae Historians, Legal Scholars, and CRPA Foundation in Support of Appellees and in Support of Affirmance at 4, Wrenn v. District of Columbia, 808 F.3d 81 (D.C. Cir. 2017) (No. 15-7057); Amicus Brief of Academics for the Second Amendment in Support of Petitioners at 16–17, Kachalsky v. Cacace, 133 S. Ct. 1806 (2013) (mem.) (No. 12-845).

104 *See* Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*, 39 FORDHAM URB. L.J. 1727, 1733–91 (2012) [hereinafter Charles, *Historiographical Crisis*] (historically rebutting each of these claims); Patrick J. Charles, *The Constitutional Significance of A "Well-Regulated" Militia Asserted and Proven with Commentary on the Future of Second Amendment Jurisprudence*, 3 NE. U. L.J. 1, 55–60 (2011) [hereinafter Charles, *The Constitutional Significance of a "Well-Regulated" Militia*] (same); Patrick J. Charles, *"Arms for Their Defence"?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in* McDonald v. City of Chicago, 57 CLEV. ST. L. REV. 351, 435–49 (2009) [hereinafter Charles, *"Arms for Their Defence"?*] (same).

historical claims made by gun rights writers and advocates regarding firearms and weapons laws on the other side of the Atlantic.[105]

This brief historiography answers *how* the "gun control is racist" narrative came to be. It is the *why*, however, that is most interesting from a history-in-law perspective. So far as this author and others can tell, the why is essentially twofold—the first *why* being political and the second *why* being constitutional framing. As to the political *why*, the "gun control is racist" narrative is not really all that different from the many other gun rights claims regarding the history of gun control—each of which seeks to historically cast gun control in malevolent and unfavorable terms. In fact, from the early twentieth-century genesis of gun rights advocacy, this tactic was used early and often in an attempt to historically sully the 1911 Sullivan Law, the very law that caused gun rights advocates to become politically organized in the first place.[106] And to this day, gun rights advocates continue to subjectively frame, and therefore espouse, false and misleading historical claims on the origins, intent, and purpose of the Sullivan Law.[107] Indeed, the existence of any disproportionate, class-based enforcement of the Sullivan Law

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105 Joyce Lee Malcolm is primarily responsible for these intellectually suspect and hyperbolic historical claims. *See, e.g.*, JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994) [hereinafter MALCOLM, TO KEEP AND BEAR ARMS]; Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983). To date, other historians specializing in this history have been unable to corroborate her claims. *See, e.g.*, Tim Harris, *The Right to Bear Arms in English and Irish Historical Context*, *in* A RIGHT TO BEAR ARMS? THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT 23, 23–36 (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019); Lois G. Schwoerer, *English and American Gun Rights*, *in* A RIGHT TO BEAR ARMS? THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT, *supra*, at 139, 139–53; Charles, *Historiographical Crisis*, *supra* note 104, at 1795–1827; Charles, *"Arms for Their Defence"?*, *supra* note 104, at 356–403; Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, *in* THE SECOND AMENDMENT IN LAW AND HISTORY: HISTORIANS AND CONSTITUTIONAL SCHOLARS ON THE RIGHT TO BEAR ARMS 207, 207–21 (Carl T. Bogus ed., 2000) [hereinafter Schwoerer, *To Hold and Bear Arms*].

106 *See* CHARLES, *supra* note 43, at 182–83, 314 (outlining how gun rights advocates argued against the 1911 Sullivan Law); *see also* Kates, *supra* note 83, at 15–24 (advancing an anti-immigrant narrative for the 1911 Sullivan Law). For some early attempts by gun rights advocates to historically sully the 1911 Sullivan Law, see Jac Weller, *The Sullivan Law*, AM. RIFLEMAN, Apr. 1962, at 33; Robert Dyment, *The People vs. The Sullivan Law*, GUNS MAG., July 1960, at 24–25, 49, 51–52, 54; Cottrol & Diamond, *supra* note 97, at 1334 (restating the 1911 Sullivan Law's genesis as being anti-immigrant without any direct historical evidence).

107 *See, e.g.*, HALBROOK, *supra* note 97, at 301–06; *see also* Amicus Curiae Brief of Italo-American Jurists & Attorneys in Support of Petitioners at 6–29, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, No. 20-843 (July 15, 2021); Petition for Writ of Certiorari at 29, Libertarian Party v. Cuomo, 141 S. Ct. 2797 (2021) (No. 18-386). For a rebuttal of this characterization, see Patrick J. Charles, *A Historian's Assessment of the Anti-Immigrant Narrative in* NYSRPA v. Bruen, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Aug. 4, 2021), https://firearmslaw.duke.edu/2021/08/a-historians-assessment-of-the-anti-immigrant-narrative-in-nysrpa-v-bruen [https://perma.cc/V64Y-UDUJ].

(or any law for that matter) is worthy of study and criticism. The Sullivan Law's principal purpose, however, was not about expanding political corruption or advancing an anti-immigrant agenda. It was about reducing firearms-related homicides, fighting crime, and increasing public safety.[108] To suggest otherwise is to break the bands of historical elasticity. The "gun control is racist" narrative is part of this same acontextual "gun control is evil" constitutional-framing playbook. Simply put, the "gun control is racist" narrative is merely one of many misinformation means toward achieving expansive gun rights.

The second *why* the "gun control is racist" narrative came to be is to provide gun rights advocates with a favorable constitutional framework.[109] For by associating the right to "keep and bear arms" with the civil rights movement's push for racial equality, gun rights advocates are trying to frame the Second Amendment in a way that helps convince the courts to administer some form of heighted scrutiny when examining the constitutionality of gun controls.[110] To date, although some jurists have been willing to embrace the idea of associating Second Amendment rights with the fight for racial equality,[111] the courts have yet to accept gun rights advocates' plea[112] to invoke the "same demanding standards when reviewing the constitutionality of a gun control law" as is applied to laws that "discriminate[] based on race."[113] Gun rights advocates have, however, proved successful in convincing some Supreme Court Justices that Second Amendment rights are receiving "second-class" constitutional

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108 *See* CHARLES, *supra* note 43, at 175–79, 182 (expounding on the legislative history behind the 1911 Sullivan Law). Gun rights advocates would do well to look at their own history and see how they at times scapegoated and excluded immigrants. *See, e.g.*, NAT'L RIFLE ASS'N, *supra* note 91, at 3 ("If further regulations are needed, a law prohibiting the possession of firearms by aliens would complete the cordon."); *300,000 in Rifle Association Told to Watch 5th Columnists*, PRESS & SUN BULL. (Binghamton, N.Y.), June 7, 1940, at 1 (reporting that an NRA bulletin urged members to watch the Canadian and Mexican borders for "unrestricted passage by aliens" and report them immediately to the FBI); U.S. Revolver Ass'n, *supra* note 91 (noting that the Capper Bill, which was touted by gun rights advocates, will ensure "aliens and persons who have been convicted of a felony are not permitted to possess a pistol or revolver").

109 *See generally* Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229 (2020).

110 *Id.* at 245–58.

111 *See, e.g.*, Rogers v. Grewal, 140 S. Ct. 1865, 1873–74 (2020) (Thomas, J., dissenting); Duncan v. Becerra, 970 F.3d 1133, 1153–55 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021) (mem.); McDonald v. City of Chicago, 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring).

112 Zick, *supra* note 109, at 269–70.

113 Cramer, *supra* note 96, at 23.

treatment,[114] i.e., that the Second Amendment is being relegated to the "back of [the] constitutional bus."[115]

Whether the "gun control is racist" narrative will ever gain jurisprudential traction is unknown. What is for certain is the narrative is a principal argument before the Supreme Court in *New York State Rifle & Pistol Ass'n v. Bruen*. Therein, petitioners and accompanying amici—in the hopes of persuading the Court to adopt strict scrutiny—are constitutionally framing the history of armed carriage laws as being racist.[116] Yet the petitioners' and accompanying amici's constitutional framing is neither in moral nor historical earnest. For all the while petitioners and accompanying amici are framing armed carriage laws as being racist, they are also citing racist history to advance broad Second Amendment carry rights, including the very eighteenth-century Southern slave laws enacted to suppress slave revolts on days of worship.[117] And reliance on these racist laws to expand Second Amendment rights by gun rights advocates is not some mistaken one-off.[118] Time and time again,[119] despite having been repeatedly criticized

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114 Silvester v. Becerra, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting) (mem.); *see* N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525, 1527–44 (2020) (Alito, J., dissenting); Peruta v. California, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting) (mem.); Voisine v. United States, 136 S. Ct. 2272, 2292 (2016) (Thomas, J., dissenting).

115 John Yoo & James C. Phillips, *The Second(-Class) Amendment*, NAT'L REV. (Nov. 19, 2018, 6:30 AM), https://www.nationalreview.com/2018/11/supreme-court-second-amendment-rights (last visited Mar. 20, 2022). For some useful discussions on this point, see Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621 (2019); Darrell A.H. Miller, *The Second Amendment and Second-Class Rights*, HARV. L. REV. BLOG (Mar. 5, 2018), https://blog.harvardlawreview.org/the-second-amendment-and-second-class-rights [https://perma.cc/68TL-H6UZ].

116 *See* Brief for Petitioners at 9–13, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (July 13, 2021); Brief of Amici Curiae Professors of Second Amendment Law, Weld County, Colorado, Weld County Sheriff Steve Reams, Independence Institute, and Firearms Policy Foundation in Support of Petitioners at 27, *Bruen*, No. 20-843 (July 13, 2021); Brief for Amicus Curiae National African American Gun Ass'n, Inc. in Support of Petitioners at 4–18, *Bruen*, No. 20-843 (July 16, 2021).

117 *See* Brief of Amicus Curiae Patrick J. Charles in Support of Neither Party at 31–32, *Bruen*, No. 20-843 (July 19, 2021) (signaling to the Court the "racist" hypocrisy contained within petitioners' and accompanying amici's briefs); *see also supra* notes 36–39 and accompanying text (discussing Southern "bring guns to church" laws).

118 *See, e.g.*, Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121 (2015) (examining Southern Antebellum Second Amendment case law and its slavery roots).

119 Since the late 1980s, at the same time the "gun control is racist" narrative was gaining acceptance within gun rights advocacy circles, so too was the argument that Southern compulsory arms bearing laws—laws intended to help suppress and subdue slave revolts—were indicative that the Second Amendment protected broad carry rights. *See, e.g.*, KOPEL, THE TRUTH, *supra* note 97, at 6 (referencing laws requiring American colonists to bring firearms to

for invoking these racist laws in their writings and legal briefs,[120] gun rights advocates continue to hold them up as proof positive that the Founding Fathers enshrined the Second Amendment to protect broad public carrying rights.[121] Suffice it to say, it is not only the *how* "gun control is racist" that is worthy of criticism, but also the *why*—for both are merely a means to manipulate history in a way that expands Second Amendment rights and diminishes gun control.

II. A CRITICAL EXAMINATION OF HOW (AND THE ELUSIVE WHY) THE "SECOND AMENDMENT IS RACIST" NARRATIVE CAME TO BE

At the opposite end of the "racist history" spectrum is the "Second Amendment is racist" narrative. It too is largely derived from the same historical intersection between race and firearms spanning from American colonization through Reconstruction. What distinguishes the "Second Amendment is racist" narrative from its "gun control is racist" counterpart is that history is not framed in civil rights and racial equality terms.[122] Rather, the historical intersection between race and

church as indicative of broad Second Amendment rights); MALCOLM, TO KEEP AND BEAR ARMS, *supra* note 105, at 139 (citing a 1770 Georgia law for this effect); HALBROOK, *supra* note 101, at 150 (same); STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES 94 (1989) (same). The 1770 Georgia law that gun right advocates frequently cite was an update of a 1757 Georgia law. *See* statutes cited *supra* note 39. Over the years, the 1770 Georgia law has appeared frequently in amicus briefs submitted by gun rights advocates. *See, e.g.*, Brief of Amici Curiae Professors of Second Amendment Law, Firearms Policy Coalition, Firearms Policy Foundation, Cato Institute, Madison Society Foundation, California Gun Rights Foundation, Second Amendment Foundation, and Independence Institute in Support of Appellant and Reversal at 21, Young v. Hawaii, 992 F.3d 765 (9th Cir. 2021) (No. 12-17808); Brief of Amici Curiae Historians, Legal Scholars, and CRPA Foundation in Support of Appellees and in Support of Affirmance at 12–13, Wrenn v. District of Columbia, 808 F.3d 81 (D.C. Cir. 2015) (No. 15-7057). And in some instances, so too does an eighteenth-century South Carolina law that served the same purpose. *See, e.g.*, Brief of Amici Curiae Professors of Second Amendment Law, Firearms Policy Coalition, Firearms Policy Foundation, Cato Institute, Madison Society Foundation, California Gun Rights Foundation, Second Amendment Foundation, and Independence Institute in Support of Appellant and Reversal at 21, *Young*, 992 F.3d 765 (No. 12-17808).

120 *See, e.g.*, CHARLES, *supra* note 43, at 288, 530 n.118; Charles, *Historiographical Crisis*, *supra* note 104, at 1735 n.26.

121 *See, e.g.*, HALBROOK, *supra* note 97, at 135 (citing a 1740 South Carolina and 1770 Georgia law for this effect).

122 *See, e.g.*, STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876 (1998) (advancing a civil rights narrative for racial gun equality).

firearms is primarily viewed through the lens of white privilege and the level of armed oppression that was legally directed at people of color.[123]

When exactly the "Second Amendment is racist" narrative first entered the public discourse is difficult to gauge. What is known is the narrative first appeared within the legal discourse in 1998 in a law review article written by Carl T. Bogus. Titled *The Hidden History of the Second Amendment*, the article claimed that the Second Amendment was part of the larger constitutional bargain between the Northern and Southern delegates on maintaining the institution of slavery.[124] According to Bogus, given that the Constitution provided Congress broad authority over the militia, and the militia was the principal means through which the Southern states carried out slave patrols, many Southern delegates feared that Congress might use this authority to muster and assemble the militias out of their respective states, thus leaving the South virtually unprotected from slave insurrections.[125] It was primarily for this reason that James Madison, through the urging of George Mason and Patrick Henry, included the Second Amendment within the Bill of Rights. According to Bogus, this "slavery compromise" motivation for including the Second Amendment was well understood by Madison's congressional "colleagues in the House and Senate."[126]

What direct historical evidence did Bogus unearth to come to this astonishing conclusion? Nothing significant—certainly no historical "smoking gun." Rather, Bogus came to his slavery compromise conclusion with what he, himself, described as "circumstantial" evidence.[127] Indeed, throughout the article, Bogus includes a multitude

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123 *See, e.g.*, Lois Beckett, *"Dying of Whiteness": Why Racism Is at the Heart of America's Gun Inaction*, GUARDIAN (Aug. 9, 2019, 1:36 PM), https://www.theguardian.com/us-news/2019/aug/08/racism-gun-control-dying-of-whiteness [https://perma.cc/3Z2U-VF95]; Jonathan P. Baird, *My Turn: The Racist Roots of the Second Amendment*, CONCORD MONITOR (Apr. 21, 2019, 12:20 AM), https://www.concordmonitor.com/A-different-perspective-on-the-Second-Amendment-24863978 (last visited Mar. 20, 2022); Zenobia Jeffries Warfield, *The Racist Origin of the Second Amendment and the Rise of Black Gun Ownership*, YES! (Mar. 14, 2018), https://www.yesmagazine.org/social-justice/2018/03/13/the-racist-origin-of-the-second-amendment-and-the-rise-of-black-gun-ownership [https://perma.cc/GJ6K-QXQ6]; Patrick Blanchfield, *The Brutal Origins of Gun Rights*, NEW REPUBLIC (Dec. 11, 2017), https://newrepublic.com/article/146190/brutal-origins-gun-rights [https://perma.cc/B8CU-KU2Z].

124 *See generally* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998).

125 *Id.* at 335–44.

126 *Id.* at 371.

127 *Id.* at 372; *see also* Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, *in* THE SECOND AMENDMENT IN LAW AND HISTORY, *supra* note 105, at 228, 239.

of reliable historical sources. However, much like the "gun control is racist" narrative, Bogus's thesis breaks the bands of historical elasticity and is severely undercut by the weight of the full evidentiary record—a record that, when viewed in context, reveals that the Second Amendment was drafted, enacted, and ratified with the principal purpose of sustaining the republican concept of a well-regulated militia.[128] The evidentiary record is replete with examples of the Founders referring to a well-regulated militia as the "palladium" or "bulwark" of liberty—that is, a constitutional counterpoise to unlawful standing armies and one of several legal protections that balanced the Constitution in favor of the people.[129] The significance the Founders placed on the constitutional concept of a well-regulated militia is underscored by the fact that almost all of the Second Amendment's language (or some variation thereof) can be found regularly within English and American militia laws spanning from the seventeenth through the eighteenth century.[130]

That the Second Amendment was included within the Bill of Rights with the purpose of sustaining the constitutional concept of a well-regulated militia does not extinguish the fact that Southern slave states often utilized their militia rolls for the dual purpose of conducting slave patrols.[131] It does, however, seriously call into academic question the implicit conclusion from which the "Second Amendment is racist" narrative principally rests.

For if circumstantial evidence and historical conjecture is all that is necessary to declare the Second Amendment as inherently racist, then the same loose standard must apply to all the amendments within the Bill of Rights. And under this loose evidentiary standard, given the disparate, inequitable legal treatment afforded people of color both before and after the ratification of the Bill of Rights, there is a valid argument to be made that—except for the Third Amendment—the entire Bill of Rights is inherently racist. For whether one examines the First Amendment rights of free speech, association, and religion, the Fourth Amendment rights against unreasonable searches and seizures, the Fifth Amendment right of due process, the Sixth Amendment right to a fair jury trial, and so forth and so forth, the evidentiary record is

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128 *See, e.g.*, CHARLES, *supra* note 43, at 70–121; Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267 (2008); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, *in* THE SECOND AMENDMENT IN LAW AND HISTORY, *supra* note 105, at 74, 74–116; Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39 (1998).

129 Charles, *The Constitutional Significance of a "Well-Regulated Militia*,*" supra* note 104, at 71–80.

130 *See* CHARLES, INTENT AND INTERPRETATION, *supra* note 16, at 15–47.

131 *See supra* note 30 and accompanying text.

full of examples where people of color were mistreated and not afforded the same rights and protections as whites. Additionally, if circumstantial evidence and historical conjecture are indeed an acceptable academic standard, then those that subscribe to the "Second Amendment is racist" narrative must also concede to the validity of the "gun control is racist" narrative. But, academically speaking, this would set a very low scientific and evidentiary bar and it is largely why—that is, until recently—both the "Second Amendment is racist" and the "gun control is racist" narratives languished in academic obscurity.

The fact that neither "racist" history narratives were taken all that seriously in academia is not to say that they have coexisted equally within the public discourse. Without a doubt, the "gun control is racist" narrative has shown itself to be far more vocal, widespread, and politically prevalent than the "Second Amendment is racist" narrative, particularly among gun rights supporters.[132] Conversely, the "Second Amendment is racist" narrative—although it did appear periodically in the public discourse from 1998 to 2017, largely in editorials[133]—failed to gain any considerable political traction. The reason for this is threefold. First, since the early twentieth-century genesis of the gun rights movement, the political fortitude, messaging, and strategy of gun rights supporters far surpassed that of gun control supporters. While gun rights organizations have been a political constant for more than a century,[134] gun control organizations did not really enter the political fold until 1968, and since that time several gun control organizations have come and gone.[135] And not one of these gun control organizations have come close to replicating the political power and influence of their gun rights organization counterparts. Second, unlike the "gun control is racist" narrative, no organization or institution has ever actively promoted or funded the "Second Amendment is racist" narrative.[136] And there is certainly nothing even remotely comparable to the extremist message contained within the 1999 gun rights pamphlet titled *"Gun Control" Is Racist!: Facts that Racists Don't Want You to Know*.[137]

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132 *See supra* notes 92–97 and accompanying text.

133 *See* Charles, *supra* note 5; *see also* Thom Hartmann, *The Second Amendment Was Ratified to Preserve Slavery*, HISTORY NEWS NETWORK (Jan. 15, 2013), https://historynewsnetwork.org/article/150144 [https://perma.cc/FKM7-FJYU]; Maria Baldwin, Letter to the Editor, *2nd Amendment, Slavery*, KANSAS CITY STAR (Mo.), Aug. 3, 2016, at 19; Neil Nissenbaum, Opinion, *Second Amendment Had Ties to Slavery*, JDNEWS.COM (Feb. 1, 2013, 3:14 PM), https://www.jdnews.com/story/opinion/letters/2013/02/01/second-amendment-had-ties-to/34189609007 [https://perma.cc/9YKU-KKJA].

134 CHARLES, *supra* note 43, at 166–70.

135 *Id.* at 195, 197, 231, 268.

136 *Id.* at 289–90 (explaining why Second Amendment myths often gain traction).

137 *See* JEWS FOR THE PRESERVATION OF FIREARMS OWNERSHIP, *supra* note 99.

Third and lastly, there is nothing within the Second Amendment's text that implicates race, nor states or infers the militia shall be utilized for the suppression of slave rebellions.

However, beginning in 2018, a few historians gave the "Second Amendment is racist" narrative a veneer of historical legitimacy[138]—the most prominent being Emory University historian Carol Anderson,[139] who asserts that the Second Amendment needs to stop being treated as "hallowed" or "holy ground," but instead should be treated as an "indefensible" antecedent of slavery.[140] Not long after Anderson published her findings, media outlets ran eyepopping headlines and interview segments with titles such as *The Second Amendment Is Not About Guns—It's About Anti-Blackness, a New Book Argues*,[141] *Historian Uncovers the Racist Roots of the 2nd Amendment*,[142] and *White Supremacy as the Foundation of the Second Amendment*.[143]

What new historical evidence did Anderson uncover to resurrect the "Second Amendment is racist" narrative from the dustbin of history? Nothing, really. Virtually, Anderson uncovered the same "circumstantial" evidence that Bogus presented more than two decades ago. Yet, somehow, Anderson is confident that the Founders drafted, enacted, and ratified the Second Amendment with racist aforethought. As Anderson puts it in her book, *The Second: Race and Guns in a Fatally Unequal America*, the Second Amendment "not only elevated militias, whose primary and most important function was controlling the Black population, but ensured that the federal government's constitutional role would not interfere in the states' ability to use those forces when necessary."[144] In another section in Anderson's book, the Second

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138 *See* NOAH SHUSTERMAN, ARMED CITIZENS: THE ROAD FROM ANCIENT ROME TO THE SECOND AMENDMENT 189–90, 210–12 (2020); ALLAN J. LICHTMAN, REPEAL THE SECOND AMENDMENT: THE CASE FOR A SAFER AMERICA 46, 51–52 (2019); ROXANNE DUNBAR-ORTIZ, LOADED: A DISARMING HISTORY OF THE SECOND AMENDMENT 35–40 (2018); *see also* MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 38–39 (2014).

139 CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA 25–38 (2021).

140 *Historian Uncovers the Racist Roots of the 2nd Amendment*, NPR (June 2, 2021, 11:40 AM), https://www.npr.org/transcripts/1002107670 [https://perma.cc/E8FP-PGB2].

141 John Blake, *The Second Amendment Is Not About Guns—It's About Anti-Blackness, a New Book Argues*, CNN (May 30, 2021, 9:57 AM), https://www.cnn.com/2021/05/30/us/second-amendment-guns-anti-black-anderson-blake/index.html [https://perma.cc/9V26-JHSL].

142 Dave Davies, *Historian Uncovers the Racist Roots of the 2nd Amendment*, NPR (June 2, 2021, 11:40 AM), https://www.npr.org/2021/06/02/1002107670/historian-uncovers-the-racist-roots-of-the-2nd-amendment [https://perma.cc/X8PE-8FYV].

143 The Brian Lehrer Show, *White Supremacy as the Foundation of the Second Amendment*, WNYC (June 3, 2021), https://www.wnyc.org/story/white-supremacy-foundation-second-amendment [https://perma.cc/3ZRN-FDL6].

144 ANDERSON, *supra* note 139, at 37.

Amendment is viciously labeled a constitutional "bribe to the South using the control of Black people as the payoff."[145]

The fact that neither Anderson nor anyone else has uncovered anything new in the way of buttressing the "Second Amendment is racist" narrative is not to say it is not built upon some historical layer of truth. As noted earlier, the historical intersection between race and firearms is complex and multifaceted. There is not one narrative, but many. Consider that just as history provides examples where people of color have disparately suffered at the hands of armed violence, state and nonstate sponsored alike, it also provides examples where people of color successfully armed themselves to protect their lives, liberty, and property. Simply put, there is no one right answer when it comes to the history of race and firearms.

Yet despite there being room for many narratives on the history of race and firearms, for Anderson or any other writer to conclude that the "Second Amendment is racist" primarily because Southern slaveholding states often utilized their militia rolls for the dual purpose of appointing slave patrols, is a disservice to the long and well-documented history of the right to keep and bear arms—a history that sufficiently predates American colonization and the normalization of slave patrols.[146] For one, as Sally E. Hadden has demonstrated, and whom Anderson regularly cites in her book, the militia rolls were merely one of several means through which Southern slaveholding states and municipalities carried out slave patrols, as well as legally subjugated people of color.[147] The simple point to be made is that the institution of slavery pervaded much more than just Southern state militias' rolls. The institution was systemic in most facets of Southern society. Second, as outlined earlier in Part II, the significance the Founders placed on the constitutional concept of a well-regulated militia is thoroughly documented—a significance that ideologically had nothing to do with slave patrols.[148] Third and lastly, if indeed the Second Amendment was a "bribe to the South" as Anderson suggests, the contemporaneous congressional debates on federal-state authority over the militia severely undercuts it. For not once during three years of congressional debate (1790–1792) over the division of powers between the national and state militias was the institution of slavery or the

145 *Id.* at 38.

146 *See, e.g.*, Schwoerer, *To Hold and Bear Arms*, *supra* note 105, at 207–21.

147 HADDEN, *supra* note 31, at 2, 24–25, 33–34, 40–42, 72–79.

148 *See supra* text accompanying notes 123–130.

subject of slave patrols ever brought up.[149] The overall point to be made is that for Anderson, or anyone for that matter, to confidently arrive at the conclusion that the Second Amendment was a "bribe to the South" requires substantiated evidence that proves it, which remains utterly lacking in the case of the "Second Amendment is racist" narrative.[150]

This concludes the *how* the narrative came to be, as well as its surprising resurgence in both the public and academic discourse. The *why*, however, remains elusive. While some supporters of the "Second Amendment is racist" narrative appear to have politically partisan reasons for doing so,[151] there is no organized, well-funded movement behind it.[152] Moreover, unlike the "gun control is racist" narrative, no one appears to be using the "Second Amendment is racist" narrative as

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149 This author has examined these debates in detail several times. *See supra* note 16 and accompanying text. However, to be sure, in researching this Article, this author reexamined the primary sources for these congressional militia debates. Nothing of substance pertaining to either slavery or slave patrols was uncovered.

150 This author is not alone in criticizing the "Second Amendment is racist" narrative. *See, e.g.*, Randall Kennedy, *Was the Constitutional Right to Bear Arms Designed to Protect Slavery?*, N.Y. TIMES (May 28, 2021), https://www.nytimes.com/2021/05/28/books/review/the-second-carol-anderson.html [https://perma.cc/3SVK-YVJH] (reviewing ANDERSON, *supra* note 139); Jonathan Turley, *No, the Second Amendment Was Not Primarily About Suppressing African Americans*, JONATHAN TURLEY: RES IPSA LOQUITUR—THE THING ITSELF SPEAKS (June 12, 2021), https://jonathanturley.org/2021/06/12/not-the-second-amendment-was-not-primarily-about-suppressing-african-americans/comment-page-2 [https://perma.cc/KYB9-Y7VS]; BLOCHER & MILLER, *supra* note 44, at 35–36; Stephen P. Halbrook, Opinion, *The Second Amendment Had Nothing to Do with Slavery*, FOX NEWS (June 22, 2018, 12:57 PM), https://www.foxnews.com/opinion/the-second-amendment-had-nothing-to-do-with-slavery [https://perma.cc/FZ85-7J9Q]; Paul Finkelman, *2nd Amendment Passed to Protect Slavery? No!*, ROOT (Jan. 21, 2013, 12:25 AM), https://www.theroot.com/2nd-amendment-passed-to-protect-slavery-no-1790894965 [https://perma.cc/W6HH-TKCX].

151 *See, e.g.*, LICHTMAN, *supra* note 138, at 1–14; Nicolaus Mills, *How Slave Owners Dictated the Language of the 2nd Amendment*, DAILY BEAST (Aug. 18, 2019, 5:12 AM), https://www.thedailybeast.com/how-slave-owners-dictated-the-language-of-the-2nd-amendment [https://perma.cc/UKL4-RJR9].

152 On July 25, 2021, the American Civil Liberties Union (ACLU) tweeted: "Racism is foundational to the Second Amendment and its inclusion in the Bill of Rights. Learn more from experts Carol Anderson and Charles Howard Candler on this episode of the At Liberty podcast." @ACLU, TWITTER (July 25, 2021, 9:53 AM), https://twitter.com/aclu/status/1419294620417155074?lang=en (last visited Mar. 21, 2022). Both gun rights advocates and conservative media outlets criticized the ACLU for the tweet. *See, e.g.*, Charles Creitz, *Colion Noir Blasts ACLU for Declaring the Second Amendment "Racist": "Disgusting" to Use Racism*, FOX NEWS (July 30, 2021, 11:07 PM), https://www.foxnews.com/media/colion-noir-aclu-second-amendment-racist [https://perma.cc/XV9W-2TFH]; Christopher Tremoglie, *ACLU Tweet on Second Amendment and Bill of Rights Is Radical Leftist Propaganda*, WASH. EXAM'R (July 28, 2021, 3:00 PM), https://www.washingtonexaminer.com/opinion/aclu-tweet-on-second-amendment-and-bill-of-rights-is-radical-leftist-propaganda [https://perma.cc/3XSU-PFU6]. Yet despite the gun rights advocacy and conservative outcry, the tweet is rather clear in that the ACLU is merely advertising its podcast discussion with Carol Anderson and Charles Howard Candler.

a litigation strategy, i.e., trying to convince the courts to adopt a favorable form of judicial scrutiny that will constitutionally diminish the right to keep and bear arms. It seems that the best explanation for the resurgence of the "Second Amendment is racist" narrative is that the authors believe or intuitively want to believe it to be true. Certainly, it is every person's right to believe whatever they want. However, historical claims require substantiated evidence to support them, and the "Second Amendment is racist" narrative falls woefully short.

Again, there is certainly room for many narratives on the history of race and firearms, including how firearms-related violence has historically impacted communities of color disproportionately. However, despite the necessity of these narratives being thoroughly examined and explored, when any narrative is principally built on historical misinformation, it will ultimately end up doing more harm than good.

III. RACIST HISTORY AND THE SECOND AMENDMENT: THE HISTORY-IN-LAW CASE FOR A HIGH EVIDENTIARY BURDEN

To understand how historical misinformation can end up doing more societal harm than good, one needs to look no further than the historiography of the Civil War. There is widespread academic consensus that slavery was far and away the war's principal cause.[153] Indeed, few if any historians will dispute that when Southerners outlined their reasons for supporting the war, they often did so in states' rights terms, and certainly many Southerners supported the war for nonslavery-based reasons. However, the historical record is replete with examples that the principal states' right that Southerners were defending was state authority to maintain the institution of slavery without federal interference.[154] Yet not long after Reconstruction, Southerners began reframing the Civil War as a revolutionary, "lost

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153 *See, e.g.*, Ta-Nehisi Coates, *What This Cruel War Was Over*, ATLANTIC (June 22, 2015), https://www.theatlantic.com/politics/archive/2015/06/what-this-cruel-war-was-over/396482 [https://perma.cc/TD8K-GUHW]; Michael E. Woods, *What Twenty-First-Century Historians Have Said About the Causes of Disunion: A Civil War Sesquicentennial Review of the Recent Literature*, 99 J. AM. HIST. 415 (2012) (exploring how historians are in virtual agreement that slavery was the cause of the Civil War, but widely diverge on why slavery was so divisive).

154 *See, e.g.*, James Oliver Horton, *Confronting Slavery and Revealing the "Lost Cause,"* NAT'L PARK SERV. (Mar. 10, 2017), https://www.nps.gov/articles/confronting-slavery-and-revealing-the-lost-cause.htm [https://perma.cc/ND7V-SHCU].

cause" conflict over states' rights[155] and increasingly referred to it as the "war of Northern aggression."[156] And some even went so far as to defend slavery as a necessary and benevolent institution.[157] To this day, due largely to this Southern historical reframing of the causes of the Civil War, the United States has yet to fully heal and move on. Despite the progress of the 1960s civil rights movement, the societal repercussions of the Civil War's historical revisionism persist. The recent resurgence of white supremacist ideology, the debates over displaying the Confederate flag, and the debates over retaining Confederate monuments on government property are all cases in point.[158]

Similar, long-term societal harm will likely arise should either the "gun control is racist" narrative or "Second Amendment is racist" narrative ever be given the imprimatur of the courts. The narratives are simply opposite sides of the same ahistorical coin. This is not to say, of course, that there are not times and events where racism or discrimination reared its ugly head, whether it be in gun control or the Second Amendment context. It most assuredly has. Rather, what is concerning is the long-term harm that legitimizing either the "gun control is racist" or "Second Amendment is racist" narrative will have on the country. Both narratives are largely built on misinformation and serve to stoke political divisions only further, particularly as they

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155 *See, e.g.*, Caleb McDaniel, *The South Only Embraced States' Rights as It Lost Control of the Federal Government*, ATLANTIC (Nov. 1, 2017), https://www.theatlantic.com/politics/archive/2017/11/states-rights/544541 [https://perma.cc/B4ZF-6KGN].

156 *See, e.g.*, Gaines M. Foster, *What's Not in a Name: The Naming of the American Civil War*, 8 J. CIV. WAR ERA 416 (2018) (exploring the historiography of how the Civil War was historically framed).

157 *See, e.g.*, ULRICH BONNELL PHILLIPS, AMERICAN NEGRO SLAVERY: A SURVEY OF THE SUPPLY, EMPLOYMENT AND CONTROL OF NEGRO LABOR AS DETERMINED BY THE PLANTATION REGIME (1918).

158 *See, e.g.*, Erin Blakemore, *How the Confederate Battle Flag Became an Enduring Symbol of Racism*, NAT'L GEOGRAPHIC (Jan. 12, 2021), https://www.nationalgeographic.com/history/article/how-confederate-battle-flag-became-symbol-racism [https://perma.cc/B7SC-373B]; Keisha N. Blain, Perspective, *Destroying Confederate Monuments Isn't "Erasing" History. It's Learning from It.*, WASH. POST: POSTEVERYTHING (June 19, 2020), https://www.washingtonpost.com/outlook/2020/06/19/destroying-confederate-monuments-isnt-erasing-history-its-learning-it [https://perma.cc/DQR6-ZB5E]; Donna Ladd, *Pride and Prejudice? The Americans Who Fly the Confederate Flag*, GUARDIAN (Aug. 6, 2018, 5:00 PM), https://www.theguardian.com/us-news/2018/aug/06/pride-and-prejudice-the-americans-who-fly-the-confederate-flag [https://perma.cc/48MY-7ESH]; Douglas S. Massey, *The Big Picture: Confederate Revisionist History*, PUB. BOOKS (Nov. 8, 2017), https://www.publicbooks.org/big-picture-confederate-revisionist-history [https://perma.cc/RLG2-T7NT]; Frank Scaturro, *The Confederate Flag Debate Is Revising Our Revisionist History*, WASH. EXAM'R (July 14, 2015, 12:01 AM), https://www.washingtonexaminer.com/the-confederate-flag-debate-is-revising-our-revisionist-history [https://perma.cc/4GN6-VSZK].

pertain to the more-than-a-century-long political fight over gun rights and gun control.

As for history-in-law—the study of how the law has evolved in a particular area; what events and factors caused the law to evolve; and how, if at all, this history is important when adjudicating legal questions—legitimizing either the "gun control is racist" narrative or "Second Amendment is racist" narrative would have, at least in this author's opinion, dire legal and constitutional consequences. For one, given that both narratives are largely built on misinformation, by accepting either narrative as true the courts will end up facilitating a perpetual chain of ill-founded jurisprudence.[159] For one historical misstep begets another, and another, until myth consumes fact.[160] Additionally, should the courts accept either the "gun control is racist" narrative or the "Second Amendment is racist" narrative, even piecemeal, it sends the wrong message that circumstantial evidence and historical conjecture is jurisprudentially equal to substantiated evidence and historical context.

Certainly, there are cases in which circumstantial evidence is all that has survived historical posterity, and therefore what historians must rely upon when reconstructing the past. In such cases, the courts will have to choose whether such circumstantial evidence is indeed sufficient to rely upon. But in this author's opinion, it is best that the courts err on the side of caution and lean against relying on circumstantial historical evidence when adjudicating constitutional questions and controversies, particularly when alleged "racist history" is involved.[161] There are two reasons for this. First, if circumstantial evidence of racism is all that is required to call a law or body of law into constitutional question, it would signal to litigants that all that is necessary for them to advance a legal claim is to unearth some evidence of racism, whether that be a racist article, editorial, statement, or

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159 *See* Charles, *supra* note 5, at 32–34, 53.

160 *See* PATRICK J. CHARLES, HISTORICISM, ORIGINALISM AND THE CONSTITUTION: THE USE AND ABUSE OF THE PAST IN AMERICAN JURISPRUDENCE 116–18 (2014).

161 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1426–33 (2020) (Alito, J., dissenting). Both proponents of the "gun control is racist" narrative and the "Second Amendment is racist" narrative have primarily advanced unsubstantiated, circumstantial evidence to advance their claims of discrimination. *Compare* Patrick J. Charles, *The Black Panthers, NRA, Ronald Reagan, Armed Extremists, and the Second Amendment*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Apr. 8, 2020), https://sites.law.duke.edu/secondthoughts/2020/04/08/the-black-panthers-nra-ronald-reagan-armed-extremists-and-the-second-amendment [https://perma.cc/A8T3-DCCM] (showing how public views on law and armed carriage impacted the passage of the 1967 Mulford Act) and CHARLES, *supra* note 43, at 174–83 (providing a legislative history of the 1911 Sullivan Law), *with* ANDERSON, *supra* note 139, at 133–37 (ignoring this history and characterizing the 1967 Mulford Act as racist) and HALBROOK, *supra* note 97, at 301–06 (ignoring this history and characterizing the 1911 Sullivan Law as anti-immigrant).

allegation at any historical point in time, and decry the law or body of law as racist. Yet such arguments show too little and claim too much. Second, if the courts indeed accepted such a low standard and applied it evenly across the constitutional board, it would end up placing most, if not all, categories of law as having been tainted with racism. For following Reconstruction through the 1960s civil rights movement, particularly in the South, the historical intersection between racism and the law was systemic. Genuine novel additions to that historical record are useful and important; table-thumping based on strained extrapolations from the existing record are not.[162]

In closing, this author's criticism of the "gun control is racist" and "Second Amendment is racist" narratives should not be interpreted as suggesting that racist or discriminatory aforethought is never relevant in adjudicating constitutional cases and controversies. To the contrary, if it can be shown that a particular law or body of law was adopted with racist or discriminatory aforethought, then said law or body of law should be adjudicated accordingly. But the evidentiary burden in such cases should be *high*—that is, with concrete and substantiated evidence, not evidence that is circumstantial, loosely connected, and principally based on historical conjecture.

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162 *See, e.g.*, Justin Aimonetti & Christian Talley, Essay, *Race,* Ramos*, and the Second Amendment Standard of Review*, 107 VA. L. REV. ONLINE 193 (2021) (relying solely on racist articles, editorials, and statements made by post-Reconstruction Southerners concerning the carrying of concealed weapons to call the constitutionality of all gun control into question on racist grounds).