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The Trap Chronicles, Vol. 3, Felons & Firearms

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THE TRAP CHRONICLES, VOL. 3: FELONS & FIREARMS

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If your life was in jeopardy everyday, is you tellin' me you wouldn't need weaponry, just because of your felonies?[1]

* Professor of Law, Indiana University Robert H. McKinney School of Law. This volume of the Trap Chronicles is the third and final installment in a planned series of works concerning the War on Drugs' impact on the rights and freedoms of felons. The first volume is Lahny Silva, *The Trap Chronicles, Vol. 1: How U.S. Housing Policy Impairs Criminal Justice Reform*, 80 MD. L. REV. 565 (2021). The second volume is Lahny Silva, *The Trap Chronicles, Vol. 2: A Call to Reconsider "Risk" in Federal Supervised Release*, 82 MD. L. REV. 530 (2023). Thank you, Mum, for struggling with me through this paper. A special thanks to Professors Florence Roisman, George Wright, Mike Pitts, John Hill, and Eric Miller for reviewing drafts of this Article. And thank you to Ridley, Jennifer, and Porter for always riding with me.

1. T.I., *Ready for Whatever*, *on* PAPER TRAIL (2008).

INTRODUCTION

Felons and firearms sit at the intersection of grave issues that lie deep in the belly of American history. The two topics crisscross in dark historical eras where the democratic ideals of equality, freedom, and individual rights have been suffocated by violence, white supremacy, and a carceral state. Here, the American theoretical paradigm gets ensnared in racial hypocrisy concealed by the colorblind creed.

Since the early twentieth century, legislatures, courts, and the American public have sanctioned the exclusion of felons from the right to bear and carry firearms. With the recent Supreme Court Second Amendment gun cases,[2] the subsequent Circuit Court split,[3] and the barrage of challenges brought in the

2. District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742 (2010); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022); United States v. Rahimi, 144 S. Ct. 1889 (2024).

3. Currently, the Sixth, Ninth, Tenth, and Eleventh Circuits suggest the statute is always constitutional as applied to felons as a class. Stimmel v. Sessions, 879 F. 3d 198, 210 (6th Cir. 2018); United States v. Rozier, 598 F. 3d 768, 771 (11th Cir. 2010); United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010); *In re* U.S. 578 F.3d 1195, 1200 (10th Cir. 2009). The First, Fifth,

federal district courts,[4] the constitutionality of felon firearm bans is being seriously called into question.[5] The perfect legal storm is brewing that could force the country to face the excruciating historical truths and broken promises embedded in the evolution of not only gun control, but also of the American version of liberty and fairness.[6]

Starting with *District of Columbia v. Heller*[7] in 2008, followed by *McDonald v. City of Chicago*[8] in 2010 and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*[9] in 2022, the Supreme Court vastly expanded individual protections provided by the Second Amendment. The Court determined that "the people" have a fundamental, individual right to bear arms for self-defense in the home and in public.[10] In doing so, the Court rejected means-

Seventh, Fourth, Eighth, Eleventh and D.C. Circuits alluded to the possibility for as-applied challenges. United States v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011); United States v. Pruess, 703 F.3d 242, 247 (4th Cir. 2012); *Rahimi*, 61 F.4th 443, 451–53 (5th Cir. 2023), *rev'd,* 114 S. Ct. 1889; Atkinson v. Garland, 70 F.4th 1018, 1038 (7th Circ., 2023); United States v. Williams, 616 F.3d 685, 693 (7th Cir. 2010); Medina v. Whitaker, 913. F.3d 152, 160 (D.C. Cir. 2019); United States v. Jackson, 69 F.4th 495 (8th Cir. 2023), *vacated*, 85 F.4th 468 (8th Cir. 2024); United States v. Woosely 759 F.3d 905, 909 (8th Cir. 2014); United States v. Jimenez-Shilon, 34 F.4th 1042, 1043–46 (11th Cir. 2022). The Third Circuit is the only federal appellate court that upheld an as-applied challenge. Binderup v. Attorney General, 836 F.3d 336, 348–49, 385 (3d Cir. 2016); Range v. Attorney General, 53 F.4th 262 (3d. Cir. 2022).

4. United States v. Hawkes, No. 22-111-GBW, 2023 WL 8433758, at *4–5 (D. Del. Dec. 5, 2023); United States v. Schnur, 684 F. Supp. 3d 522, 527–30 (S.D. Miss. 2023); United States v. Rowson, 652 F. Supp. 3d 436, 462–64 (S.D.N.Y. 2023); United States v. Hicks, 649 F. Supp. 3d 357, 361–62 (W.D. Tex. 2023) ; United States v. Kays., 624 F. Supp. 3d 1262, 1264–66 (W.D. Okla. 2022); United States v. Holden, 683 F. Supp. 3d 931, 936–37, (N.D. Ind. 2022); United States v. Bivens, No. 1:22-cr-23, 2023 WL 8101846, at *3–4 (E.D. Tenn. Nov. 21, 2023); United States v. Capozzoli, No. 22-20005, 2023 WL 709379, *2–5 (E.D. Mich. Oct. 26, 2023); United States v. Hughes, No. 2:22-cr-00640-DCN-1, 2023 WL 4205226 (D.S.C. June 27, 2023). *See generally* United States v. Fulcar, No. 23-cr-10053-DJC, 2023 WL 7116738 (D. Mass. Oct. 27, 2023); United States v. Goins, 647 F. Supp.3d 538 (E.D. Ky. Dec. 21, 2022); United States v. Sternquist, 692 F. Supp.3d 19 (E.D.N.Y. Sept. 12, 2023); United States v. Quailes, 688 F. Supp. 3d 184 (M.D. Pa. 2023); United States v. Lane, No. 5:22-cr-132, 2023 WL 5614798 (D. Vt. Aug. 24, 2023); United States v. Zelaya Hernandez, 678 F. Supp. 3d 850 (N.D. Tex. 2023); United States v. Melendrez-Machado, 677 F. Supp. 623 (W.D. Tex. 2023); United States v. Le, No. 4:23-cr-00014-SHL-HCA, 2023 WL 3016297 (S.D. Iowa, April 11, 2023); Campiti v. Garland, 649 F. Supp. 3d 1 (D. Conn. 2023); United States v. Young, 639 F. Supp. 3d 515 (W.D. Pa. 2022); United States v. Coombes, 629 F. Supp. 3d 1149 (N.D. Okla. 2022).

5. *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742 (2010); N.Y. State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

6. *See* Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203 (2021).

7. 554 U.S. 570 (2008).

8. 561 U.S. 742 (2010).

9. 142 S. Ct. 2111 (2022).

10. *Heller*, 554 U.S. at 685 (holding that the Second Amendment fundamentally protects an individual's right to possess a firearm for self-defense in the home); *McDonald*, 561 U.S. at 749–50 (incorporating *Heller*'s holding to the states); *Bruen*, 142 S. Ct. at 2122 (expanding the right to possess a firearm outside the home).

end scrutiny and created a new test in *Bruen* that focused squarely on constitutional text and regulatory history.[11] The most recent case, *United States v. Rahimi*,[12] decided in 2024, attempted to clarify the historical component of the new constitutional test.[13] The *Rahimi* Court loosened the interpretative rigidity of the *Bruen* test but also cabined the scope of gun freedoms pursuant to the newly-minted Second Amendment individual right to bear arms.[14]

Felon firearm bans were often referenced in dicta throughout the cases and as an example of a presumptively constitutional firearm regulation.[15] The Court failed, however, to offer any further analysis or guidance on how and why these prohibitions were considered so.[16] Thus, the federal courts that are currently confronting 18 U.S.C. § 922(g)(1) ("Section 922(g)(1)") challenges, the federal statute prohibiting felon possession of firearms, are left struggling to determine whether the law is constitutional (facially and as applied), and they are split.[17]

11. *Bruen*, 142 S. Ct. at 2128–30.

12. 144 S. Ct. 1889 (2024).

13. *Id.* at 1897–98.

14. While the Court greatly expanded the scope of the Second Amendment right to bear arms in *Heller* (announcing a fundamental right to bear arms for self-defense in the home), *McDonald* (incorporating the right to the States), and *Bruen* (extending the right to bear arms for self-defense to apply outside of the home), it upheld, for the first time since the announcement of a fundamental right to firearm possession, a firearm restriction in the *Rahimi* case. *Rahimi*, 144 S. Ct. 1898.

15. *Heller*, 554 U.S. at 626–27 ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."). *See also McDonald*, 561 U.S. at 786; *Rahimi*, 144 S. Ct. at 1902.

16. *See generally Heller*, 554 U.S. 579 (2008); *McDonald*, 561 U.S. 742 (2010); *Bruen*, 142 S. Ct. 2111 (2022).

17. For example, a number of courts have found that felons do not constitute "the people." *See generally* United States v. Jackson, 69 F4th 495 (8th Cir. 2023), *vacated*, 85 F.4th 468 (8th Cir. 2023); United States v. Bivens, No. 1:22-cr-23, 2023 WL 8101846, at *3–4 (E.D. Tenn. Nov. 21, 2023); United States v. Capozzoli, No. 22-20005, 2023 WL 709379 (E.D. Mich. Oct. 26, 2023); United States v. Hughes, No. 2:22-cr-00640-DCN-1, 2023 WL 4205226 (D.S.C. June 27, 2023); Medina v. Whitaker, 913 F.3d 152 (D.C. Cir. 2019); United States v. Fulcar, No. 23-cr-10053-DJC, 2023 WL 7116738 (D. Mass. Oct. 27, 2023); United States v. Goins, 647 F. Supp. 3d 538 (E.D. Ky. Dec. 21, 2022). However, several courts decided that felons do constitute "the people." *See* United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), *rev'd,* 114 S. Ct. 1889; Range v. Attorney General, 56 F.4th 992 (3d. Cir. 2023); United States v. Jimenez-Shilon, 34 F.4th 1042 (11th Cir. 2022); United States v. Sternquist, 692 F. Supp. 3d 19 (E.D.N.Y. Sept. 12, 2023); United States v. Quailes, 688 F. Supp. 3d 184 (M.D. Pa. 2023); United States v. Lane, No. 22-cr-132, 2023 WL 5614798 (D. Vt. Aug. 24, 2023); United States v. Schnur, 684 F. Supp. 3d 522 (S.D. Miss. 2023); United States v. Zelaya Hernandez, 678 F. Supp. 3d 850 (N.D. Tex. 2023); United States v. Melendrez-Machado, 677 F. Supp. 3d 623 (W.D. Tex. 2023); United States v. Le, No. 4:23-cr-00014-SHL-HCA, 2023 WL 3016297 (S.D. Iowa April 11, 2023); Campiti v. Garland, 649 F. Supp.3d 1 (D. Conn. 2023); United States v. Young, 639 F. Supp. 3d 515 (W.D. Pa. 2022); United States v. Coombes, 629 F. Supp.3d 1149 (N.D. Okla. 2022).

This Article contends that felons *do* have a right to bear arms under the recently announced individual rights interpretation of the Second Amendment. Felons constitute "the people" enumerated in the text of the Second Amendment. However, the justifications for Section 922(g)(1) and burdens imposed by the statute are unconstitutional, doing harm to the principle of equality.

Per *Bruen*, unless the government can show a historical analogue with a comparable burden and justification, a restrictive regulation will be deemed unconstitutional.[18] Without a relevantly similar historical felon exclusion, this Article shows that the only comparable historical analogues to Section 922(g)(1) are found in firearm bans on Blacks during the American colonial, Founding, and early Reconstruction eras. These exclusions would be judged unconstitutional today. As such, either the *Bruen* test does not work or, after a true application of *Bruen*, Section 922(g)(1) should be deemed unconstitutional, as the historical analogues to the contemporary statute are firmly linked to white fear of armed Blacks and the preservation of white supremacy.

The justifications for both Section 922(g)(1) and historical Black firearm bans are similar, if not the same: white fear of Blacks, especially Blacks with guns. Moreover, no other American gun control regulation has ever imposed a lifetime ban on the right to bear arms on a group (without an exception or legal mechanism to regain it) other than these historical racial exclusions and Section 922(g)(1).[19] Because Section 922(g)(1) and historical Black firearm exclusions that would be deemed unlawful today are relevantly similar, Section 922(g)(1) should be struck down as a violation of the Second Amendment.

For many courts, the absence of clear textual language excluding felons is not enough to strike down Section 922(g)(1), as courts have found ways and means to justify the statute. However, the racial motivations underlying Section 922(g)(1) are unconstitutional and its impact on Black America is egregiously disproportionate. With the removal of means-end scrutiny from Second Amendment challenges, this Article contends that the Court is no longer constrained by the jurisprudential issues plaguing contemporary equal protection analysis: problems that distort the equality principle and undo the original intention of the Reconstruction Amendments—racial equality. The justifications and burdens imposed by the Section 922(g)(1) are very similar

18. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2118 (2022) ("To determine whether a firearm regulation is consistent with the Second Amendment, *Heller* and *McDonald* point toward at least two relevant metrics: first, whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified.").

19. United States v. Prince, 700 F. Supp. 3d 663, 671–73 (N.D. Ill. 2023).

to the history and tradition of the prejudiced America of the past: A prejudice that the country engaged in Civil War to remedy. This paper demonstrates as much, urging lower courts to consider the racial history used in *Bruen* to assess the constitutionality of Section 922(g)(1).

To comport with the *Bruen* test, the Article emphasizes the need to remove the colorblind lens from the Second Amendment constitutional analysis. The text of Section 922(g)(1) is facially race neutral; a "felon" is prohibited from possessing a firearm, not a racial group. In evaluating Section 922(g)(1) challenges, lower courts are not obliged to discuss the racial history of gun control, rarely if ever exploring it, despite the Court's in-depth discussions of Black history in the modern Second Amendment jurisprudence.[20] Colorblindness prevents a true evaluation of the history of gun control in America and precludes a fair assessment of the justifications and burdens of both contemporary and historical firearm regulation. Furthermore, colorblindness provides cover for "coded" language used not only by politicians to message their constituents, but also used in the actual text of legislation and policy.

This Article shows that racial coding throughout the twentieth century's drug wars firmly linked Blacks to drug crimes and transformed the word "felon" into a synonym for Black. Drug felons were heavily targeted for disarmament during the 1980s War on Drugs, which resulted in the crippling of the Black male population's ability to defend themselves despite the fact that this disproportionately lives in violent neighborhoods. It also culminated in an excessive and imbalanced burden on the fundamental and individual right to bear arms experienced by a particular segment of American society: Black America.

Part I of this Article begins with an overview of the law; both Section 922(g)(1) and the modern Second Amendment jurisprudence.[21] This section first provides a summary of Section 922(g)(1) beginning with the Federal Firearms Act of 1938 and through the Anti-Drug Abuse Act of 1986. It also briefly explores the tenets of Section 922(g)(1) liability and the general criticism of felon firearm bans as status offenses. In addition, Part I examines the modern Second Amendment jurisprudence. It provides a doctrinal review of the four Supreme Court gun cases—*Heller*, *McDonald*, *Bruen*, and *Rahimi* (hereinafter referred to as "the gun cases")—that have created the Second Amendment of today.

20. District of Columbia v. Heller, 554 U.S. 570, 611–616 (2008) (discussing pre- and post-Civil War statutes excluding Blacks from possessing arms); McDonald v. City of Chicago, 561 U.S. 742, 771, 776 (2010); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2150–52 (2022).

21. *See infra* Part I.

Part II discusses colorblindness as a mode of constitutional interpretation and offers a critique of its effectiveness in supporting racial equality.[22] This section also reviews the gun cases to show the ways in which the Court used Black history to find an individual right to bear arms and then incorporate it to the States. To complete the appraisal of colorblindness, this part also examines racial coding as an American practice and a contemporary technique to bypass constitutional scrutiny of group exclusions. This tactic was very much employed in the architecture of modern American gun control and during the War on Drugs.

Part III analyzes a Section 922(g)(1) challenge pursuant to the *Bruen* test.[23] While this part provides a textual evaluation in accord with Step One, the focus of this article is on Step Two, which requires the production of a relevantly similar historical analogue to Section 922(g)(1). *Bruen* directs that the justification and burdens of both the challenged regulation and comparable historical law be contrasted. This section does just this, by decoding of Section 922(g)(1) and confronting America's ugly past.

Finally, Part IV concludes with a recommendation of remedies: one temporary and one long-term.[24] The temporary solution is to providing funding for federal felon restoration of rights procedures pursuant to 18 U.S.C. § 925(c) ("Section 925(c)").[25] The second recommendation is to put the issue of felon firearm exclusions up for a constitutional amendment. That is the only way to be sure that such disarmament is desired by "the people."

I. THE LAW

Prior to the Second Amendment gun cases, the laws involved at the crossroads of felons and firearms appeared simple and clear; Section 922(g)(1) prohibited felons from possessing a firearm and the Second Amendment allowed it. After the gun cases, the law is not so plain. The Second Amendment jurisprudential revolution changed the rules regarding gun control and reformulated the constitutional test, making a once forgotten history dispositive and the justifications and burdens of contemporary rules relevant. To fully grasp the contours of the issue of whether felons have a constitutional right to bear arms, one must understand both the statutory progeny and subsequent expansion of Section 922(g)(1) as well as the Second Amendment gun cases of the twenty-first century. This section provides an overview of both.

22. *See infra* Part II.
23. *See infra* Part III.
24. *See infra* Part IV.
25. 18. U.S.C. § 925(c).

A. Section 922(g)(1)

Felon firearm prohibitions did not exist prior to World War I.[26] The federal government did not have a felon ban, and states avoided prohibiting possession.[27] In the first 100 years after the adoption of the Second Amendment, cases concerned restrictions on publicly carrying firearms as opposed to possessing.[28] By mid-1925, no states prohibited felons from possession of long guns and only six states prohibited possession of concealable weapons by felons.[29] Licensing gun dealers, mandatory background checks, and waiting periods for gun purchases first arose in the twentieth century.[30] It was not until the Federal Firearms Act of 1938 that the national government enacted gun control for a class of felons, those convicted of a "crime of violence."[31] It was fifty years later, with the Gun Control Act of 1968, that a federal law was enacted that prohibited simple gun possession by any felon, violent or non-violent.[32]

1. Federal Firearms Act

The precursor to Section 922(g)(1) was outlined in the first national felon ban: the Federal Firearms Act in 1938.[33] The Act limited the sale of ordinary guns, but it was primarily aimed at those selling and shipping firearms across state lines or from abroad.[34] Convicted *violent* felons—people convicted of a "crime of violence"—were prohibited from shipping, transporting, and receiving firearms.[35] The phrase "crime of violence" was

26. C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, HARV. J.L. & PUB. POL'Y, 695, 708 (2021); Zach Sherwood, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in a Post-*Heller *World*, 70 DUKE L.J. 1429, 1456 n.186 (2021).

27. Marshall, *supra* note 26, at 707–08.

28. *Id*. at 710.

29. *Id*. at 708 (citing the HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 862–63 (1925)).

30. Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1563 (2009); *see also* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 929 (2001).

31. Federal Firearms Act, Pub. L. No. 75-785, § 1 (6), 52 Stat. 1250, 1250 (repealed 1968); Sherwood, *supra* note 26, at 1456.

32. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202, 82 Stat. 197, 236; Sherwood, *supra* note 26, at 1456.

33. Federal Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250 (repealed 1968); HARRY L. WILSON, GUN POLITICS IN AMERICA: HISTORICAL AND MODERN DOCUMENTS IN CONTEXT 94 (2016).

34. Federal Firearms Act § 2, 1251; WILSON, *supra* note 33, at 94.

35. Federal Firearms Act § 2(f), 1251; WILSON, *supra* note 33; Conrad Kahn, *Challenging the Federal Prohibition on Gun Possession by Nonviolent Felons*, 55 TEX. L. REV. 113, 116 (2013). Discovery of a firearm or ammunition in the possession of a violent felon was considered

narrowly defined by a specifically enumerated list of offenses without a residual clause.[36] The crimes included: murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.[37]

The penalty for a violation of the Act was not more than five years imprisonment and no more than a $2,000 fine or both.[38] If a violator was a licensed gun dealer, license revocation was also a penalty.[39]

2. 1968 Gun Control Act

Thirty years later, the 1968 Gun Control Act (hereinafter "GCA") expanded the reach of the felon exclusion, codifying Section 922(g)(1) and enacting a more general ban on felons. The prior focus on prohibiting violent felons from possessing a firearm in the Federal Firearms Act of 1938 was abandoned in the GCA.[40] "Crime of violence" was modified to "crime punishable by imprisonment for a term exceeding one year,"[41] broadening the category of offenses to now include violent and *most* nonviolent offenses.[42] The GCA cast blanket prohibitions on drug addicts and most felons from purchasing, transporting, or receiving firearms[43] but excepted several white-collar felonies.[44] In addition, the penalty for a violation was

presumptive evidence that the firearm was indeed shipped, transported, and/or received in violation of the statute. Federal Firearms Act § 2(f), 1251.

36. Federal Firearms Act § 1(6), 1250.

37. *Id.*

38. *Id.* § 5, 1252.

39. *Id.* § 3(c), 1251.

40. *Id.*; Kahn, *supra* note 35.

41. Federal Firearms Act § 1(6), 1250; Gun Control Act of 1968, Pub. L. No. 90-618, § 921(a)(14), 82 Stat. 1213, 1216.

42. Federal Firearms Act § 1(6), 1250; Gun Control Act § 921(a)(2), 1216.

43. Gun Control Act § 922(d)(3), 1220–21; 18 U.S.C. § 922(g).

> It shall be unlawful for any person—(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . (3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug . . . to ship or transport any firearm or ammunition in interstate or foreign commerce.

Id.; *see also* Gun Control Act § 922(d), 1220; 18 U.S.C. § 922(d):

> It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . (3) is an unlawful user of or addicted to marihuana or any depressant or stimulant drug . . . .

18 U.S.C. § 922(d).

44. Gun Control Act § 922(a)(20), 1216; 18. U.S.C. § 921(a)(20) ("The term 'crime punishable by imprisonment for a term exceeding one year' shall not include (A) any Federal or State offenses

increased to a minimum term of one year and maximum term of ten years' imprisonment.[45]

Congress further enacted 18 U.S.C. § 924(c) ("Section 924"), enlarging the federal government's criminal jurisdiction regarding firearms.[46] Section 922(g)(1) can be charged alongside Section 924(c) in the same indictment. The statute authorized a mandatory minimum term of imprisonment of one year and up to ten years for the use or carrying of a firearm during "any felony" that could be prosecuted in the federal courts.[47] In the case of a second offense, the mandatory minimum sentence of imprisonment increased to five years, with a statutory maximum of twenty-five years.[48] Finally, Section 924(c) was directed as a mandatory and consecutive sentence of imprisonment imposed for a base offense (i.e. possession with intent distribute fifty grams or more cocaine base).[49]

3. War on Drugs

Guns and drugs were definitively linked during the War on Drugs in the 1980s and 1990s. Drug war legislation including the Comprehensive Crime Control Act of 1984 (hereinafter "Crime Control Act") and Anti-Drug Abuse Acts of 1986 and 1988 built-in stringent gun control measures and harsh sentencing enhancements.[50] As part of the Crime Control Act, the Armed Career Criminal Act ("ACCA") was enacted, amending the 1968 Section 922(g)(1) prison exposure from the ten-year maximum to a mandatory minimum of fifteen years in prison and up to life, depending on the criminal history of the defendant.[51]

The Crime Control Act also amended the "any felony" language Section 924(c) in two ways. First it amended "any felony" to "any crime of violence."[52] This phrase was again later amended to include "drug trafficking crime."[53] The change was meant to increase the penalties for the use of

pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate . . . .").

45. Gun Control Act § 924(c)(2), 1224.

46. *Id.* § 101, 1213–14.

47. *Id.* § 924(c)(2), 1224.

48. *Id.*

49. 114 CONG. REC. 22231 (1968).

50. Comprehensive Crime Control Act of 1984, Public Law 98-473, 98 Stat. 1837 (1984); John J. Cleary & Alan Ellis, *An Overview of the Comprehensive Crime Control Act of 1984*, 31 PRAC. LAW. 31, 31–32 (1985).

51. See Armed Career Criminal Act, Pub. L. No. 98-473, ch. XVII, 98 Stat. 2185 (1984); 18 U.S.C. § 924(e).

52. Comprehensive Crime Control Act § 1005(a), 2138–39 (codified at 18 U.S.C. § 924(c)(1)–(2) (1984), amended by 18 U.S.C. § 924 (c)(1) (1994)).

53. Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 457; 18 U.S.C. § 924(c)(1) (1994).

firearms during a drug trafficking offense.[54] Secondly, the legislation authorized the practice of stacking Section 924(c) offenses.[55] "Stacking" is the prosecutorial practice of charging multiple offenses with their accompanying mandatory minimums in one indictment.[56] The amendment authorized application of the statute to crimes that carried a separate sentencing enhancement for the use of a firearm.[57] The potential exposure was again life imprisonment.[58] Finally, Section 924(c) was directed as a mandatory and consecutive five-year sentence of imprisonment for each instance of the offense.[59]

The Anti-Drug Abuse Act of 1986[60] once again amended the ACCA to include two sentence enhancement categories: "violent felon[ies]" and "serious drug offenses."[61] Defendants with three or more prior "serious drug offense" or "violent felony" offenses were and continue to be subjected to a minimum mandatory term of imprisonment of fifteen years and up to an implied maximum of life.[62] The legislation did not include a time limitation on the predicate convictions, except that convictions occur prior to the instant offense.[63] Later, the ACCA was again modified as part of the Anti-Drug Abuse Act of 1988.[64] The Act was revised to include juvenile conduct "involving the use or carrying of a firearm, knife, or destructive device that

54. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6462, 102 Stat. 4181, 4374.

55. Comprehensive Crime Control Act § 1005(a), 2138–39 (codified at 18 U.S.C. § 924(c)).

56. U.S. SENT'G COMM'N, 2011 REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 359 (2011).

57. Comprehensive Crime Control Act § 1005(a), 2138–39 (codified at 18 U.S.C. § 924(e)(2)(B)).

58. Anti-Drug Abuse Act § 6452, 4371.

59. 114 CONG. REC. 22231 (1968).

60. Pub. L. No. 99-570, 100 Stat. 3207 (1986); 21 U.S.C. § 841(b) (1986); Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2533 (2010).

61. Career Criminals Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, 3207–39.

62. *See* Armed Career Criminal Act, Pub. L. No. 98-473, ch. XVII, 98 Stat. 2185 (1984); 18 U.S.C. § 924(e). The term 'serious drug offense' refers to offenses with a statutory maximum term of imprisonment of at least ten years that are (1) federal offenses under the Controlled Substances Act, the Controlled Substances Import and Export Act, or Maritime Drug Law Enforcement, or (2) state offenses involving the manufacturing distributing or possessing with intent to manufacture or distribute a controlled substance as defined in the Controlled Substances Act. 18 U.S.C. § 924(e)(2)(A). The "term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threated use of physical force against the person of another" or "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. § 924(e)(2)(B).

63. 18 U.S.C. § 922(g).

64. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified and amended in scattered sections in U.S. Code); DEBORAH J. VAGINS & JESSELYN MCCURDY, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW, AM. C.L. UNION 11 (2006), https://www.aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf.

would be punishable by imprisonment for such term if committed by an adult."[65]

4. Today

Today, Section 922(g)(1) prohibits anyone convicted of a crime punishable by imprisonment for more than one year, violent and nonviolent offenders alike, from possessing a firearm.[66] However, there are non-violent white-collar crimes excepted from the definition of a predicate crime in 18 U.S.C. § 921(a)(20) including "antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices."[67] All other offenses, including non-violent drug offenses, qualify as a sufficient predicate.

Per 18 U.S.C. § 921(a)(20), a criminal conviction is classified by the law of the jurisdiction where the offense occurred.[68] Section 921(a)(20) further directs that convictions that are expunged, set aside, or pardoned generally will not be treated as convictions for purpose of the statute.[69] The same is true for individuals whose civil rights are restored.[70]

To establish a Section 922(g)(1) charge, the government must prove that: (1) the defendant sustained a previous conviction for a crime punishable by a term of imprisonment exceeding one year, and (2) he knowingly possessed a firearm, and (3) he knew that he belonged to a category of persons prohibited from possessing a firearm, and (4) the firearm was in or

65. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6451, 102 Stat. 4181, 4371.

66. Sherwood, *supra* note 26, at 1451; Kanter v. Barr, 919 F. 3d 437, 468 (7th Cir. 2019) (Barrett, J., dissenting).

67. 18 U.S.C. § 921(a)(20).

> The term 'crime punishable by imprisonment for a term exceeding one year' does not include—(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

Id.; *see also* E. ANN CARSON, PRISONERS IN 2021—STATISTICAL TABLES, 35, NCJ 305125, Table 19, n.j (2022) ("Includes regulatory offenses; tax law violations; bribery; perjury, contempt, and intimidation in U.S. courts; national defense offenses; escape; racketeering and extortion; gambling; sexual offenses, excluding sexual abuse; offenses involving liquor, traffic, wildlife, and environmental matters; and all other public order offenses.").

68. 18 U.S.C. § 921(a)(20).

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Id.

69. *Id.*

70. *Id.*

affected interstate commerce.[71] A violation of Section 922(g)(1) exposes offenders to ten years' imprisonment and may trigger substantial sentence enhancements.[72] Conviction under Section 922(g)(1) also exposes recidivists to a possible life sentence without ever harming anyone (or anything) if the offender is designated an Armed Career Criminal and has three "serious drug offense[s]."[73]

Section 922(g)(1) functionally punishes any type of gun possession by a felon, regardless of whether a crime occurred or is probable.[74] Though possession of a firearm does not harm anyone, such statutes function "as possession *qua* possession, an offense in and of itself."[75] The nexus focuses squarely on the firearm itself.[76]

Like vagrancy laws, possession statutes are an easy port of entry into the criminal system.[77] They operate outside the purview of constitutional protections and have the advantage of being a pliable and expedient tool for police and prosecutors.[78] Possession offenses are easy to discover, simple to prove, exclude the ability to use several defenses, and can lead to incredibly long prison sentences.[79] Because they are not conduct offenses, they appear and are treated as impervious to challenges.[80]

Professor Markus Dubber argues that felon-in-possession of illegal contraband are the archetypal status offense.[81] As he explained:

> To prohibit not merely possession, but possession by a certain type of person, is to create a double status offense. To *be* in possession is a status. And to *be* a felon, or alien, or youth, or insane person, in possession is another status. So, a felon in possession is punished for the status of being a "felon" and of being "in possession." This makes "Felon in Possession of a Firearm . . . the prototypical status offense . . . ."[82]

71. Rehaif v. United States, 139 S. Ct. 2191, 2200 (2019).

72. *See* ASSISTANT ATT'Y GEN. ROBERT MUELLER, III, DEP'T MEMORANDUM – PROSECUTIONS UNDER 18 U.S.C. § 922(g) (November 3, 1992), available at https://www.justice.gov/archives/jm/criminal-resource-manual-1431-department-memorandum-prosecutions-under-922g; 18 U.S.C. § 924(a)(2); Armed Career Criminal Act, Pub. L. No. 98-473, 98 Stat. 2185 (1984).

73. 18 U.S.C. § 924(e)(1).

74. *See* Sherwood, *supra* note 26, at 1450.

75. Dubber, *supra* note 30, at 855, 936; Sherwood, *supra* note 26, at 1450.

76. *See* Sherwood, *supra* note 26, at 1450; Dubber, *supra* note 30, at 834.

77. *See* Dubber, *supra* note 30, at 856–58.

78. *Id*.

79. *Id*. at 857–58.

80. *Id*. at 914.

81. *Id*. at 920 (citing United States v. Leviner, 31 F. Supp. 2d 23, 26 (D. Mass. 1998)).

82. *Id*. (citing United States v. Leviner, 31 F. Supp. 2d 23, 26 (D. Mass. 1998)).

Status offenses are generally frowned upon. The Supreme Court has previously found status-type offenses unconstitutional. For example, in *Lanzetta v. New Jersey*,[83] the Court struck down a criminal statute that made being a "gangster" a crime.[84] The Court found the statute void-for-vagueness and therefore a violation of the Fourteenth Amendment Due Process Clause.[85] Moreover, in *Robinson v. California*,[86] the Court struck down a California statute punishing the status of being "'addicted to the use of narcotics.'"[87] In that case, the Court reasoned that the California law made the status of addiction a crime and disapproved of the State's principle that one could be continuously guilty of the crime.[88]

In the wake of the Second Amendment gun cases, and particularly *Bruen*, lower courts are wrestling with whether Section 922(g)(1) is constitutional. The Second Amendment of the twenty-first century looks quite different than the Second Amendment of the twentieth century. Interpreting the Second Amendment as a fundamental individual right coupled with the creation of a new constitutional test to analyze gun regulations, the Court has sent lower federal courts on a jurisprudential collision course, where American equality will be tested.[89]

B. The Gun Cases

The new millennium brought with it a new understanding of the Second Amendment. The Supreme Court announced new rules in three cases: *Heller*,[90] *McDonald*,[91] and *Bruen*[92]—causing a seismic shift in the understanding of the right to bear arms. With opinions written by an increasingly originalist Court, the cases provided an expansive and

83. 306 U.S. 451 (1939).

84. *Id.* at 458; Erik Luna, *The Story of* Robinson: *From Revolutionary Constitutional Doctrine to Modest Ban on Status Crimes*, *in* CRIMINAL LAW STORIES 47, 48–49 (Donna Coker & Robert Weisbert eds., 2013) (citing Lanzetta v. New Jersey, 306 U.S. 451 (1939)).

85. *Lanzetta*, 306 U.S. at 458.

86. 370 U.S. 660 (1962).

87. *Id.* at 660, 667 (citations omitted). The *Robinson* Court held that laws imprisoning persons afflicted with the "illness" of drug addiction violated the Eighth and Fourteenth Amendments' proscription against cruel and unusual punishment. *Id.* at 667.

88. *Id*. at 666–67.

89. United States v. Rowson, 652 F. Supp. 3d 436, 463 (S.D.N.Y. 2023); United States v. Hicks, 649 F. Supp. 3d 357, 359 (W.D. Tex. 2023); United States v. Kays, 624 F. Supp. 3d 1262, 1266 (W.D. Okla. 2022).

90. 554 U.S. 570, 635 (2008).

91. 561 U.S. 742, 791 (2010). The *McDonald* Court used the Due Process test from *Duncan v. Louisiana*—whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice—referring to those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 764.

92. 142 S. Ct. 2111 (2022).

individualistic interpretation of the constitutional contours of the right. In a fourth case, *United States v. Rahimi*,[93] the Court confronted the first statutory prohibition on a designated group in 2024.[94] Upholding the statute, the *Rahimi* Court may have started a jurisprudential retraction of the reach of the individual right to bear arms.[95]

The Court's 2008 *Heller* opinion started the revolution.[96] In a 5–4 decision, the *Heller* Court held that the Second Amendment protects an individual right to possess a firearm for purposes of self-defense in the home.[97] Debate concerning the theoretical underpinning of the Amendment was settled; the Second Amendment was decidedly an individual right separate and apart from the Militia Clause.[98] For the Court, the Constitution "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[99]

In concluding that an individual right to bear arms existed, the *Heller* Court referenced four historical eras. First, it cited Blackstone and other 1600s English luminaries theorizing an understanding of an inherent and natural right to self-defense for self-preservation.[100] Second, the *Heller* Court discussed disarmament as a government tool of the English monarchs and Parliament to suppress political and religious dissent.[101] Justice Scalia referenced the Stuart Kings use of disarmament as a tool to crush political opponents and the Game Act passed by King Charles in 1671, prohibiting commoners from owning guns.[102] For the *Heller* Court, at the time of the Founding it was well established that the right to bear arms was "fundamental for English subjects."[103]

The *Heller* Court also referenced the Founding, concluding that the Framers understood the right to bear arms as belonging to an individual separate and apart from the Militia.[104] It was clear that Americans inherited

93. 144 S. Ct. 1889 (2024). Respondent Rahimi was indicted pursuant to Section 922(g)(8), the federal statute prohibiting firearm possession while subject to a domestic violence restraining order. *Id.* at 1894.

94. *Id*. at 1897.

95. *Id*. at 1901–02.

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

97. *Id*. at 635.

98. *Id*. at 577. The debate centered around a collective right versus individual rights theory of the Second Amendment.

99. *Id*. at 635.

100. *Id*. at 593–94.

101. *Id*. at 592–95.

102. *Id*. at 592 ("Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents.").

103. *Id*. at 593.

104. *Id*. at 594–95.

government suspicion of disarmament from their English forebears.[105] Justice Scalia detailed Founding-era state constitutions as further proof that the understanding of the right to bear arms was tied to individual freedom.[106]

Finally, the *Heller* Court spent considerable time reviewing Black history to support the individualist interpretation of the Second Amendment. It focused primarily on the pre-Civil War and Reconstruction eras, noting anti-slavery support for free Blacks to have firearms as well as the congressional recognition that there was a need for the Freedmen to have guns to protect themselves against white mobs.[107] Historical Black exclusions from the liberties associated with citizenship were also examined by the *Heller* Court to show the individualist understanding of the right to bear arms.[108]

Two years after *Heller*, a badly-fractured Court in *McDonald v. City of Chicago*[109] incorporated the Second Amendment to the States, holding the right to bear arms "fundamental to our scheme of ordered liberty."[110] Written by Justice Alito, the *McDonald* plurality cited *Heller's* constitutional support for "lawful" possession, implying limits to the Second Amendment right.[111] The *McDonald* plurality adopted *Heller's* reasoning finding support in the natural right to self-defense[112] and the history of disarmament to control political rivals.[113] And, as in *Heller*, the plurality discussed the Freedmen and Reconstruction as a rationale to support the Framers' intent to afford an individual right to bear arms.[114]

Like *Heller*, *McDonald* discussed Black America, but it differed from *Heller* in that it did not focus exclusively on pre-twentieth-century Black history. The plurality referenced twenty-first-century urban gun violence.[115] The lead petitioner, Mr. Otis McDonald, was a Black man living in Chicago, an "urban" area.[116] Citing *amici*, the plurality discussed the benefit of the

105. *Id*.
106. *Id*. at 602–05.
107. *Id*. at 609–18.
108. *Id*. at 611–12.
108. *Id*. at 594–95.
109. 561 U.S. 742, 764 (2010). The *McDonald* Court used the Due Process test from *Duncan v. Louisiana*—whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice—referring to those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* (quoting Duncan v. Louisiana, 391 U.S. 145, 148 (1968)).
110. *Id*. (emphasis removed).
111. *Id*. at 780.
112. *Id*. at 767–70.
113. *Id*. at 768–69.
114. *Id*. at 771–78.
115. *Id*. at 789–90.
116. *Id*. at 750.

right to bear arms for women, minorities, and disadvantaged groups living in high crime areas whose "needs are not being met by elected public officials."[117]

In June of 2022, the Court decided *Bruen*.[118] In a 6–3 decision, the Court, in an opinion written by Justice Thomas, held that "[t]he Second Amendment[] . . . presumptively guarantees" law-abiding, adult citizens "a right to 'bear' arms in public for self-defense."[119] In doing so, the Court determined the test to be used in Second Amendment challenges to gun regulation.[120] It abandoned means-end scrutiny and instead imposed a textual and historical frame. [121] Per *Bruen*,

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[122]

For the *Bruen* Court, the substance of the right to bear arms articulated in the text is inspired by its charge "of facilitating a fundamental unenumerated right of self-defense."[123] Thus, even if a state regulation serves an important interest, it should be struck down unless the state shows that it is consistent with the American historical tradition of firearms regulation.[124]

Employing a textual and historical framework and disregarding legislative justifications, the Court underscored the need to identify historical analogues as evidence of the challenged regulation's constitutionality.[125] Modern regulations born from "unprecedented societal concerns or dramatic technological changes" unknown to the Framers at the time of the Founding would require "a more nuanced approach."[126] Thus, the analogue need not be a "historical twin" or a "dead ringer" to pass constitutional muster.[127] But the historical frame requires reviewing courts to cabin their analysis to historical

117. *Id*. at 789–90.

118. 142 S. Ct. 2111 (2022).

119. *Id.* at 33.

120. *Id.* at 24.

121. *Id.*; Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 465 (2023).

122. *Bruen*, 142 S. Ct. at 2129–30.

123. Barnett & Solum, *supra* note 121, at 464.

124. *Id.* at 465.

125. *Bruen*, 142 S. Ct. at 2131.

126. *Id*. at 2132.

127. *Id*. at 2133 (emphasis removed).

practices to 1791 or 1868.[128] Whether a historical practice or tradition is an appropriate analogue for a modern regulation requires a determination that "the two regulations are 'relevantly similar.'"[129] The *Bruen* Court pointed to "two metrics" culled from *Heller* and *McDonald* as "central considerations" in the "relevantly similar" evaluation: "[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified[.]"[130]

The most recent Second Amendment case, *United States v. Rahimi*,[131] was decided in June of 2024. The case involved a challenged to 18 U.S.C. § 922(g)(8), a federal statute prohibiting possession of a firearm by a person subject to a domestic violence restraining order.[132] Applying *Bruen*, the *Rahimi* Court determined that the government may disarm an individual consistent with the Second Amendment when a court finds that she poses "a credible threat to the physical safety of others."[133] In a 8–1 decision, the *Rahimi* Court rolled back the rigidity of the *Bruen* inquiry requiring a 1:1 historical analogue. The Court clarified that the government had to demonstrate that the challenged law was consistent with the "principles" underlying the historical tradition of gun regulation.[134] Writing for the majority, Chief Justice Roberts explained that historical principles and common sense application to modern circumstances inform the Second Amendment analysis.[135] Justice Thomas, the sole dissenting Justice in *Rahimi* and author of *Bruen*, condemned "approaches based on generalized principles."[136]

Felon prohibitions were taken as a given in the gun cases. Pre-*Heller*, the Court never decided a direct challenge to a felon ban on Second Amendment grounds. The closest the Court came was in the case of *Lewis v. United States*.[137] In that case, petitioner-Lewis challenged a federal felon-in-possession conviction arguing that the state felony conviction, which served as the predicate felony for the felony possession charge, was invalid because he was not adequately represented by counsel in violation of the Sixth and Fourteenth Amendments.[138] The Court found for the Government.[139] There

128. Barnett & Solum, *supra* note 121, at 472.
129. *Bruen*, 142 S. Ct. at 2132.
130. *Id*. at 2133.
131. 144 S. Ct. 1889 (2024).
132. 18 U.S.C. § 922(g)(8); *Rahimi*, 144 S. Ct. at 1895.
133. *Rahimi*, 144 S. Ct. at 1902.
134. *Id*. at 1898.
135. *Id*.
136. *Id*. at 1946 (Thomas, J., dissenting).
137. 445 U.S. 55 (1980).
138. *Id*. at 57–58.
139. *Id*. at 64–65.

was no direct Second Amendment challenge, but the Court firmly stated in a footnote that statutory felon dispossession was constitutionally permissible.[140] However, its rationale relied on the collective-rights interpretation of the Second Amendment, a theory that *Heller* has since disposed of.[141]

While "law-abiding, responsible citizens" were provided expansive interpretive freedom to bear arms in the Second Amendment gun cases, the Court endorsed blanket felon gun prohibitions as presumptively lawful.[142] In *Heller* and *Bruen*, the Court repeatedly stressed that the right to bear arms was authorized for "law-abiding, responsible citizens."[143] And in *Heller*, *McDonald*, and *Rahimi*, the Court asserted that the declaration of the individual right to bear arms for self-defense did not impinge upon felon in possession of firearm prohibitions.[144] Without analysis or any indication that such statutes were vulnerable to challenge, the Court made its pronouncement causing a groundswell of constitutional uncertainty on a topic that was previously well-settled jurisprudential territory. Though the Court seemingly approved of felon prohibitions and presumed such statutes lawful, the presumption is a rebuttable one.[145]

When confronted with Section 922(g)(1) challenges, lower courts are writhing around in a swamp of constitutional confusion. Otherwise rudimentary issues are causing major trepidation, such as whether Section 922(g)(1) constitutes a "what" restriction or "who" restriction.[146] However, a

140. *Id*. at 65–66 n.8.

141. *Id*.

142. District of Columbia v. Heller, 554 U.S. 570, 626–27, 635 (2008) ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.").

143. *Id*. at 635; N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2131 (2022).

144. *Heller*, 554 U.S. at 625–26; McDonald v. City of Chicago, 561 U.S. 742, 786 (2010); United States v. Rahimi, 144 S. Ct. 1889, 1902 (2024).

145. *Heller*, 554 U.S. at 626–27, n. 26 (2008).

146. *See supra* note 17; *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1443 (2009). Professor Volokh's taxonomy of gun restrictions is as follows:

> [(1)] "what" restrictions (such as bans on machine guns, so-called "'assault weapons,'" or unpersonalized handguns)[;] [(2)] "who" restrictions (such as bans on possession by felons, misdemeanants, noncitizens, or 18-to-20-year-olds)[;] [(3)] "where" restrictions (such as bans on carrying in public, in places that serve alcohol, or in parks, or bans on possessing [guns] in public housing projects)[;] [(4)] "how" restrictions (such as storage regulations)[;] [(5)] "when" restrictions (such as waiting periods)[;] [(6)] "who knows" regulations (such as licensing or registration requirements)[;] and [(7)] taxes and other expenses.

Id.

stark issue in the recent lower court jurisprudence is the apparent inability of courts to identify a proper historical analogue. Opposite of the United States Supreme Court Second Amendment cases, lower courts seem almost fearful to discuss the racial origins of gun control, making only a passing reference if anything at all to these regulations. Colorblindness erases the historical purpose and context in which firearm regulations were originally ratified. Staying in line with the current Second Amendment jurisprudential analysis requires putting aside colorblindness and applying *Bruen* with a focus on textual fidelity and historical accuracy.

II. FRAME

Colorblindness, though a lofty goal, is a doctrine incompatible with the equality principle and unworkable given American history. It is incapable of piercing through coded language when applied to legislative text and history and also neglects to consider the negative and disparate outcomes on communities of color. The Second Amendment gun cases, however, recognized Black history to support the finding that the right to bear arms is an individual one.[147] The Court repeated this historical narrative in both *McDonald* and *Bruen*, further embedding Black history in the jurisprudential interpretation of the Second Amendment and removing, to a certain extent, the colorblind lens.

This section provides a review of the colorblind doctrine and offers a more in-depth critique. In addition, it examines the use of Black history and Black urban violence by the Court to validate the understanding of the Second Amendment as an individual constitutional right. This part also discusses racial coding and the way in which it influences and weaponizes legislation to work against minority groups.

147. *Heller*, 554 U.S. at 614 ("Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms."). The *McDonald* plurality cited the language of the Freedmen's Bureau Act of 1866 as the "most explicit evidence" of Congress's intent that all citizens have a right to bear arms for self-defense:

> The most explicit evidence of Congress' aim appears in § 14 of the Freedmen's Bureau Act of 1866, which provided that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery."

561 U.S. at 773 (citing 14 Stat. 176–77).

A. Colorblindness

Since *Plessy v. Ferguson*,[148] Justice Harlan's "colorblind" constitution has been woven into the fabric of Supreme Court doctrine.[149] It understands racism as animus directly linked to skin pigmentation as opposed to the "systemic skewing of opportunities, resources, and life chances along racial lines."[150] Put simply, it is the idea that racism no longer influences individual socio-economic progress, because it is unlawful to deny education, employment, and housing opportunities based on race.[151]

The focus of the doctrine has customarily been on overt individual acts of racism as opposed to historical and structural systems of racial inequality.[152] An example of this played out in *McClesky v. Kemp.*[153] There, the petitioner argued that the risk of race playing a role in capital sentencing violated the Equal Protection Clause of the Fourteenth Amendment and Eighth Amendment, making the death penalty unconstitutional.[154] McClesky presented a strong evidentiary case, with a sophisticated racial statistical analysis documenting the influence of racial considerations in capital punishment decisions.[155] The Court, however, required proof of racial animus that showed that the racial outcomes emerged from purposeful discrimination by the state legislature.[156] Because McClesky could not prove that legislators passed the death sentence statute in anticipation of racially disparate outcomes, the study was deemed jurisprudentially inconsequential.[157]

Colorblindness, while an excellent social goal, is unrealistic considering the persistence of racism in U.S. society and the continuation of structures that perpetuate racial inequities.[158] The notion of a "colorblind" society, one built on the codification and categorization of racial differences, has always

148. 163 U.S. 537 (1896).

149. Plessy v. Ferguson, 163 U.S. 537, 559 (1896); AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 158 (2014).

150. Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang & George Lipsitz, *Introduction*, *in* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS DISCIPLINES 1, 4 (Kimberle Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang & George Lipsitz eds., 2019).

151. Nikole Hannah-Jones, *The 'Colorblindness' Trap: How a Civil Rights Ideal Got Hijacked*, N.Y. Times Magazine (Mar. 13, 2024), https://www.nytimes.com/2024/03/13/magazine/civil-rights-affirmative-action-colorblind.html.

152. LERMAN & WEAVER, *supra* note 149, at 162.

153. *Id.* at 165–66; McClesky v. Kemp, 481 U.S. 279, 292 (1987).

154. *See McClesky*, 481 U.S. at 291–92.

155. *Id.* at 286–287.

156. *Id.* at 292–93, 298.

157. LERMAN & WEAVER, *supra* note 149, at 166.

158. *See* KWAME TURE & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 54 (1992).

only been a hope.[159] If the law presumes otherwise, then in the wise words of *Oliver Twist*'s Mr. Bumble, "the law is a ass—a idiot."[160] And though colorblindness is often celebrated, let us not forget the entirety of the passage from which the notion was born in 1896. Justice Harlan's famous phrase was suffused in a white supremacist frame:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.[161]

The message is duplicitous—the law does not recognize color or caste, but the white race is dominant in the American social order and will remain so for eternity.[162] Racial dominance of the white race is first acknowledged and then, with the phrase "colorblind," white supremacy summarily disappears under a blanket of equality rhetoric.[163]

The colorblind doctrine brings with it only a mechanical application of the equality principle.[164] The approach emphasizes that similarly situated individuals be treated the same regardless of historical context or special circumstances.[165] It fails to contemplate the constitutional social goal of racial equality and "at the most basic level[, colorblindness] mobilizes a metaphor of visual impairment to embrace a simplistic and misleading affirmation of racial egalitarianism."[166] Without explicit evidence of purposeful racial hostility, racial inequalities are deemed nonjusticiable.[167] With formal equality, historical context and sociopolitical circumstances surrounding a challenged regulation are often dropped from analytical consideration and

159. Hannah-Jones, *supra* note 151; George Lipsitz, *The Sounds of Silence: How Race Neutrality Preserves White Supremacy*, *in* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS DISCIPLINES, *supra* note 150, at 24.

160. Collins v. Virginia, 584 U.S. 586, 611 (2018) (Alito, J. dissenting) (citing CHARLES DICKENS, OLIVER TWIST 277 (1867)).

161. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting); Lipsitz, *supra* note 159, at 30.

162. Lipsitz, *supra* note 159, at 30.

163. *Plessy*, 163 U.S. at 560 (Harlan, J. dissenting) ("The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race.").

164. *See* LERMAN & WEAVER, *supra* note 149.

165. *Id.*; *see* Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEV. ST. L.R., 823, 831–33 (2008).

166. Crenshaw, Harris, HoSang & Lipsitz, *supra* note 150.

167. LERMAN & WEAVER, *supra* note 149, at 163.

race disappears from history. When applied as a legal framework, colorblindness allows for the sterilization of the historical record and disregards the glaring disproportionate and harmful impact of regulations on communities of color.[168] Whiteness and the general experiences and opportunities afforded white people, become the benchmark "against which difference is measured."[169] And, just as important, it facilitates a more comfortable mode of analysis for courts, permitting them to evade the controversial and uncomfortable topic of race altogether.[170]

Justices of the Court have recognized the weaknesses of colorblindness. For example, Justice Blackmun notably stated that "[i]n order to get beyond racism, we must first take account of race."[171] In *Parents Involved in Community School v. Seattle School District No. 1*,[172] Justice Thomas remarked that "the colorblind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination—indeed, it requires that such measures be taken in certain circumstances."[173] Most recently, Justice Jackson fervently criticized the Court's use of colorblindness as a doctrinal "ripcord," allowing it to escape confronting the reality of the socio-racial landscape of the American polity in her dissenting opinion in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*.[174] For her, the "let-them-eat-cake obliviousness" ignores the racial history and present-day racial imbalances that deny Blacks true American freedom.[175]

The Second Amendment gun cases do not sidestep race, creating an important precedent for lower courts to follow. Indeed, the Court addresses American racial history as well as contemporary social circumstances that disproportionately impact Black communities. In doing so, there is a quiet recognition by the Court and individual Justices that American gun control is historically rooted in racial disarmament.[176]

168. *See* Powell, *supra* note 165, at 831–33.

169. Lipsitz, *supra* note 159, at 24.

170. *See* Powell, *supra* note 165, at 831–33.

171. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

172. 551 U.S. 701.

173. *Id.* at 772 n.19 (2007) (Thomas, J., concurring)

174. 600 U.S. 181, 407 (2023) (Jackson, J., dissenting).

175. *Id*. at 407–09.

176. *See* Atkinson v. Garland, 70 F.4th 1018, 1032 (7th Cir. 2023) (Woods, J., dissenting); Range v. Att'y Gen., 69 F.4th 96, 104–05 (3d Cir. 2023); United States v. Rowson, 652 F. Supp. 3d 436, 464 (S.D.N.Y. 2023).

1. Gun Cases & Race

The Second Amendment gun cases brought to the fore the importance of Black history in the understanding of individual rights in America. Used in all but *Rahimi*, the Court included a survey of the historical political landscape that included Black slavery and freedom. The obvious importance of Black history in the formulation of the modern Second Amendment is clear from the reasoning of the Court.

In *Heller*, the Court utilized Black history to demonstrate the intent of the Second Amendment was to safeguard an individual's right to bear arms, disconnected from a militia.[177] Writing for the Majority, Justice Scalia pointed to various historical statutory firearm exclusions of free Blacks during the Founding, pre- and post-Civil War eras to show that the right was an individual one; one that was given as well as taken away from *individuals*.[178] And citing *United States v. Cruikshank*,[179] the *Heller* Court noted the facts about the Colfax massacre to provide context to the case's principle that the right to bear arms transcends the Constitution.[180]

Written by Justice Alito, the plurality in *McDonald* followed suit discussing Black history pre- and post-Civil War in reasoning through the incorporation of the Second Amendment to the states.[181] The plurality cited post-Civil War racial firearm exclusions as well as historical evidence after the ratification of the Fourteenth Amendment showing that the reborn America provided newly freed Blacks an equal right to bear arms.[182] *Cruikshank* was also cited in *McDonald*, however, Justice Alito took the discussion a step further, taking a much deeper historical dive into the factual circumstances and procedural history of the case.[183] While Justice Scalia in *Heller* acknowledged the racial violence, Justice Alito provided a very specific account of the horrific details of not only the violence, but of the *Cruikshank* Court's disappointing holding reversing the convictions of the leaders of the white mob that massacred close to 100 Black people under a statute, the Enforcement Act of 1870, that was meant to protect the

177. District of Columbia v. Heller, 554 U.S. 570, 600 (2008).

178. *Id.* (discussing the Militia Act of 1792's exclusion of free Blacks); *id*. at 611–16 (discussing pre- and post-Civil War statutes excluding Blacks from possessing arms).

179. 92 U.S. 542 (1875).

180. *Heller*, 554 U.S at 619–20.

181. McDonald v. City of Chicago, 561 U.S. 742, 771 (2010) (discussing state statutory racial exclusions post-Civil War).

182. *Id.* at 776.

183. *Id.* at 757–58 (separate opinion of Alito, J.).

Freedmen.[184] Noting that *Cruikshank*, along with *Presser*[185] and *Miller*,[186] were pre-selective incorporation cases, the plurality ultimately found pre-2008 precedent out of step with the recent interpretation of the Second Amendment announced in *Heller*.[187] And in speaking to Justice Stevens' concern that politically neglected minority communities will be left unprotected, the plurality referenced Black violence in the city of Chicago and the need and desire of residents living in high-crime areas to bear arms for self-defense.[188] Their safety "would be enhanced by the possession of handguns in the home for self-defense," thus empowering minority communities to keep safe despite the neglect of public officials.[189]

Like *Heller* and *McDonald*, *Bruen* offered a great deal of historical racial context to further interpret the Second Amendment. The author of *Bruen*, Justice Thomas, an originalist with a strong dedication to applying a historical frame, continued using history as the primary mode of interpretation as he did in his *McDonald* concurrence.[190] For example, when addressing the lack of enforcement of surety laws, the *Bruen* Court commented that the only known surety enforcement cases involved Black "defendants who may have been targeted for selective or pretextual enforcement."[191] The Court also chronicled the public discourse during Reconstruction.[192] In doing so, the Court provided different accounts of the violence Blacks endured after the Civil War and the understanding of the

184. *Id.* The Enforcement Act of May 1870 was the first in a series of three congressional acts meant to prohibit racial violence by the Ku Klux Klan. *See* Enforcement Act of May 1870, ch. 114, 16 Stat. 140 (enacted May 31, 1870), *amended by* An Act to amend an Act Approved May thirty-one, eighteen hundred and seventy (Second Force Act), Ch. 99, 16 Stat. 433 (enacted Feb. 28, 1871); An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes (Third Force Act), ch. 22, 17 Stat. 13 (enacted April 20, 1871). The Enforcement Act of May 1870, often referred to as the Civil Rights Act of 1870, was the first congressional effort to address racial violence. The 1870 Act prohibited groups of people from intimidating individuals with the intention of violating their civil rights. It targeted the Klan, prohibiting people, to "go in disguise upon the public highway, or upon the premises of another" to terrorize citizens. Enforcement Act of May 1870, ch. 114, § 6, 16 Stat.141. The second Enforcement Act, the Enforcement Act of February 1871, placed federal elections under administration of the federal government. It also authorized federal judges and federal marshals to oversee local polling sites. The third and final Act, the Enforcement Act of 1871 made state officials liable for equal protection violations. It made Klan style intimidation tactics federal crimes and authorized the president to use the militia to suppress conspiracies and suspend the writ of habeas corpus if Klan violence rendered alternatives ineffective.

185. 116 U.S. 252 (1886).

186. 307 U.S. 174 (1939).

187. McDonald v. City of Chicago, 561 U.S. 742, 758–59 (2010).

188. *Id.* at 789–90.

189. *Id.* at 790.

190. *Id.* at 856–58 (Thomas, J. concurring in part and concurring in the judgment); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2111–56 (2022).

191. *Bruen*, 142 S. Ct. at 2149.

192. *Id.* at 2151–53.

critical need for the Freedmen to publicly carry firearms to "defend themselves and their communities" during Reconstruction.[193]

The majority opinion in the most recent Second Amendment case decided in June of 2024, *United States v. Rahimi*,[194] does not discuss racial history or context at all. Surveying the historical landscape, the *Rahimi* Court centered its analysis on surety and going armed laws to which were cited as the relevantly similar historical analogues.[195] The attention was centered on public safety and spousal abuse.

Justice Thomas, the sole dissenter in *Rahimi*, did however reference the historical racial landscape.[196] He condemned "approaches based on generalized principles," which allows for depriving groups of gun rights based on labels such as "threats" and "dangerous."[197] In doing so, Justice Thomas cited the systematic disarmament of freed Blacks after the Civil War as an example.[198] He cautioned the Court against exchanging "the Second Amendment's boundary line . . . for vague (and dubious) principles with contours defined by whoever happens to be in power."[199]

The Second Amendment gun cases require that lower courts examine the historical record and American tradition, including Black history, when relevant. In the context of Section 922(g)(1), lower courts will be hard pressed to find more relevantly similar analogues to Section 922(g)(1) than historical Black firearm exclusions. To see and understand the comparability, Section 922(g)(1) has to be decoded.

B. Racial Coding

Racism is not as open as it once was.[200] Once upon a time in American history, racism was a socially acceptable practice. It was reflected in the laws and social customs in the Thirteen colonies and persisted after the Civil War. Overtly discriminatory language depriving racial groups of rights and liberties was ever-present in Founding era statutes and continued throughout history past Reconstruction, until one day in the late nineteenth century, it seemed to disappear from the rule books. It was replaced with colorblind language, race-neutral words, suggesting equal application of the law. Lurking in the text of policy or political speeches, however, are subtle racist

193. *Id.* at 2151.
194. 144 S. Ct. 1889 (2024).
195. *Id.* at 1900–01.
196. *Id.* at 1946 (Thomas, J. dissenting).
197. *Id*.
198. *Id*.
199. *Id*.
200. Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs during the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 617 (2000).

cues, known as "code words." These code words are not only evident in legislation, but they are also used by politicians to message their constituents, and by the media to the detriment of communities of color.

Racial coding occurs when race neutral phrases are used to indirectly signify a racial theme or invoke racial resentment.[201] A damaging message or negative racial connotation is buried within race neutral language.[202] Code words do not appear to pose a challenge to democratic principles, but they do appeal to racial antipathy.[203] At times, code words are merged with images to express a particular racial meaning.[204] Code words can, and often do, serve as a reason for a discriminatory policy.[205] Written in race neutral terms and seemingly in line with democratic structures, code words conceal racist sentiment and mask political intentions.[206]

America has a long history and tradition of racial coding.[207] Delegate John Dickinson from Pennsylvania, a drafter of the Articles of Confederation, provided the reason for the omission of the word "slavery": "to conceal a principle of which we are ashamed."[208] Professor Lipsitz shows how constitutional backing for American slavery was expressed with colorblind language.[209] He points to the three-fifths clause in the United States Constitution, which allowed slave-holding states to count slaves as three-fifths of a person for purposes of representation in Congress.[210] Lipsitz also cites several other race neutral laws including:

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201. *Id*. at 615, 625 (discussing the phrase "welfare queen" as code for "Black, lazy women who drain the tax rolls by having too many babies"); *see also* Leland Ware & David C. Wilson, *Jim Crow on the "Down Low": Subtle Racial Appeals in Presidential Campaigns*, 24 ST. JOHN'S J. L. COMMENT. 299, 300, 311 (2009) (reviewing Ronald Reagan's first inaugural address where he recounted the "outrage" of public patrons at a grocery store observing a "strapping young buck" purchasing a T-bone steak with food stamps; "[t]he 'strapping young buck' was an undeserving, able-bodied African American who was taking advantage of the system."); City of Memphis v. Greene, 451 U.S. 100, 135–36, 147–53 (1981) (Marshall, J., dissenting) (remarking on the connection of a Black neighborhood with the phrase "undesirable traffic").

202. Ware & Wilson, *supra* note 201, at 300.

203. *Id*.; Dvorak, *supra* note 200, at 615.

204. Ware & Wilson, *supra* note 201, at 300.

205. Dvorak, *supra* note 200, at 615.

206. *Id*.; Ware & Wilson, *supra* note 201, at 300.

207. Lipsitz, *supra* note 159, at 26.

208. John Dickinson, Notes for a Speech (II) (July 9, 1787), *in* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 158–59 (James H. Hutson ed. 1987).

209. Lipsitz, *supra* note 159, at 27.

210. *Id*. ("[R]epresentation is described as determined by the numbers of 'free Persons,' 'those bound to Service for a Term of Years' (indentured servants), and 'three fifths of all other Persons.' Everyone knew that those 'other persons' were African Americans held in bondage, who were not considered citizens or even humans in many other senses but whose enslavement added to the political power of the states in which they were held."); U.S. CONST. art. I, § 2, cl. 3.

> [T]he fugitive slave provisions in the Constitution, state "grandfather" clauses, poll taxes and "understanding clauses," alien land laws, the Wagner Act, Social Security, and, more recently, the sentencing differential between powder and rock cocaine in the war on drugs, [and] the requirement for picture identification cards in order to vote . . . .[211]

In the above-mentioned rules, neither slavery nor race is explicitly stated.[212]

Coding is a common practice. Politicians and bureaucrats often use racial coding to gain political influence.[213] Take, for example, the father of racial coding, the 1968 presidential candidate George Wallace.[214] His "colorblind slur" was created to invoke a racial reaction.[215] He coded racist phrases to attract white Americans' "sense of justice" and to garner political support in blue collar northern cities.[216] Barry Goldwater invoked the colorblind Constitution to challenge school desegregation rights.[217] In a speech written with the help of William H. Rehnquist, Goldwater reframed the issue: "Our aim, as I understand it, is not to establish a segregated society or an integrated society. It is to preserve a free society."[218]

The media, too, has used racial coding. It has employed racial tropes and stereotypes since American slavery.[219] At the Founding, newspapers would write about slaves' predisposition to commit crimes.[220] With television and media the expansive reach of the media became dangerous. As technology advanced, the media developed into an enormous racial coding outlet.[221]

Racially coded language allows discriminatory regulations to escape constitutional scrutiny. Justice Thurgood Marshall called out racial coding in the 1981 case of *City of Memphis v. Greene*[222] recognizing the impact of

211. Lipsitz, *supra* note 159, at 26.

212. Lipsitz, *supra* note 159, at 26–27.

213. Atiba R. Ellis, "*This Lawsuit Smacks of Racism": Disinformation, Racial Coding, and the 2020 Election*, 82 LA. L. REV. 453, 470 (2022).

214. Dvorak, *supra* note 200, at 622.

215. *Id.* at 622–24.

216. *Id.* at 622.

217. Hannah-Jones, *supra* note 151 (citing Barry Goldwater: "It has been well said that the Constitution is colorblind. And so it is just as wrong to compel children to attend certain schools for the sake of so-called integration as for the sake of segregation.").

218. *Id*.

219. Bryan Adamson, "*Thugs," "Crooks," and "Rebellious Negroes": Racist and Racialized Media Coverage of Michael Brown and the Ferguson Demonstrations*, 32 HARV. J. RACIAL & ETHNIC JUST. 189, 221 (2016).

220. *Id*.

221. D. Marvin Jones, *"He's a Black Male . . . Something is Wrong with Him!": The Role of Race in the Stand Your Ground Debate*, 68 U. MIAMI L. REV. 1025, 1038 (2014).

222. 451 U.S. 100 (1981).

apparent race-neutral language.[223] In *Greene*, the City of Memphis closed a parcel of land adjoining a white neighborhood with a Black neighborhood for the purpose of reducing "undesirable traffic."[224] The majority found the statute race-neutral and therefore constitutional.[225] Dissenting, Justice Marshall identified the race neutral language as "code phrases of racial discrimination."[226] Further, Justice Marshall cited the nation's history of racism and practice of racial residential segregation to explain why he came to the opposite conclusion as the Court.[227]

In *McDonald*, the plurality also recognized the ineffectiveness of race neutral language in the context of the Second Amendment.[228] Justice Alito discussed a hypothetical race neutral firearm ban for all private citizens passed after the Civil War and the futility of Blacks relying on the local militia for protection as the militia was known to be comprised of groups implicated in harassing Black people.[229] He used this to demonstrate the need for Chicago and Oak Park residents to possess a firearm for self-defense.[230] At the same time, the *McDonald* case itself could be an example of racial coding. The City of Chicago is known as code for "Black criminality," "lawlessness," and "Black violence."[231] It is quite interesting that the responding party to the case (the eventual loser) incorporating the Second Amendment to the states is the City of Chicago, the dog-whistle for Black violence and dangerousness.

Guns represent the battle for freedom from the colonial shackles of European monarchs and for a democratic system of government, where "the people" have rights, liberties, and voice.[232] They are a symbol of American pride and liberty. Early in American history, bearing arms was considered an "important right and obligation" marking "membership in the white

223. *Id.* at 136 (Marshall, J., dissenting).

224. *Id*.

225. *Id*. at 128–29.

226. *Id*. at 136.

227. *Id*. at 147–53.

228. 561 U.S. 742, 779 (2010).

229. *Id*.

230. *Id*.

231. *See generally* CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA (2023); Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999).

232. THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOR OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3424, 3428 (Francis Newton Thorpe ed., 1909); DONALD J. CAMPBELL, AMERICA'S GUN WARS: A CULTURAL HISTORY OF GUN CONTROL IN THE UNITED STATES 20–21 (2019); District of Columbia v. Heller, 554 U.S. 570, 598 (2008).

community."[233] This tradition continues with the staunchest supporters of gun rights usually conservative groups that reinforce the image of the historical prototypical gun owner: a white male, which is the opposite of profile of the stereotypical firearm offender. [234]

The Black male, the "thug," is the national representation of the American criminal.[235] The stereotypical "felon" is a young, Black, justice-involved male: the "super predator," "the drug-dealer," "the rapist," and the "killer."[236] This classification as a felon authorizes the state to deprive that person of rights, goods, and privileges.[237] No rights, no liberties, no voice. A Section 922(g)(1) challenge will bring these two diametrically opposed American constructs, felons and guns, to a head. They are both rooted in American history and tradition, and they are both linked to the equality principal.

III. APPLICATION OF *BRUEN*

This Part analyzes Section 922(g)(1) in accord with the *Bruen* test. Step One examines whether felons are considered "the people" referenced in the Second Amendment. This Part thus reviews textual arguments as well as historical American thought regarding felon exclusions from the Founding era through Reconstruction.

Focusing on the American history and tradition of categorical firearm exclusions, the analysis at Step Two details the way in which historical Black firearm exclusions are the most comparable analogue to Section 922(g)(1) in both justification and burden. Abandoning the colorblind doctrine, the Step Two discussion decodes the statutory text of Section 922(g)(1) showing the justification for the legislation and then comparing it to historical legislation disarming Blacks during the American colonial, Founding, and Reconstruction eras. The burdens imposed by Section 922(g)(1) are then discussed and compared to the burdens created by historical Black laws.

233. WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812, 78 (1968).

234. Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2193–94 (2016).

235. Jones, *supra* note 221, at 1033.

236. andré douglas pond cummings & Steven Ramirez, *The Racist Roots of the War on Drugs & the Myth of Equal Protection for People of Color*, 44 U. ARK. LITTLE ROCK L. REV. 453, 475–76 (2022); *Fact Check: Hillary Clinton, Not Joe Biden, Used the Term Super Predator in the 1990s*, REUTERS (Oct. 26, 2020, 9:50 AM), https://www.reuters.com/article/uk-factcheck-hillary-clinton-biden-super/fact-checkhillary-clinton-not-joe-biden-used-thetermsuperpredatorin1990s-idUSKBN27B1PQ; Adamson, *supra* note 219, at 221; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 50–52 (2020).

237. Alice Ristroph, *Farewell to Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 568–69 (2018).

A. Step One–Text

To determine whether felons are considered "the people," Step One requires a close look at the constitutional text of the Second Amendment scrutinizing the language that *is* included as well as language *not* included. In doing so, canons of interpretation are used to support the principle that felons are considered "the people" in accord with the *Heller* Court's interpretation of the phrase. In addition, this part considers Founding era legislative support for felon exclusions cited by lower courts such as "civil death" and "virtuous citizen" as well as the phrase "law-abiding citizen" coined in *Heller*.[238] Finally, an examination of language not included in the Second Amendment is discussed. Again, applying canons of constructions, this demonstrates that felons are considered "the people."

1. "The People"

At Step One, many courts analyzing Section 922(g)(1) challenges center the analysis on whether felons are considered "the people."[239] The United States Constitution does not define "the people" nor "the right of the people" anywhere in the text.[240] The *Heller* Court presented an interpretation of "the people" from *United States v. Verdugo-Urquidez*,[241] a 1990 case that involved a Fourth Amendment challenge to the search and seizure of a nonresident alien (citizen of Mexico) on foreign soil (Mexico).[242] The *Verdugo-Urquidez* Court determined that phrase "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[243] In the context of convicted persons, the Court in *Bell v. Wolfish*[244] concluded that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison," adding support to the notion that felons are considered "the people."[245]

As noted in *Heller*, the phrase "right of the people" appears not only in the Second Amendment but also in the First Amendment's Assembly and Petition Clause and the Fourth Amendment's Search and Seizure Clause.[246]

238. District of Columbia v. Heller, 554 U.S. 570, 625 (2008).

239. *See supra* note 17.

240. United States v. Rahimi, 144 S. Ct. 1889, 1945 (2024) (Thomas, J. dissenting); *see generally* U.S. CONST.

241. 494 U.S. 259 (1990).

242. *Id.* at 262–63.

243. *Id*. at 265.

244. 441 U.S. 520 (1979).

245. *Id.* at 545.

246. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against

First, neither the First nor Fourth Amendment divests the individual from exercising rights based on their status.[247] Canons of interpretation necessitate that "the people" in the Second Amendment are not stripped of their right to bear arms based on status. Here the related-statutes canon requires consideration of the entire corpus juris, the whole statute, when interpreting a word or phrase of a statute.[248] Second, the presumption of consistent usage directs that "a word or phrase is presumed to bear the same meaning throughout a text."[249] Thus, the understanding of the "right of the people" in the Second Amendment is accorded the same construction as in the First and Fourth Amendment contexts making status alone an improper basis to deny protection of an individual constitutional right.

a. Civil Death

Some federal courts have determined that felons were not considered "the people," pointing to the concept of civil death.[250] Civil death upon conviction was a practice known to the Framers.[251] In England, it was a common law penance.[252] Civil death was meant to settle the estate of the felon, signaling "a transitional status in the period between a capital sentence and its execution."[253] Rooted in social contract theory, civil death excluded felons from legal functions such as entering into contracts.[254] Most felony convictions also came with a judgment of death, attainder, and the branding of "corruption of blood."[255] None of this impacted the understanding of the right to bear arms for self-defense in the eighteenth century.[256] Death extinguished the need to consider some rights, such as the rights to self-

unreasonable searches and seizures, shall not be violated . . . ."); District of Columbia v. Heller, 554 U.S. 570, 579 (2008); United States v. Coombes, 629 F. Supp. 3d 1149, 1155 (N.D. Okla. 2022).

247. *Id*.

248. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 252 (2012).

249. *Id.* at 170; *Coombes*, 629 F. Supp. 3d at 1155 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 170 (2012)).

250. United States v. Rice, 662 F. Supp. 3d 935, 943–46 (N.D. Ind. 2023); United States v. Collette, 630 F. Supp. 3d 841, 850–51 (W.D. Tex. 2022); United States v. Riley, 635 F. Supp. 3d 411, 424–25 (E.D. Va. 2022); United States v. Hill, No. Crim. H-22-249, 2022 WL 17069855, at *4 (S.D. Tex. Nov. 17, 2022); United States v. Grinage, SA-21-CR-00399-JKP, 2022 WL 17420390, at *4–7 (W.D. Tex. Dec. 5, 2022); United States v. Spencer, No. 2:22cr106, 2022 WL 17585782, at *4 (E.D. Va. Dec. 12, 2022).

251. Kahn, *supra* note 35, at 129.

252. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration*, 160 U. PA. L. REV. 1789, 1796 (2012).

253. *Id*. at 1797; Kanter v. Barr, 919 F.3d 437, 459 (7th Cir. 2019) (Barrett, J., dissenting); Harry David Saunders, *Civil Death—A New Look at an Ancient Doctrine*, 11 WM. & MARY L. REV. 988, 990 (1970).

254. Marshall, *supra* note 26, at 715.

255. *Id*.

256. *Id*.

preservation, property, and freedom of religion. Attainder essentially forfeited property, while corruption of blood denied inheritance to the felon's heir.

If one suffered a civil death only, the legal and social functions of the felon would be restricted while the natural rights would not be. [257] With the social contract, natural rights are distinguishable from social rights.[258] Self-preservation, being a natural right, would thus be excluded from rights related to the moral condemnation of society.

The American version of civil death was authorized by statute only.[259] When the Constitution was ratified, the term "felony" could no longer be definitively intertwined with a capital sentence.[260] Life imprisonment was unknown at common law, requiring American courts to recognize that death was not automatic upon felony conviction.[261] This shift required a different understanding of the term "civil death."[262] Courts thus settled on a civil death by statute model, allowing for the deprivation of some rights from felons.[263] By the mid-twentieth century, civil death statutes faded.[264]

b. Virtuous Citizen

Historically, felons could be excluded from exercising certain rights such as voting and jury service.[265] Such exclusions were considered appropriate because these rights were exercised by virtuous citizens only.[266] Courts considering Section 922(g)(1) challenges often examine rights associated with the "virtuous citizen."[267] These courts connect the concept

257. *Id*.

258. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 243, 245, 365–66 (1772) (discussing natural rights in Section 87, "Man being born, as has been proved, with a title to perfect freedom, and an uncontrouled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power, not only to preserve his property, that is, his life, liberty and estate, against the injuries and attempts of other men . . ."; explaining the social compact in Section 89, "Where-ever therefore any number of men are so united into one society, as to quit every one his executive power of the law of nature, and to resign it to the publick, there and there only is a *political, or civil society*"; remarking on self-defense in Section 233, "Self-defense is a part of the law of nature; nor can it be denied the community, even against the king himself. . . .").

259. Chin, *supra* note 252, at 1796.

260. *Id*. at 1797; Kanter v. Barr, 919 F.3d 437, 459 (7th Cir. 2019) (Barrett, J., dissenting).

261. *Kanter*, 919 F.3d at 460 (Barrett, J., dissenting).

262. Saunders, *supra* note 253, at 990.

263. *Kanter*, 919 F.3d at 460 (Barrett, J., dissenting).

264. Chin, *supra* note 252, at 1790.

265. *Kanter*, 919 F.3d at 462 (Barrett, J., dissenting).

266. *Id*.

267. United States v. Rice, 662 F. Supp. 3d 935, 945 (N.D. Ind. 2023); United States v. Butts, 637 F. Supp. 3d 1134, 1138 (D. Mont. 2022); United States v. Ramos, No. 2:21-cr-00395-RGK-1, 2022 WL 17491967, at *4 (C.D. Cal. Aug. 5, 2022).

with republicanism and an understanding that only virtuous citizens, those interested in maintaining peace, could bear arms.[268] Some scholars support this notion, finding the right to bear arms strongly linked to the idea that the virtuous citizen would protect society against foreign enemies, criminals, and an oppressive government.[269] Others find the American frontier ethos as a point of divergence; a point where some rights, such as the right to bear arms, were divorced from their civic communal obligations.[270] Violence on the frontier brought a different understanding to the exercise of the right to bear arms.[271] Nevertheless, several federal courts determined that felons were not considered "the people," referring to the principle of virtuous citizenship.[272]

In the context of the Second Amendment, *Heller* provides a distinction between individual rights and collective rights. Virtue exclusions are connected with civic rights, requiring individuals '"to act in a collective manner for distinctly public purposes.'"[273] Noting the First Amendment's Assembly and Petition Clause, the Fourth Amendment's Search and Seizure Clause, and the Ninth Amendment's reference to "the people," the Court distinguished these as "individual rights" as opposed to "'collective rights'" or "rights that may be exercised only through participation in some corporate body."[274] For example, The Fourth Amendment's Search and Seizure Clause is not a civic right, where citizens must act in a collective manner for a public purpose.[275] Instead, the "right of the people" is to be exercised individually, separate from other citizens. Therefore, the individual right enshrined in the Second Amendment is like the right guaranteed by the Fourth Amendment.

268. *Ramos*, 2022 WL 17491967, at *4 (citing John Trenchard & Walter Moyle, AN ARGUMENT SHEWING, THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT, AND ABSOLUTELY DESTRUCTIVE TO THE CONSTITUTION OF THE ENGLISH MONARCHY 7 (1697)); *Butts*, 637 F. Supp. 3d at 1138.

269. David Thomas Konig, *The Persistence of Resistance: Civic Rights, Natural Rights, and Property Rights in the Historical Debate over "the Right of the People to Keep and Bear Arms"*, 73 FORDHAM L. REV. 539, 541 (2004); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 L. & CONTEMP. PROBS. 143, 146 (1986).

270. Konig, *supra* note 269, at 542.

271. *Id*. at 541–42.

272. *Rice*, 662 F. Supp. 3d at 945; United States v. Collette, 630 F. Supp. 3d 841, 850–51 (W.D. Tex., 2022); United States v. Riley, 635 F. Supp. 3d 411, 424–25 (E.D. Va. 2022); United States v. Hill, No. Crim. H-22-249, 2022 WL 17069855, at *3–4 (S.D. Tex. Nov. 17, 2022); United States v. Grinage, No. SA-21-CR-00399-JKP, 2022 WL 17420390, at *4–7 (W.D. Tex. Dec. 5, 2022); United States v. Spencer, No. 2:22cr106, 2022 WL 17585782, at *4 (E.D. Va. Dec. 12, 2022).

273. Kanter v. Barr, 919 F.3d 437, 462 (7th Cir. 2019) (Barrett, J., dissenting).

274. District of Columbia v. Heller, 554 U.S. 570, 579 (2008).

275. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

c. Law-abiding Citizen

In *Heller* and *Bruen*, the Court remarked in dicta that the right to bear arms was authorized for "law-abiding, responsible citizens."[276] Prior to *Rahimi*, the idiom "law-abiding, responsible citizen" was frequently employed to uphold Section 922(g)(1). Lower courts interpreted the phrase as jurisprudential exclusionary language forming part of the Second Amendment.[277]

The Court seemed to clarify in *Rahimi* that the axiom did not create an exception. There, the Government argued that Congress had authority to disarm "those who are not law-abiding, responsible citizens" referencing *Heller* and *Bruen*.[278] Focusing on the word "responsible," the *Rahimi* Court declined to adopt the government's rule, finding the word too "vague" on which to create a workable ruling.[279]

In his *Rahimi* dissent, Justice Thomas vehemently opposed the government's argument, finding it "antithetical to our constitutional structure" and "not a historically grounded right."[280] He further added the danger that Congress could impose any firearm regulation so long as it targets "unfit" persons.[281] And, of course, Congress would also dictate what "unfit" means and who qualifies. The historical understanding of the Second Amendment right would be irrelevant. In fact, the Government posited that Congress could enact a law that the Founders explicitly rejected.[282]

Justice Stevens discussed this very idea over a decade earlier in his *Heller* dissent, finding the linkage of a constitutional right to the ideas of "law-abiding" and "responsible" concerning.[283] For him, such language allows for the introduction of subjective assessments of what those words

276. *Heller*, 554 U.S. at 635; N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2131 (2022).

277. United States v. Torres–Rosario, 658 F.3d 110, 113 (1st Cir. 2011); United States v. Moore, 666 F.3d 313, 319 (4th Cir. 2012); United States v. Pruess, 703 F.3d 242, 245–46 (4th Cir. 2012); United States v. McKay, No. 23 CR 443, 2024 WL 1767605, at *3–4 (N.D. Ill. Apr. 24, 2024); United States v. Fulcar, No. 23-cr-10053-DJC, 2023 WL 7116738, at *5 (D. Mass. Oct. 27, 2023); United States v. Daniels, No. 13-cr-00523-WHO, 2015 WL 1743746, at *6–8 (N.D. Cal. 2015); United States v. Giambro, 676 F. Supp. 3d 9, 11–12 (D. Me. 2023); Nicks v. United States, No. 5:23-cv-2-KDB, 2023 WL 4356065, at *10 (N.D.N.C. July 5, 2023); United States v. Jones, 673 F. Supp. 2d 1347, 1352 (N.D. Ga. 2009); United States v. Bullock, 679 F. Supp. 3d 501, 518–19 (S.D. Miss. 2023).

278. United States v. Rahimi, 144 S. Ct. 1889, 1903 (2024); Oral Argument at 1:20–1:27, United States v. Rahimi, Oral Argument, 144 S. Ct. 1889 (2024) (No. 22-915), https://www.oyez.org/cases/2023/22-915.

279. *Rahimi*, 144 S. Ct. at 1903.

280. *Rahimi*, 144 S. Ct. at 1945 (Thomas, J., dissenting).

281. *Id*.

282. *Id*.

283. District of Columbia v. Heller, 554 U.S. 570, 644–45 (2008) (Stevens, J., dissenting).

mean in a constitutional sense.[284] He further remarked that it would likely lead to significant jurisprudential variation in the federal circuits and states as well as reinscribe the racial typecasts of who is a law-abiding responsible citizen and who is a criminal.[285]

"Law-abiding, responsible citizen" is not in the text of the Second Amendment and was ultimately rebuffed by the Court as a principled basis for a Second Amendment exclusion in *Rahimi*.[286] Mentioned only in dicta, the phrase should not be afforded persuasive weight. To do otherwise is to read into the constitutional text a meaning that is not there.

2. Omitted language

The Second Amendment analysis should consider the absence of the word "felon" or some other phraseology indicating an exclusion based on a criminal conviction. *Richardson v. Ramirez*[287] and the constitutionality of felon exclusions from the franchise provide an example of a textual deprivation of a right.[288] In *Richardson*, the Supreme Court ruled that felon disenfranchisement is not a violation of Equal Protection.[289] In doing so, the Court pointed to the text of Section 2 of the Fourteenth Amendment where the language explicitly authorized limitations on the right to vote based on a criminal conviction.[290] The constitutional text unequivocally calls for disenfranchisement for participation "in rebellion, or other crime[s]."[291] The text of the Second Amendment makes no such reference.

The words "crime" or "felony" are wording the Framers were familiar with at the time of the ratification. The words are used in other sections of the Constitution.[292] Moreover, "felony" and "crime" used in the Constitution

284. *Id*.

285. *Id*.

286. *Rahimi*, 144 S. Ct. at 1903; Oral Argument at 1:20–1:27, *Rahimi*, 144 S. Ct. 1889 (2024) (No.22-915), https://www.oyez.org/cases/2023/22-915.

287. 418 U.S. 24 (1976).

288. *Id.* at 24.

289. *Id*. at 56.

290. *Id*. at 42–48.

291. *Id*. at 42–43 (emphasis removed).

292. *See* U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high *Crimes* and Misdemeanors.") (emphasis added); U.S. CONST. art. IV, § 2, cl. 2 ("A Person charged in any State with Treason, *Felony*, or other *Crime*, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime) (emphasis added); U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, *Felony* and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and

connote an exclusion from holding office and exercising civil rights.[293] This is strong evidence against providing a felon exclusion. The Framers knew how to use these words to delineate an exception to a constitutional provision at the time of the Founding and did so.[294] Again, there is no such language in the Second Amendment text.[295] And "what a text chooses *not* to do–[is] as much a part of its 'purpose' as its affirmative dispositions."[296] With this, judges should refrain from invoking an "unprovided-for exception[]" when interpreting the Second Amendment.[297]

Many lower courts upholding Section 922(g)(1) cite several examples, almost always the same ones, of proposed exclusionary language at the Founding as evidence of the Framers' intent to exclude felons from the right to bear arms.[298] The "Dissent of the Minority" publication from Pennsylvania Anti-Federalists is often cited for the "unless clause" suggestion, that "no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals."[299] The New Hampshire convention's unless clause is also frequently cited. It reads: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."[300] Finally, a few delegates from the Massachusetts convention, including Samuel Adams, proposed a proviso that the Constitution "be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms."[301] As the text of the Second Amendment demonstrates, none of this language was adopted.[302]

In the same vein, evidence exists that several of the Framers believed in "an armed people" without restriction.[303] Much of the Framers' support of firearms was premised on the ideology that a free people must be permitted

returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.") (emphasis added).

293. *Id.*

294. *Id.*

295. Sherwood, *supra* note 26, at 1455.

296. SCALIA & GARNER, *supra* note 248, at 57.

297. *Id.* at 93–94 ("The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it.").

298. Range v. Att'y Gen., 69 F.4th 96, 126 (3d Cir. 2023) (en banc), *vacated sub nom.* Garland v. Range, 144 S. Ct. 2706 (2024); United States v. Jackson, 69 F.4th 495 (8th Cir. 2023), *vacated*, 85 F.4th 468 (8th Cir. 2024); Atkinson v. Garland, 70 F.4th 1018, 1032 (7th Cir. 2023) (Wood, J., dissenting).

299. Marshall, *supra* note 26, at 712–13 (citation omitted); *Jackson*, 69 F.4th at 503.

300. Marshall, *supra* note 26, at 713 (citation omitted).

301. *Id*.

302. United States v. Rahimi, 61 F.4th 443, 457 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024).

303. Don B. Kates, Jr., *Toward a History of Handgun Prohibition in the United States*, in RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 7, 9 (Don B. Kates, Jr. ed., 1979).

to defend themselves physically.[304] Guns were politically pragmatic and personally necessary.[305] Thomas Jefferson, for example was a consummate supporter of firearm freedoms and had a negative opinion of restrictions.[306] He was an amateur gunsmith, keeping a personal arsenal of guns.[307] In a 1776 model constitution Jefferson authored, he wrote: "[N]o free man shall be debarred the use of arms within his own land."[308] James Madison celebrated the "advantage of being armed, which the Americans possess over the people of almost every other nation" in The Federalist No. 46.[309] In The Federalist No. 29, Alexander Hamilton understood freedom to require that "the people at large" be permitted to be "properly armed and equipped. . . ."[310] Patrick Henry, an avid Anti-Federalist, expressed the same idea: "The great object is that every man be armed . . . everyone who is able may have a gun."[311]

The Founding generation did not want to impose any gun control laws equivalent to a laundry list.[312] There is no comparable history of felon-based restrictions at the Founding. The 1689 English Declaration of Rights did not exclude felons.[313] Neither did the criminal law of the 1700s.[314] At common law there were no prohibitions on felons possessing firearms.[315] There were no laws limiting gun possession by the mentally ill, nor laws denying the right to people convicted of crimes.[316] Moreover, there were no restrictions on the commercial sale of firearms, gun dealer licensing requirements, mandatory background checks, or waiting periods on gun purchases; these laws were first enacted in the twentieth century.[317]

The fundamental nature of the right to bear arms should not be forgotten because the challenger is from a disliked group.[318] After examining the text

304. *Id*. at 10.
305. *Id*. at 9–10.
306. *Id*. at 9.
307. *Id*. at 10.
308. *Id*. at 9.
309. *Id.*; THE FEDERALIST NO. 46 (James Madison).
310. Kates, *supra* note 303, at 9; THE FEDERALIST NO. 29 (Alexander Hamilton).
311. Kates, *supra* note 303, at 9.
312. Winkler, *supra* note 30, at 1563.
313. Marshall, *supra* note 26, at 714.
314. *Id*.
315. *Id*. at 717.
316. Winkler, *supra* note 30, at 1563.
317. *Id*.; *see also* Dubber, *supra* note 30, at 929; BENJAMIN QUARLES, THE NEGRO IN THE MAKING OF AMERICA 81 (1987).
318. *See generally* United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024); Range v. Att'y Gen., 69 F.4th 96 (3d. Cir. 2023) (en banc), *vacated sub nom.* Garland v. Range, 144 S. Ct. 2706 (2024); United States v. Jimenez-Shilon, 34 F.4th 1042 (11th Cir. 2022); United States v. Sternquist, 692 F. Supp. 3d 19 (E.D.N.Y. 2023); United States v. Quailes, 688 F. Supp. 3d 184 (M.D. Pa. 2023); United States v. Lane, No. 22-cr-132, 2023 WL 5614798 (D. Vt. Aug. 24, 2023); United States v. Schnur, 684 F. Supp. 3d 522 (S.D. Miss. 2023); United States v.

of the Second Amendment, the construction of "the people," and the historical understanding of the divestment of rights at the Founding, the presumption that lifetime felon firearm bans are constitutionally permissible is significantly weakened.

B. Step Two

Step Two of the *Bruen* test requires an analysis of the American history and tradition of a challenged regulation. To accomplish this, Step Two is divided into two primary parts: (1) justifications and (2) burdens. Each part will analyze Section 922(g)(1) and then compare the statute with historical Black firearm exclusions during the Founding, pre- and post-Civil War era, and during Reconstruction.

1. Justifications

The examination of the justification underlying Section 922(g)(1) entails an honest evaluation of the social circumstances surrounding the enactment of Section 922(g)(1) and its modifying statutory successors. It involves removing the colorblind lens and piercing through the coded language in the legislative text and political messages supporting it. This part then offers an analysis of the justifications for the historical comparable analogues: Black firearm exclusions during the American colonial era, the Founding, and during Reconstruction. The similarity of the political reasons for Section 922(g)(1) and historical Black firearm exclusions comes into focus revealing that white fear of armed Blacks is a chief reason for both sets of rules.

a. Section 922(g)(1)

Colorblindness allows for a clean break from the racially charged social circumstances and historical facts influencing legislation at the time of the ratification of any rule. Without decoding, the words and phrases cited by Congress and the courts today appear race-neutral and are general enough to be loosely interpreted to fit any category of persons the law wishes to target. The modern Second Amendment jurisprudence, however, constitutionally linked race to the tradition of disarmament thus removing the colorblind lens to a degree and permitting a more probing inquiry into the racial narrative

Zelaya Hernandez, 678 F. Supp. 3d 850 (N.D. Tex. 2023); United States v. Melendrez-Machado, 677 F. Supp. 3d 623 (W.D. Tex. 2023); United States v. Le, 669 F. Supp. 3d 754 (S.D. Iowa 2023); Campiti v. Garland, 649 F. Supp. 3d 1 (D. Conn. 2023); United States v. Carrero, 635 F. Supp. 3d 1210 (D. Utah 2022); United States v. Young, 639 F. Supp. 3d 515 (W.D. Pa. 2022); United States v. Coombes, 629 F. Supp. 3d 1149 (N.D. Okla. 2022); United States v. Barber, No. 20-cr-384, 2023 WL 1073667 (E.D. Tex. Jan. 27, 2023); United States v. Gray, No. 22-cr-00247, 2022 WL 16855696 (D. Colo. Nov. 10, 2022).

influencing American gun control. In peeling back the socio-political layers of Section 922(g)(1) and decoding the seemingly colorblind language in the statute, the racial motivations for the GCA in 1968, and later the ACCA during the War on Drugs in the 1980s, come into focus.

At first glance, the justification for Section 922(g)(1) appears reasonable. In endorsing the GCA, Congress found "widespread traffic in firearms . . . a significant factor in the prevalence of lawlessness and violent crime in the United States."[319] Further, the Court in *Huddleston v. United States*[320] recognized the legislative intent of the Act was to reduce "lawlessness and violent crime[s]."[321] The Act itself explicitly cited concerns for "dangerousness" and "risk" as the purpose for the legislation.[322]

Since its enactment, reviewing federal courts have interpreted the congressional intent of the GCA to authorize the disarmament of presumptively "dangerous" or "risky" people.[323] Per *Bruen*, reviewing courts must therefore analyze whether there is an American history and tradition of disarming "dangerous" people.[324] While there is a history of firearm restrictions based on dangerousness that dates back to 1600s England, relying on these times presents serious constitutional questions that impinge upon race, equality, and freedom.[325]

There are two principal issues triggered by this inquiry. First, and as Justice Barrett recognized in *Kanter*, using dangerousness could allow the government "to designate any group as dangerous and thereby disqualify its members from having a gun."[326] Justice Thomas further reiterated the concern for using dangerousness in his *Rahimi* dissent, finding the use of such general principles "wrong as a matter of constitutional interpretation" while "undermin[ing] the very purpose and function of the Second Amend-

319. United States v. Jackson, 69 F.4th 495, 504 (8th Cir. 2023), *vacated*, 85 F.4th 468 (8th Cir. 2024) (citing Pub. L. No. 90-351, § 901(a)(1)–(2), 82 Stat. 225, 225).

320. 415 U.S. 814 (1974).

321. *Id.* at 824.

322. United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010); Schrader v. Holder, 704 F.3d 980, 990 (D.C. Cir. 2013).

323. *Holder*, 704 F.3d at 989–90; *Yancey*, 621 F.3d at 683; *Jackson*, 69 F.4th at 504–05.

324. United States v. Velazquez, No. 23-657, 2024 WL 49690, at *13 (D.N.J. Jan. 4, 2024); United States v. Hawkes, No. 22-111-GBW, 2023 WL 8433758, at *7 (D. Del. Dec. 5, 2023); United States v. Rowson, 652 F. Supp. 3d 436, 466 (S.D.N.Y. 2023); *contra* United States v. Bullock, 679 F. Supp. 3d 501, 534 (S.D. Miss. 2023); Jackson, 69 F.4th at 504; Range v. Att'y Gen. U.S., 53 F.4th 262, 281–82 (3d Cir. 2022), *rev'd en banc*, 69 F.4th 96 (3d Cir. 2023), *vacated sub nom.* Garland v. Range, 144 S. Ct. 2706 (2024).

325. *Jackson*, 69 F.4th at 502.

326. Kanter v. Barr, 919 F.3d 437, 465 (7th Cir. 2019) (Barrett, J., dissenting).

ment."[327] For Justice Thomas, "laws targeting 'dangerous' persons led to the Second Amendment."[328]

Almost all gun control can be recast as limitations on a dangerous person.[329] And criminal offenses lay the groundwork for classifying dangerousness.[330] A felon is a "person[] who, by their actions, [has] demonstrated that they are dangerous, or that they may become dangerous."[331] By their nature, and because they belong to the excluded group, they are considered dangerous.[332] Thus, felons "may not be trusted to possess a firearm without becoming a threat to society."[333] However, "no one piece of historical evidence suggests that when the Founders ratified the Second Amendment, they authorized Congress to disarm anyone it deemed dangerous."[334] Nevertheless, lower courts are finding such a history and using it as a basis to uphold Section 922(g)(1), going as far as creating an explicit presumption of dangerousness to felon status.[335]

Secondly, using America's history and tradition of enacting categorical restrictions on those deemed dangerous is hypocritical. The government uses the regretful history of racial and religious exclusions to rationalize the constitutionality of Section 922(g)(1).[336] No doubt, group and status firearm restrictions existed during the American colonial and Founding eras.[337] There were two primary types: (1) prohibitions on whites and (2) restrictions on non-whites. Whites who refused to swear loyalty oaths to the Revolution were disarmed along with religious minorities at the Founding.[338] In terms of racial exclusions, Native Americans and both free and enslaved Blacks were

327. United States v. Rahimi, 144 S. Ct. 1889, 1945 (2024) (Thomas, J., dissenting).

328. *Id*. at 1934.

329. *Id*. at 1938.

330. Dubber, *supra* note 30, at 843.

331. *Id*. at 919 (citing 114 CONG. REC. 14773 (1968) (statement of Sen. Long)).

332. *Id*. at 920.

333. *Id*. at 919 (citing 114 CONG. REC. 14773 (1968) (statement of Sen. Long)).

334. *See* United States v. Daniels, 77 F.4th 337, 350 (5th Cir. 2023), *vacated*, 144 S. Ct. 2707 (2024).

335. *See* United States v. Jackson, 69 F.4th 495, 504–05 (8th Cir. 2023), *vacated*, No. 22-2870, 2024 WL 3768055 (8th Cir. 2024) (citing Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 119–20 (1983)) (citing the Congressional intent of the GCA to disarm those that pose "an unacceptable risk of dangerousness," the Court of Appeals upheld the statute determining that Congress meant to prohibit firearm possession from those "who might be expected to misuse them"); *see also* Schrader v. Holder, 704 F.3d 980, 990 (D.C. Cir. 2013); United States v. Yancey, 621 F.3d 681, 683–84 (7th Cir. 2010).

336. *Jackson*, 69 F.4th at 502; Range v. Att'y Gen. U.S., 53 F.4th 262, 283 (3d. Cir. 2022), *rev'd en banc*, 69 F.4th 96 (3d Cir. 2023), *vacated sub nom.* Garland v. Range, 144 S. Ct. 2706 (2024).

337. Winkler, *supra* note 30, at 1562.

338. *Id*.; *see Daniels*, 77 F.4th at 350–51.

disarmed.[339] Thus, only a small fraction of the American population was permitted to bear arms at the Founding.[340] These laws were "based on concerns for the safety of the polity," and "had [their] own unique political or social motivations."[341] Today, most such exclusions would be deemed unconstitutional and protected by the First, Fourteenth, and now, Second Amendments.

The Second Amendment inquiry at Step Two thus requires an inquiry into whether the justifications for Section 922(g)(1) have a historical analogue.[342] To appropriately answer this question, courts must first investigate what "dangerousness," "risk," "lawlessness," or "violent crime" Congress is referencing. Who exactly were considered the "dangerous" and "risky" people in 1968? This naturally leads to an examination of the socio-political circumstances at the time the GCA was enacted.

Taken without context, phrases such as "dangerous," "lawlessness," and "violent crime" are left without substance. Alone, the race neutral terminology may appear innocently motivated by public safety. However, when considering the record without a colorblind lens, the words take on a socio-political meaning. Here the meaning ascribed to each of these terms is that Black people are dangerous, lawless, and violent. Without cherry picking through the record, there is no other reasonable conclusion when one considers the general background, the facts supported by primary and secondary sources, congressional records, and public debates.[343] Once explicitly a racial exclusion, it is now concealed by colorblind language using "dangerous" and "risk" as its proxy.

i. Gun Control Act of 1968

In the 1960s, Blacks demanded equality.[344] As Black America's self-perception improved, so did the clarity in the contrast of opportunities offered

339. The Government in Section 922(g)(1) challenges has used these statutes as historical analogues or evidence of an American history and tradition to disarm dangerous people. *See, e.g.*, United States v. Griffin, 704 F.Supp.3d 851, 859–60 (N.D. Ill. 2023); United States v. Robinson-Davis, No. 7:22-cr-00045, 2023 WL 2495805, at *3 n.1 (W.D. Va. March 14, 2023); United States v. Williams, 718 F.Supp.3d 651, 674 (E.D. Mich. 2024).

340. Winkler, *supra* note 30, at 1562.

341. *See Daniels*, 77 F.4th at 351.

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

343. Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 439 (2023). Professor Solum encourages originalist judges to "consider all of the relevant evidence provided by the constitutional record," which "includes, but is not limited to, the general historical background in which provisions were framed and ratified, records of the framing or drafting of the relevant provisions, public debates about the relevant provisions . . . and early judicial decisions interpreting the provisions." *Id.*

344. QUARLES, *supra* note 317, at 306.

to whites.[345] Casting off the blood-soaked blanket of inferiority, Blacks instead wrapped themselves in the cloak of equality and insisted on fair treatment.[346] And the necessity of guns for-self-defense found overwhelming support in the Black community. [347]

The struggle for Black equality during the Civil Rights Movement was a time of "unprecedented societal concern[]" and took on two different shades.[348] The non-violent approach, endorsed by Martin Luther King, Jr., was all-inclusive, started the momentum of the movement, and brought international attention to the inequities suffered by Black Americans.[349] This approach did not use violence in the face of a physical attack.[350] Instead, civil disobedience and large scale marches were used to exercise constitutional freedoms and bring attention to racist American laws.[351] The other approach, Black Power, encouraged armed self-defense, shunned white participation in the movement and proclaimed self-sufficiency.[352] It was this approach that frightened white America and inspired the GCA.[353]

Black Power terrified white America.[354] Started in the 1930s, the Black Muslim movement gained traction in the 1960s, producing Malcolm X, the ex-con turned Minister whose anger enchanted Blacks and terrified whites.[355] He offered "the bullet" as an alternative to "the ballot" and fervently asserted the need for Black armed self-defense.[356] The Deacons for Defense and Justice, organized in Louisiana in 1964, obtained a charter for their organization and obtained guns with a pledge to shoot back if fired upon.[357] Formed in 1966 by two Black activists in Oakland California, Huey Newton

345. *Id.*

346. *Id.*

347. John R. Salter, Jr. & Don B. Kates, Jr., *The Necessity of Access to Firearms by Dissenters and Minorities When Government is Unwilling or Unable to Protect*, *in* RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 186 (Don B. Kates, Jr., ed., 1979).

348. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2132 (2022).

349. ANDERSON, *supra* note 231, at 129; *see generally* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63 (1988).

350. *See generally* BRANCH, *supra* note 349.

351. *Id.*

352. QUARLES, *supra* note 317, at 307; TURE & HAMILTON, *supra* note 158, at 52.

353. Wilson, *supra* note 33, at 168–69.

354. *Id*.

355. *See generally* MALCOLM X & ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X (1965); *see also* QUARLES, *supra* note 317, at 324.

356. Malcolm X, Address, The Ballot or the Bullet, Cleveland, Ohio (Apr. 3, 1964), *reprinted in* MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 23–25 (George Breitman ed., 1965); Anders Walker, *From Ballots to Bullets:* District of Columbia v. Heller *and the New Civil Rights*, 69 LA. L. REV. 509, 517 (2009); M.S. Handler, *Malcolm X Sees Rise in Violence: Says Negroes Are Ready to Act in Self-Defense*, N.Y. TIMES, Mar. 13, 1964, at 20.

357. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO L.J. 309, 357–58 (1991).

and Bobby Seale, the Black Panther Party for Self-Defense was founded in reaction to police violence and entered the national stage in the fight for equality.[358] The Panthers intended to fight back "'by whatever means necessary'" and for them "[t]he gun 'is the only thing the pigs will understand.'"[359] And SNCC joined the Black Power movement in 1966 after the bigot of Sammy Younge Jr., a Black college student, for his participation in the civil rights movement.[360]

Chairman Stokely Carmichael developed the Black Power philosophy:[361]

> Those of us who advocate Black Power are quite clear in our own minds that a "non-violent" approach to civil rights is an approach black people cannot afford and a luxury white people do not deserve. It is crystal clear to us—and it must become so with the white society—*that there can be no social order without social justice*. White people must be made to understand that they must stop messing with black people, or the blacks *will* fight back![362]

To white America, Black Power conveyed a message of physical force.[363] From the viewpoint of the Black Power movement, "rampaging white mobs and white night-riders must be made to understand that their days of free head-whipping are over."[364]

In the early 1960s, the gun was a source of protection for Black communities and civil rights workers.[365] As civil rights activist and lawyer Don Kates chronicled,

> I found that the possession of firearms for self-defense was almost universally endorsed by the black community, for it could not depend on police protection from the KKK.
>
> During the civil rights turmoil in the South, Klan violence was bad enough; it would have been worse with gun control. It was only because black neighborhoods were full of people who had guns and could fight back that the Klan didn't shoot up civil rights meetings or terrorize blacks by shooting at random from cars.
>
> Moreover, civil rights workers' access to firearms for self-defense often caused Southern police to preserve the peace as they would not have done if only the Ku Kluxers had been armed.[366]

358. Wilson, *supra* note 33, at 167.
359. *Id*. at 167–68.
360. HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY 1954–1980 216 (1981).
361. *Id.* at 217.
362. TURE & HAMILTON, *supra* note 158, at 53.
363. QUARLES, *supra* note 317, at 322.
364. TURE & HAMILTON, *supra* note 158, at 52–53.
365. Kates & Salter, *supra* note 347, at 186.
366. *Id.* at 186, 188.

The federal government also reacted brutally to Black America during the Civil Rights Movement via COINTELPRO, a string of secret, unlawful FBI counterintelligence projects meant to disrupt domestic political organizations.[367] Director J. Edgar Hoover did deploy violence.[368] The program used espionage, subversive infiltration tactics, wiretapping, and violent measures.[369] COINTELPRO targeted Martin Luther King, Malcolm X, the Black Panthers, and SNCC leadership.[370] But it was Black Panther Fred Hampton that scared the FBI the most.[371] It was when Hampton linked up with the Blackstone Rangers, a strong Black street gang known by the FBI for its violence and guns—"shootings, beatings, and a high degree of unrest"—that COINTELPRO escalated efforts to take him down.[372] With Fred Hampton leading Blacks and backed by violent Black street gangs with guns, a race revolt was possible. After failing to incite internal conflict between the Blackstone Rangers and Hampton, the federal government murdered him; COINTELPRO officers, both city and federal, shot him as he lay asleep next to his pregnant wife in 1969.[373]

By the time three Black teenagers were killed in a Detroit incident involving police at the Algiers Hotel in 1967, the race situation was

367. WARD CHURCHILL & JIM VANDER WALL, *Preface to* THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DOMESTIC DISSENT x, xii (1990). The federal investigation program was initially called the "Counter Intelligent Program," in the early part of the twentieth century but was later named COINTELPRO. Natsu Taylor Saito, *For "Our" Security: Who is an "American" and What is Protected by Enhanced Law Enforcement and Intelligence Powers*?, 2 SEATTLE J. SOC. JUST. 23, 36 (2003); Kathleen Neal Cleaver, *Mobilizing for Mumia Abu-Jamal in Paris*, 10 YALE J.L. & HUMAN. 327, 341 (1998); Jeffrey O.G. Ogbar, *The FBI's War on Civil Rights Leaders,* DAILY BEAST (Feb. 11, 2021, 1:30 PM), https://www.thedailybeast.com/the-fbis-war-on-civil-rights-leaders; David Cunningham, *The Patterning of Repression: FBI Counterintelligence and the New Left*, 82 SOC. FORCES 209, 209 (2003); Rasha Ali, *Fact-Checking 'Judas and the Black Messiah': Was Fred Hampton Drugged or Arrested Over Ice Cream?,* USA TODAY (Feb. 16, 2021, 12:54 PM), https://www.usatoday.com/story/entertainment/movies/2021/02/13/judas-and-black-messiah-fact-check-was-fred-hampton-drugged/4390689001/; Edward J. Boyer, *Past Haunts Ex-Panther in New Life*, L.A. TIMES, May 24, 1994, at A26.

368. CHURCHILL & WALL, *supra* note 367, at 136–138.

369. Cunningham, *supra* note 367, at 211.

370. *See id*. at 223; Virgie Hoban, *'Discredit, Disrupt, and Destroy': FBI Records Acquired by the Library Reveal Violent Surveillance of Black Leaders, Civil Rights Organizations*, BERKELEY LIB. (Jan. 18, 2021), https://www.lib.berkeley.edu/about/news/fbi; ALEXANDER, *supra* note 230, at 53. *See generally* Zahra N. Mian, *"Black Identity Extremist" or Black Dissident?: How* United States v. Daniels *Illustrates FBI Criminalization of Black Dissent of Law Enforcement, From COINTELPRO to Black Lives Matter*, 21 RUTGERS RACE & L. REV. 53, 59 (2020).

371. Cynthia Deitle Leonardataos, *California's Attempt to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947, 966–67 (1999).

372. CHURCHILL & WALL, *supra* note 367, at 107, 135.

373. *Id*. at 92; Nina Renata Aron, *When the Black Justice Movement Got Too Powerful, the FBI Got Scared and Ugly*, MEDIUM (Feb. 9, 2017), https://medium.com/timeline/black-justice-fbi-scared-ebcf2986515c.

perilous.[374] From 1964 through 1967 racial tensions escalated culminating in violent waves of urban race riots across the country rousing concerns of anarchy.[375] The riots sent reverberations of danger through white America, validating the need to arm themselves for personal protection.[376]

The Panthers tested the tolerance of white America on May 2, 1967, when they entered the Capitol building to contest a bill.[377] The bill was set to outlaw open carry within Oakland city limits and was sponsored by a conservative assemblyman that publicly proclaimed he would "get" the Black Panthers.[378] The Panthers were ultimately escorted from the viewing area, guns taken, unloaded, returned and then ordered to leave the building.[379] After they left, twenty-five people were arrested at the gas station across the street.[380] The California legislature quickly passed stricter gun control legislation, which was signed into law on July 28, 1967, by then Governor Ronald Reagan and effective immediately.[381] The statute greatly hindered the ability of Blacks to defend themselves.[382]

The Gun Control Act of 1968 followed quickly on the heels of the California law, inspired by similar motivations—to restrict Black armament.[383] It was signed into law by President Johnson at the height of social disorder and white anxiety of a Black armed revolution.[384] Once decoded, the language of the Act itself provides important clues to the race-based justifications for the regulation.[385]

First, the goal of Congress was not to regulate white gun ownership and access with the GCA. [386] The legislation was not targeting white activities or discouraging private ownership by whites. Lawful uses and ownership were

374. Leonardataos, *supra* note 371, at 952.

375. WILSON, *supra* note 33, at xxii.; LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA 237 (1975); CAMPBELL, *supra* note 232, at 59.

376. CAMPBELL, *supra* note 232, at 61.

377. WILSON, *supra* note 33, at 168; QUARLES, *supra* note 317, at 323.

378. WILSON, *supra* note 33, at 168.

379. *Id*.

380. *Id*.

381. *Id*.

382. Leonardataos, *supra* note 371, at 953.

383. ROBERT SHERRILL, THE SATURDAY NIGHT SPECIAL 280 (1973).

384. Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 170–73 (2018).

385. Maya Itah, *How the Gun Control Act Disarms Black Firearms Owners*, 96 WASH. L. REV. 1191, 1191 (2021).

386. Sherrill, *supra* note 383, at 280.

presented in race neutral terms but are "white-coded activity": activity traditionally associated with whites.[387] The GCA states,

> [H]unting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes . . . .[388]

When one considers the context under which the GCA was passed, there is a strong argument that the "personal protection" clause codes the notion that white America needed to protect themselves from the racial violence plaguing the cities.

Moreover, the GCA prohibited importation of inexpensive guns traditionally associated with Blacks: the "Saturday night special."[389] "Saturday night special," a crude phrase coined during Jim Crow, was a racial slur used by police when referencing incidents of violence in Black neighborhoods.[390] Testimony during congressional hearings presented an image of a user class—Black America.[391] Once again, the exercise of a vital constitutional guarantee, the right to armed self-defense, was outside the reach of Blacks.[392]

Like the Civil War, the Civil Rights Movement was a socio-racial revolution that promised equality to Black Americans. And like the period of racial recasting during Reconstruction, laws were immediately enacted to stop the extension of the freedoms and rights of American citizenship to Blacks. As the history and tradition of the nation suggests, disarmament is a primary tactic of suppression. The GCA was the federal legislative conduit to which disarmament could be accomplished.[393] Race-neutral, Section 922(g)(1) has since been able to survive constitutional scrutiny.[394] But the recent declaration by the Court of the fundamental and individual nature of the right to bear arms coupled with the pronouncement of a new constitutional right with jurisprudential roots in Black history, there is an

387. *Id*.

388. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1214 (codified at 18 U.S.C. § 921 *et seq.*).

389. Barry Bruce-Briggs, *The Great American Gun War,* 45 PUB. INT. 37, 49–50 (1976); 18 U.S.C. § 922(k)–(l).

390. Alicia L. Granse, *Gun Control and the Color of the Law*, 37 MINN. J.L. & INEQ. 387, 409 (2019); Don. B. Kates, *Saturday Night Specials*, *in* 3 VIOLENCE IN AMERICA (Ronald Gottesman & Richard Maxwell Brown eds., 1999).

391. Granse, *supra* note 390, at 409; Gottesman & Brown, *supra* note 390; Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17, 21 (1995); Bruce-Briggs, *supra* note 389, at 50; Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD., 133, 156 (1975).

392. Granse, *supra* note 390, at 409–10.

393. *See generally* Shreefter, *supra* note 384.

394. *See supra* Section II.B.1.a for a discussion of the race-neutral proxy terms used in the GCA.

opportunity to reset the constitutional analytical paradigm to reinforce the American equality principle.

The Section 922(g)(1) of today is still yet different than the Section 922(g)(1) of 1968. The contemporary statute is more severe and because current challenges are based on the contemporary version of Section 922(g)(1), the analysis of the justification for the statute does not end here. There is quite a bit more.

ii. War on Drugs

The contemporary version of Section 922(g)(1) was modified during the War on Drugs in the 1980s. By then, the "lawlessness" referenced in the GCA took on a different character. So did the national response. Criminal punishment and imprisonment were expanded and used to address social issues producing a carceral state, where the presumptively "dangerous" and "risky" person referenced in Section 922(g)(1) continued to be racialized. While Blacks have been linked to criminality, throughout American history, national drug policy firmly connected Blacks to drugs. It did the most to create the American felon, not only by producing an astronomical number of felons vulnerable to disarmament, but also by enacting more restrictive gun control.[395] The War on Drugs thus transformed the "dangerous" civil rights activists of the 1960s into the "dangerous" drug felon of the 1980s. Both were Black in the public consciousness.

It appears from the very beginning that drug policy was racialized.[396] In the early 1900s, Southwestern states criminalized marijuana as a response to the influx of Mexicans and its affiliation with Blacks.[397] To enact the first federal law criminalizing the distribution of heroin and cocaine, the Harrison Act of 1914, Congressman Harrison invoked white anxiety regarding Black cocaine practices.[398] By the time the Federal Bureau of Narcotics ("FBN") was created in 1930, drugs were consistently connected to racial otherness—Blacks and other nonwhite racial and ethnic groups.[399]

The very first commissioner of the FBN and the "founding father" of the War on Drugs, Harry Anslinger, was an overt racist.[400] He consistently

395. Levin, *supra* note 234, at 2197.

396. pond cummings & Ramirez, *supra* note 236, at 459–60.

397. Micheal Vitiello, *The War on Drugs: Moral Panic and Excessive Sentences*, 69 CLEV. STATE L. REV. 441, 448 (2021).

398. Harrison Act of 1914, Pub. L. No. 223, 38 Stat. 785 (1914); United States v. Clary, 846 F. Supp. 768, 775 (E.D. Mo. 1994).

399. *Clary*, 846 F. Supp. at 775.

400. Colin Moynihan, *An Exhibition Tells the Story of a Drug War Leader, but Not All of It*, N.Y. TIMES (Aug. 10, 2020), https://www.nytimes.com/2020/08/10/arts/design/Anslinger-drug-czar-exhibition.html. In 1934, Anslinger "used a racial slur to describe a Black informant . . . as

used racial slurs and symbolism to incite the public, making associations between drugs and people of color.[401] Anslinger framed drugs as a nonwhite issue, demonizing marijuana notwithstanding his earlier opinion that it was not particularly harmful.[402] Many Americans agreed with him, including William Randolph Hearst, an American media mogul whose newspapers backed his efforts.[403] Anslinger successfully lobbied for the Marihuana Tax of 1937, the first federal law criminalizing marijuana.[404] The Act passed, despite opposition from the American Medical Association.[405]

The official start of the War on Drugs that we know today began with the declaration of a "war" on drug use in 1971 by Richard Nixon.[406] This war merged nicely with his "Southern Strategy," which was employed to entice white southern voters to the Republican Party during the 1968 presidential election. [407] The Southern Strategy "used dog-whistle synonyms for the n-word to define anti-Blackness," which "was a way . . . to identify whites as honest, hard-working Americans besieged by Black people, who were freeloaders and threats to society."[408] The tactic was a play on whites fear of civil rights and their dread of "[B]lack [P]ower."[409] Nixon himself believed in an ordering of the races, with Blacks lower in the hierarchy than whites and Asians.[410] And he thought that people should be treated according to their race.[411]

The Civil Rights Movement was messaged as an effort by lawless rioters, "thugs."[412] Nixon used racial codes with phrases such as "states'

described in a biography of the drug war czar by John C. McWilliams, a former history professor at Pennsylvania State University." *Id.*

401. *Id*.

402. *Id*.; Vitiello, *supra* note 397, at 448–49.

403. Vitiello, *supra* note 397, at 449.

404. Moynihan, *supra* note 400; Vitiello, *supra* note 397, at 448.

405. Moynihan, *supra* note 400. No doubt Anslinger embellished testimony during the Congressional hearing, maintaining that one marijuana cigarette could prompt a "homicidal mania," yet it raised concern. *Id*; *see also* Vitiello, *supra* note 397, at 449.

406. pond cummings & Ramirez, *supra* note 236, at 460.

407. *Id*. at 465.

408. ANDERSON, *supra* note 231, at 140.

409. pond cummings & Ramirez, *supra* note 236, at 465.

410. Tim Naftali, *Ronald Reagan's Long-Hidden Racist Conversation with Richard Nixon*, THE ATLANTIC (July 30, 2019), https://www.theatlantic.com/ideas/archive/2019/07/ronald-reagans-racist-conversation-richard-nixon/595102/.

411. *Id*.

412. SUSAN D. GREENBAUM, BLAMING THE POOR: THE LONG SHADOW OF THE MOYNIHAN REPORT ON CRUEL IMAGES ABOUT POVERTY 91 (2015).

rights" and "law and order" to ease white fears.[413] He won the 1968 presidential election, largely due to the appeals to racial resentment.[414]

The War on Drugs proved popular among key white voters, despite the fact there was no drug crisis, nor did Americans consider it a national threat.[415] History taught Nixon the drug laws could be used to vilify and thus disempower minority voters.[416] Shrouded in race neutral rhetoric, the War provided whites the chance to direct their hostility toward Blacks without appearing racist.[417] The War also offered Nixon a smokescreen meant to defuse and disempower the dissenting voting blocs: Blacks and young Americans with a left of center political persuasion.[418] In 1994, John Ehrlichman, a close advisor to Nixon during the construction of the War, conceded this:

> The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.[419]

In 1971, as part of the Comprehensive Drug Abuse Prevent and Control Act of 1970, the Controlled Substances Act was signed into law.[420] The Act created a scheduling system for narcotics and established federal regulations for manufacturing, importing/exporting, and use of these now federally regulated substances.[421] It also laid the groundwork for the Reagan Administration's War on Drugs, *the* War of all the American drug wars.

Ronald Reagan was a master at racial coding and continued the strategy of exploiting white fears of the civil rights agenda and attracting whites

413. Vitiello, *supra* note 397, at 451; Ware & Wilson, *supra* note 201, at 309–10; SITKOFF, *supra* note 361, at 223.

414. Vitiello, *supra* note 397, at 451; Ware & Wilson, *supra* note 201, at 309–10; SITKOFF, *supra* note 361, at 223; pond cummings & Ramirez, *supra* note 236, at 460–61.

415. ALEXANDER, *supra* note 236, at 68.

416. pond cummings & Ramirez, *supra* note 236, at 463.

417. ALEXANDER, *supra* note 236, at 69.

418. pond cummings & Ramirez, *supra* note 236, at 461; Vitiello, *supra* note 397, at 451–52.

419. pond cummings & Ramirez, *supra* note 236, at 461 (citing Dan Baum, *Legalize It All*, HARPER'S, https://harpers.org/archive/2016/04/legalize-it-all/); *see also* Vitiello, *supra* note 397, at 451–52.

420. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections in 21 U.S.C.).

421. *Id*.

harboring racial animus without explicitly mentioning race.[422] Like Nixon, he employed colorblind terminology while using code words signifying traditional racial sentiment such as "states' rights," which was well-known to be a code phrase for desegregation resistance, as well as the new phrases of "welfare queens" and criminal "predators."[423] White voters clearly understood the messages.[424]

Racial coding was a discreet yet widely accepted practice in the Reagan Administration.[425] In 1981, Lee Atwater, Reagan's campaign manager and future GOP Chair, explained the tactic:

> You start out in 1954 by saying "N[****]r, n[****]r, n[****]r." By 1968 you can't say "n[****]r"—that hurts you. Backfires. So you say stuff like forced busing, states' rights, and all that stuff. You're getting so abstract now[.] [Y]ou're talking about cutting taxes, and all these things you're talking about are totally economic things and a by-product of them is . . . blacks get hurt worse than whites.[426]

The practice of racial coding can also be connected to racial animus personally felt by Reagan. Recently publicized tapes of a recorded phone conversation between Reagan and then-President Nixon disclosed Reagan's personal feeling about African Blacks.[427] He said, "[l]ast night, I tell you, to watch that thing on television as I did. . . . To see those, those monkeys from those African countries—damn them, they're still uncomfortable wearing shoes.[428] This language is clearly demonstrative of racial animus.

Reagan's voting record shows a similar hostility. He opposed the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the creation of Martin Luther King, Jr. Day.[429] He kicked off his 1980 presidential campaign at a fair in Mississippi, near a town known for the 1964 murders of three civil rights activists.[430] In 1984, the Ku Klux Klan endorsed Raegan for a second

422. ALEXANDER, *supra* note 236, at 61.

423. pond cummings & Ramirez, *supra* note 236, at 467; Ware & Wilson, *supra* note 201, at 311; ALEXANDER, *supra* note 236, at 61. The phrase "states' rights" was used by prior politicians including Strom Thurmond in 1948, Barry Goldwater in 1965, and George Wallace in 1968. Ware & Wilson, *supra* note 201, at 311.

424. ALEXANDER, *supra* note 236, at 61.

425. pond cummings & Ramirez, *supra* note 236, at 467.

426. Ware & Wilson, *supra* note 201, at 312.

427. pond cummings & Ramirez, *supra* note 236, at 472 (citing Tim Naftali, *Ronald Reagan's Long-Hidden Racist Conversation with Richard Nixon*, ATLANTIC (July 30, 2019), https://www.theatlantic.com/ideas/archive/2019/07/ronald-reagans-racist-conversation-richard-nixon/595102/).

428. Naftali, *supra* note 410.

429. pond cummings & Ramirez, *supra* note 236, at 471–72.

430. ALEXANDER, *supra* note 236, at 61.

term. [431] A White House spokesperson declined to reject the endorsement.[432] And as President of the United States, he vetoed sanctions against South Africa's apartheid government.[433]

During the War on Drugs, the media propagated the association between Blacks, drugs, and violence with portrayals of wild, militant, Black and Brown perpetrators, while vicious political rhetoric played in the background linking drugs, crime, violence, and non-whites. A study in 1990 concluded that close to 80% of the news involving Black people depicted that person as involved in a violent or drug crime.[434] Such programming presented "[B]lack urban poverty" as a separate world from that of program viewers.[435] Today, the word "urban" is synonymous with "[B]lack," and is also linked with crime and drugs in the media.[436]

The protection of the public safety from drug abuse and drug trafficking was the justification for wartime legislation.[437] While the legislation was being drafted and enacted, data showed that drug use was on the decline.[438] By the end of President Reagan's tenure, only 3% of the American population regarded drug use as the most important problem the country was facing.[439]

The War on Drugs was manufactured by leaders bent on criminalizing Blacks and dissenters and a media all too happy to perpetuate white American fear of Blacks. The very architecture of wartime rules suggests race-based policies. For example, the crack-to-powder ratio used at federal sentencing is racialized.[440] Crack, a drug associated with poor Black people, was punished 100 times more harshly than powder cocaine, a drug associated with white people.[441] Congress deliberately chose to punish Black defendants more harshly than white defendants and without any evidence to support the

431. Robin D. Barnes, *Blue by Day and White by [K]night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1121 (1996).

432. *Id*.

433. pond cummings & Ramirez, *supra* note 236, at 471.

434. Jones, *supra* note 221, at 1038.

435. *Id*.

436. Adamson, *supra* note 219, at 224.

437. Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 26 (1994).

438. *Id.* at 26–36; 132 CONG. REC. S26441 (daily ed. Sept. 26, 1986) (statement of Sen. Daniel J. Evans); U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1992 336–37 (Kathleen Maguire et al. eds., 1993).

439. Katherine Beckett, *Setting the Public Agenda: "Street Crime" and Drug Use in American Politics*, 41 SOC. PROBS. 425, 425 (1994).

440. Levin, *supra* note 234, at 2181.

441. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, 2–4 (1986). The 1986 Act instructed federal courts to implement the 100:1 ratio at sentencing. For example, the same five-year mandatory minimum prison sentence was imposed for involving five hundred grams of cocaine or five grams of crack cocaine (cocaine base). 21 U.S.C. § 841(b) (2006); Benjamin Levin, Guns and Drugs, 84 FORDHAM L. REV. 2173, 2181 (2016).

distinction.[442] Furthermore, research published in 2010 reported that the tolerance for the harshness of the War on Drugs by the American public was largely due to "the belief that those disproportionately subject to these harsh sanctions are people they do not like: African American offenders."[443]

The demographic that bore the brunt of the war on drugs were Blacks, with a 205% increase in the arrest rate for use and possession between 1980 and 2009 and a 363% increase for drug sale and manufacture, compared to a 102% increase in arrests and a 205% increase for sale/manufacture for whites.[444] A similar racial imbalance can be seen in the drug war incarceration rate, with Black men six times more likely than their white counterparts to be imprisoned.[445] Simple math directs that more Black men have a predicate felony for Section 922(g)(1) than any other group in America.[446]

The justification for the enactment of Section 922(g)(1) is presented in general, race-neutral terminology, preventing "dangerousness" to protect the public safety. But it would be nothing short of disingenuous and completely inaccurate to discount the racial motivations underlying the War on Drugs and the discriminatory impact on Black communities when assessing the socio-political circumstances surrounding the legislation. In the American criminal chronicle, the presumptively "dangerous" and "risky" person is a felon, and felon is a code word strongly associated with Blacks.

With the criminalization of a large swarth of Black citizens, the government is therefore authorized to deprive this group of several constitutional rights, including the right to bear arms for self-defense, and may do so indefinitely. The indefinite deprivation of a fundamental right based on such a vague and malleable term as "dangerousness" invokes an American historical analogue that many courts ignore and national traditions of disarmament that politicians never mention: historical Black firearm exclusions enacted from the very start of the American republic through the Reconstruction period. Like Section 922(g)(1), the justification for these laws was based on the presumptive dangerousness and risk of armed Blacks able to defend themselves against or actively attack white America.

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442. Levin, *supra* note 234, at 2181–82.

443. James D. Unnever & Francis T. Cullen, *The Social Sources of Americans' Punitiveness: A Test of Three Competing Models*, 48 CRIMINOLOGY 99, 119 (2010).

444. *See* HOWARD SNYDER, U.S. DEP'T OF JUST., ARREST IN THE UNITED STATES, 1980–2009, at 13 (2011), https://bjs.ojp.gov/content/pub/pdf/aus8009.pdf; *see also id.* at Figure 44.

445. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 5, https://urrc.tsu.edu/wp-content/uploads/trends-in-us-corrections.pdf (last visited Oct. 11, 2024).

446. Sarah K. S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1949-2010*, 54 DEMOGRAPHY 1795, 1806–08 (2017); Sherwood, *supra* note 26, at 1460.

b. Comparable Historical Analogue

In the originalist frame, history and tradition serve an important function in the judicial decision-making process.[447] Historical practice is indicative of original meaning and "[h]istorical narratives provide context that both disambiguates and enriches the semantic meaning of the constitutional text."[448] Tradition helps to shape the principles used to interpret the constitutional text.[449] The originalist framework thus requires a comprehensive understanding of the historical period at the framing and ratification of the constitutional provision.[450] Such evidence and information considered includes the general historical background in which provisions were framed and ratified, records of the framing or drafting of the relevant provisions, public debates about the relevant provisions, and early judicial decisions interpreting the provisions.[451] True fidelity to originalism requires judges avoid cherry picking historical evidence that supports a desired outcome.[452] In the context of a Section 922(g)(1) challenge, a discussion of Black history is an essential ingredient to a genuine *Bruen* analysis.

In Second Amendment challenges, the government bears the burden of producing the historical analogue.[453] Here, the best evidence "would be founding-era laws explicitly imposing—or explicitly authorizing legislature to impose—such a ban."[454] Such an exclusion has yet to be discovered, but *Bruen* does not demand a "historical twin."[455] Looking at the metrics—how and why the regulation burdens the right to bear arms—historical Black firearm exclusions during the colonial period, the Founding, and Reconstruction periods are relevantly similar to Section 922(g)(1) in justification. This presents a problem for courts upholding Section 922(g)(1) as historical rules were based on race, now an unconstitutional categorical restriction.

i. Colonial America

Over a century and half before the Declaration of Independence, the American colonies enacted legislation specifically prohibiting Black people

447. Barnett & Solum, *supra* note 121, at 436.

448. *Id*.

449. *Id*.

450. Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1649 (2017).

451. *Id*. at 1655–63.

452. *Id*. at 1675.

453. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2129–30 (2022).

454. Kanter v. Barr, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting); *Bruen,* 142 S. Ct. at 2131–33.

455. *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting); *Bruen*, 142 S. Ct. at 2131–33.

from possessing and carrying weapons.[456] Keeping slaves under control was a major concern.[457] Firearms in the hands of slaves were thought to be particularly dangerous.[458] Southern planters saw not only the risk of rebellion but a threat to the entire Southern plantation system.[459] Many southern colonies thus enacted laws to prevent Blacks from procuring weapons, and all thirteen colonies had some form of Black disarmament.[460]

The earliest recorded history of Blacks on American soil is an entry by John Rolfe dated August 1619.[461] That same year, the Virginia Assembly enacted "An act for preventing Negroes Insurrections."[462] The statute made it illegal "for any negroe or other slave to carry or arme himselfe with any club, staffe, gunn, sword or any other weapon of defence or offence . . . ."[463] This is quite telling, considering that Blacks were disarmed within a year of arrival on American soil.

In 1680, South Carolina enacted a statute that would become the model of Southern repression for the next 180 years.[464] The statute prohibited free Blacks and slaves from carrying a firearm.[465] It was a lifetime exclusion with a punishment of 20 lashes for violators.[466] For southern planters, disarmed

456. *See. e.g*., 2 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL LAW OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, 481–482 (R. & W. & G. Bartow 1823), https://archive.org/details/statutesatlargeb02virg/page/480/mode/2up.

457. Wilson, *supra* note 33, at 11.

458. *Id*.

459. SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 135, 137 (2001).

460. WILSON, *supra* note 33, at 11; NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOSCARY, & MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 103 (2012).

461. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS 20 (Oxford Univ. Press ed. 1978) (citing JOHN SMITH, TRAVELS OF JOHN SMITH 41 (Edward Arber & A. G. Bradley eds., 1910)) ("[A]bout the last of August, there came to Virginia a Dutchman of Warre that sold us twenty Negers.").

462. Hening, *supra* note 456, at 481–82.

463. *Id.*

464. "Whereas the frequent meetings of considerable numbers of Negro slaves under pretense of feasts and burials is judged of dangerous consequence [it] enacted that no Negro or slave may carry arms, such as any club, staff, gun, sword, or other weapon, nor go from his owner's plantation without a certificate and then only on necessary occasions; the punishment twenty lashes on the bare back, well laid on. And further, if any Negro lift up his hand against any Christian he shall receive thirty lashes, and if he absent himself or lie out from his master's service and resist lawful apprehension, he may be killed and this *law* shall be published every six months." HIGGINBOTHAM, JR., *supra* note 461, at 39 (citing JUNE PURCELL GUILD, BLACK LAWS OF VIRGINIA 45, ACT X (Negro University Press rep. ed. 1969) (1680)).

465. *Id.*

466. *Id.*

Blacks reduced the possibility of resistance.[467] In 1712, South Carolina added a firearm search rule, requiring plantation owners to search slave quarters every two weeks "for fugitive and runaway slaves, guns, swords, clubs, and any other mischievous weapons, and finding any, to take them away, and cause them to be secured . . . ."[468]

Prohibitions were not limited to the South – whether free or enslaved.[469] In the North, Boston not only forbade Native Americans, Blacks, and mulattoes from carrying weapons, but also prohibited their assembly in groups from one hour after sundown until one hour before sunrise.[470] Maryland commanded "[t]hat no Negro or other Slave, within this Province, shall be permitted to carry any Gun or any other offensive Weapon, from off their Master's Land, without Licence from their said Master . . . ."[471]

ii. The Founding

At the Founding, relevantly similar regulations to Section 922(g)(1) continued to be Black firearm exclusions.[472] Justification for such rules remained the fear of Blacks and the maintenance of white supremacy. The tradition of Black disarmament developed just like the English practice of disarming Catholics.[473]

Slave revolts terrified white colonial America. The Haitian Revolution of the 1790s exacerbated fears among whites in the American slave states.[474] In Haiti, the slave population overthrew French masters.[475] The fear of slave insurrection was so great in South Carolina that the legislature passed a law in 1739, The Security Act, requiring white men to carry guns to church on Sunday, a time when whites were generally unarmed and slaves were

467. *Id*; *see also* Act of June 7, 1712, no. 314, 1712 S.C. Laws, *reprinted in* THE STATUTES AT LARGE OF SOUTH CAROLINA 352–54 (David McCord ed. 1840) (providing for the better governing of slaves); JULIET E. K. WALKER, FREE FRANK: A BLACK PIONEER ON THE ANTEBELLUM FRONTIER 21 (1983); 75 ARCHIVES OF MARYLAND 268 (William Hand Browne ed., 1885 (enacted 1715).

468. THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 467, at 352–54 ("That every master, mistress or overseer of a family in this Province, shall cause all his negro houses to be searched diligently and effectually, once every fourteen days, for fugitive and runaway slaves, guns, swords, clubs, and any other mischievous weapons, and finding any, to take them away, and cause them to be secured . . . .").

469. WALKER, supra note 467, at 21.

470. HIGGINBOTHAM, JR., *supra* note 461, at 76.

471. Thomas Bacon, *Maryland at Large with Proper Indexes*, 1735 (1765), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000075/html/am75—268.html.

472. Marshall, *supra* note 26, at 726.

473. *Id.*

474. QUARLES, *supra* note 317, at 98–99.

475. *Id.*

permitted to work for themselves.[476] When the first U.S. official arrived in the New Orleans territory in 1803 to take charge, the planters sought to disarm the existing free Blacks and exclude them "from positions in which they were required to bear arms."[477] A series of laws was enacted to do just that.[478]

After Nat Turner's Rebellion in 1831, restrictions on Blacks increased dramatically.[479] The states were plugging legislative and constitutional loopholes to disallow any "negroe, slave, or mulattoe" from possessing or carrying firearms.[480] For instance, the Virginia Legislature banned free Blacks from "keep[ing] or carry[ing] any firelock of any kind, any military weapon, or any powder or lead."[481] An 1840, North Carolina law did the same; it prohibited free Blacks from possessing or carrying a firearm.[482] Some states modified their constitutions in the 1830s to ensure the right to bear arms was provided only to whites.[483] For example, the Tennessee legislature amended the Constitution in 1834 from "the freemen of this State

476. WILSON, *supra* note 33, at 11.

477. Thomas N. Ingersoll, *Free Blacks in a Slave Society: New Orleans, 1718–1812*, 48 WM. & MARY Q. 173, 198 (1991).

478. Under the Black Code of Louisiana, no slave could possess any firearms, concealed or open, even with the written permission of the master. If given a gun for hunting, they had to also possess written permission for the firearm and could not carry it beyond the boundaries of the plantation. WILSON, *supra* note 33, at 42; Act of June 7, 1806, §§ 19, 20, 1806 La. Laws (prescribing the rules and conduct to be observed with respect to slaves of the territory), *in* A GENERAL DIGEST OF THE ACTS OF THE LEGISLATURE OF LOUISIANA, PASSED FROM THE YEAR 1804 TO 1827, INCLUSIVE 103, 104 (L. Moreau Lislet ed., 1828).

> No slave shall, by day or by night, carry any visible or hidden arms, not even with a permission for so doing, and in case any person or persons shall find any slave or slaves, using or carrying such fire arms, or any offensive weapons of any other kind, contrary to the true meaning of this act, he, she or they, lawfully, may seize and carry away such firearms, or other offensive weapons . . . .
>
> The inhabitants who keep slaves for the purpose of hunting, shall never deliver to the said slaves, any firearms for the purpose of hunting, without a permission by writing, which shall not serve beyond the limits of the plantation of the owners.

479. QUARLES, *supra* note 317, at 99–100; STANLEY ELKINS, SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE 220 (Univ. of Chicago Press 3rd rev. ed. 1976).

480. Act of June 18, 1822, §§ 10, 12, 1822 Miss. Laws 179, 181–83 (reducing several acts concerning slaves, free Blacks, and Mulattoes into one); Act of Mar. 15, 1852, ch. 206, 1852 Miss. Laws 328 (prohibiting magistrates from issuing licenses to Blacks for firearms); Act of Jan. 4, 1807, ch. 81, §§ 1-2, 1806 Md. Laws (prohibiting Blacks from carrying guns or offensive weapons); Act of Feb. 27, 1827, ch. 50, § 8, 1827 Del. Laws 120, 125–26 (concerning certain crimes committed by slaves); Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON C.R.L.J. 67, 67 (1991).

481. Act of Mar. 15, 1832, ch. XXII, §§ 4, 1831 Va. Laws 1, 21 (concerning slaves, free negroes, and mulattoes).

482. State v. Newsom, 27 N.C. (5 Ired.) 250, 252 (1844).

483. Marshall, *supra* note 26, at 726–27.

have a right to keep and bear arms" to "the free white men of this State have a right to keep and to bear arms."[484]

In 1857, *Dred Scott v. Sanford*[485] captured the common understanding of whites at the time regarding Blacks and guns in America.[486] Writing for the Court, Chief Justice Roger Taney reasoned that Black people could not be considered citizens under the Constitution because it "would give to persons of the negro race" the right "to keep and carry arms wherever they went."[487] This was something the slaveholding southern states would never have agreed to accept.[488] Thus, the boundary marking citizens and the panoply of constitutional rights that accompanied that status vis-à-vis non-citizens was drawn at the color line. Whether free or enslaved, Blacks were not considered "the people" and were therefore not entitled to any of the rights or liberties enumerated in the Constitution.

iii. Reconstruction

The Framers of the Fourteenth Amendment intended that the constitutional panoply of rights and freedoms granted to American citizens extended to the newly freed slaves.[489] This included "an individual right to own and keep guns in one's home for self-protection."[490] Not only did the Framers understand gun ownership as "a true 'privilege' or 'immunity' of citizens[hip]," but they also knew that Blacks in the South could not rely on the police for protection from white mobs.[491] Blacks would need to defend themselves.[492] The Civil Rights Act of 1866, proclaiming citizenship for all native-born people, including all rights and privileges guaranteed in the United States Constitution,[493] empowered Blacks to exercise newfound freedoms.[494] The Act provided "full and equal benefit of all laws and

484. *Id*.; FRANCIS NEWTON THORPE, THE FED. AND STATE CONSTS., COLONIAL CHARTERS, AND OTHER ORGANIC L. OF THE STATES, TERRITORIES, AND COLONIES NOR OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3424, 3428 (1909).

485. 60 U.S. (19 How.) 393, 416–17 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

486. *Id*.

487. *Id.* at 417.

488. *Id.*

489. QUARLES, *supra* note 317, at 164–65. In 1868, The Fourteenth Amendment was ratified constitutionally guaranteeing Blacks the privileges and immunities associated with United States citizenship and equal protection of the laws. *Id.* at 156–58.

490. Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 899 (2001).

491. *Id*. at 899, 911.

492. *Id*.

493. 14 Stat. 27, 27–30 (1866).

494. *Id*.

proceedings for the security of person and property."[495] It was official: Black America could bear arms, and they did. As a contemporary observer recounted, "some Negro men began carrying guns. White men did this too, more and more frequently. It became so common that young men of both races felt undressed without a pistol stuck in their belts or hip pocket."[496]

After the Civil War, the sight of Black troops would agitate ex-Confederate rebel soldiers.[497] Wishing the troops "removed," one man wrote President Andrew Johnson declaring that only then would "we would have peace and good order at once and thereby put down much prejudice against the negro."[498] Almost immediately after the Civil War, the 180,000 Black Union soldiers returning to the old Confederate South were met with state legislative rules disarming Blacks.[499] The *McDonald* plurality recounted this practice citing the actions of a marshal in a southern town who "[took] all arms from returned colored soldiers, and [was] very prompt in shooting the [B]lacks whenever an opportunity occur[red]."[500] Guns "were the symbols of the new freedom for [B]lacks, as well as a tool of suppression for whites seeking to reestablish the old order" after the Civil War.[501]

Southern legislatures instantly reacted to Black freedom with the Black Codes, race-based exclusions and rules including bans on Blacks from possessing firearms. Historical analogues relevantly similar to Section 922(g)(1) during Reconstruction include several southern statutes enacting legislation disarming Blacks indefinitely. The Black Codes simply continued the colonial and Founding eras oppression of Blacks. Intended to recapture control, these laws included forced labor via indestructible annual labor contracts as well as prohibitions on firearm possession.[502] For example, Mississippi's "Act to Regulate the Relation of Master and Apprentice Relative to Freedmen, Free Negroes, and Mulattoes" outlawed firearm

495. *Id*. at 27.

496. ALLEN W. TRELEASE, RECONSTRUCTION: THE GREAT EXPERIMENT 23 (1971).

497. CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION, 10–22 (2008) (describing the 1873 Colfax massacre, in which dozens of Black militiamen were murdered by former Confederate soldiers and Klu Klux Klan members in Colfax, Louisiana); Andrew F. Lang, *Republicanism, Race, and Reconstruction: The Ethos of Military Occupation in Civil War America*, 4 J. CIV. WAR ERA 559, 566, 574–76 (2014).

498. Lang, *supra* note 497, at 575.

499. Kates, *supra* note 303 (describing various state and local prohibitions of firearm possession by Black people); *Fighting for Freedom, Black Union Soldiers of the Civil War*, CITY OF ALEXANDRIA, VA, https://www.alexandriava.gov/historic-alexandria/fighting-for-freedom-black-union-soldiers-of-the-civil-war (last updated Apr. 1, 2024, 4:53 PM).

500. McDonald v. City of Chicago, 561 U.S. 742, 772 (2010) (citing H.R. Exec. Doc. No. 70, at 238 (internal quotation marks omitted)).

501. Kennett & Anderson, *supra* note 375, at 155.

502. ANDERSON, *supra* note 231, at 85–86 (citing W.E.B. Du Bois, *Black Reconstruction in America* (Henry Louis Gates ed., 1935)).

ownership by Blacks,[503] while Florida prohibited "Negro[es], mulatto[s], or person[s] of color [from possessing] any . . . firearms" without a license.[504] Violators were punished by public whipping up to "39 stripes."[505] Alabama, Mississippi, and South Carolina made it "illegal to sell give or rent firearms or ammunition of any description 'to any freedman, free Negro, or mulatto.'"[506] The *Heller* Court itself acknowledged the continuation of racial firearm exclusions in the former Confederacy after the Civil War, noting an 1866 Freedmen's Bureau report detailing a Kentucky law prohibiting Blacks from keeping and bearing arms.[507]

Although "free," Black Americans were still deprived of the rights and liberties enjoyed by white Americans.[508] Traversing the South, white supremacist groups provided informal enforcement support, disarming Blacks and inflicting a violent reign of terror on the Freedmen, prompting federal legislative action.[509] Race riots erupted in Memphis, Tennessee and New Orleans, Louisiana with dozens of Blacks killed and even more injured.[510] Despite the enactment of the Fourteenth Amendment, the campaign of disarmament and violence against Blacks continued.[511]

The last decade of the 19th century produced an economic depression, populism, lynchings, and a new way of inflicting racial terror.[512] *Plessy v. Ferguson*'s "separate but equal" benediction in 1896 solidified the acceptance of a segregated society.[513] The white South was encouraged to put

503. STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876 2, 12 (1998). The statute also prohibited ownership of "ammunition, dirk[s], or bowie-kni[ves]." *Id.* at 2.

504. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 1860–1880, 172 (First Free Press ed., 1998).

505. ANDERSON, *supra* note 231, at 85–86.

506. *Id*. (citation omitted).

507. District of Columbia v. Heller, 554 U.S. 570, 614–15 (citing H.R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236).

508. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

509. HARRY L. WILSON, GUN POLITICS IN AMERICA: HISTORICAL AND MODERN DOCUMENTS IN CONTEXT 58–59 (2016); *see also* McDonald v. City of Chicago, 561 U.S. 742, 772 (2010) (describing forceful disarmament and acts of violence against freed slaves); Kennett & Anderson, *supra* note 375, at 154 (describing congressional action in response to southern Black Codes, including enactment of the Army Appropriation Act in 1867, which effectively disbanded the southern state militias).

510. QUARLES, *supra* note 317, at 157 (describing southern disenfranchisement efforts following *Plessy v. Ferguson* and courts' striking down the Civil Rights Act).

511. *McDonald*, 561 U.S. at 772 (citing H.R. REP. NO. 30, 39th Cong., 1st Sess., pt. 2, pp. 219, 229, 272, pt. 3, pp. 46, 140, pt. 4, pp. 49–50 (1866); S. Exec. Doc. No. 2, 39th Cong., 1st Sess., 23–24, 26, 36 (1865)).

512. Sara A. Soule, *Populism and Black Lynching in Georgia, 1890–1900*, 71 SOC. FORCES 431, 431–32 (1992).

513. Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).

Blacks back in their place.[514] And, *Plessy* "provided the legal basis and cover for Jim Crow," the American system of racial segregation and inequality prescribed by the law and enforced through brutality and violence.[515]

Jim Crow brought with it a parade of spectacle lynchings, where hundreds of whites observed the torturous lynchings of Blacks.[516] These lynchings were common in the post-Civil War South with close to 2,000 Blacks murdered by white mobs.[517]Aside from white supremacist-inspired violence, Blacks were also lynched by Democratic elites as a warning to the populist movement.[518] According to the National Association for the Advancement of Colored People (NAACP), between 1889 and 1900, 3,224 people were lynched with Blacks comprising 78.2% of victims.[519]

As America struggled to grasp the new social order and implement the promise of racial equality, colorblindness and racial coding eventually replaced statutorily explicit racial firearm exclusions. Now that race was no longer a permissible basis for Black disarmament, southern state legislatures responded by enacting race neutral sale restrictions and reporting requirements. There was an understanding in the South, a custom, that gun dealers would report Blacks who were sold pistols or ammunition.[520] Local sheriffs would then arrest the purchaser, confiscate the gun(s) and either destroy the gun or give it to the Klan.[521] Tennessee, for example, established a ban on the sale of handguns.[522] When white supremacists regained control of the legislature in 1870, it enacted a restriction prohibiting the sale of all but the most expensive handguns.[523] In 1902, South Carolina enacted a statute prohibiting all handgun sales except to the sheriffs and their special deputies, who were usually "company goons and the KKK."[524] In 1906, Mississippi enacted the first registration statute for gun dealers.[525] The law required gun dealers to record all handgun and ammunition sales, making the records available for examination.[526] The authorities charged with inspecting such records often belonged to the Klan.[527]

514. QUARLES, *supra* note 317, at 171–72.

515. ANDERSON, *supra* note 231, at 101.

516. *Id*. at 102.

517. Steward E. Tolnay & E.M. Beck, *Racial Violence and Black Migration in the American South, 1910–1930*, 57 AM. SOCIO. REV. 103, 104–05 (1992).

518. *Id*.

519. NAACP, THIRTY YEARS OF LYNCHING 7 (1919).

520. Kates, *supra* note 303, at 14.

521. *Id*.

522. *Id*.

523. *Id*.

524. *Id*. at 15.

525. *Id*. at 14.

526. *Id*.

527. *See* Shreefter, *supra* note 384, at 169.

By 1919, race riots set America on fire.[528] Even in the flames, Black leaders insisted that Blacks exercise the right to bear arms for self-defense.[529] W.E.B. DuBois commented, "Today we raise the terrible weapon of Self-Defense. When the murderer comes, he shall not longer strike us in the back. When the armed lynchers gather, we too must gather armed. When the mob moves, we propose to meet it with bricks and clubs and guns."[530] Congressional efforts to aid and safeguard former slaves and ensure they could protect themselves, failed to stymie the aggressive political strategy to reestablish the racial caste system in the South.[531] The Klan was free to use paramilitary violence to continuously disarm, beat, and murder Black people.[532] In the face of this, Black America attempted to exercise the right to bear arms.[533] But in the end Black freedom was subjugated to white disarmament.

The justification for American disarmament has remained static throughout the life of the nation: white fear of armed Blacks. And the word "dangerous" has been continuously used as a basis for categorical exclusions throughout American history and up until the present day. Thus, the associations with who is considered dangerous remains fixed: Black America. The only difference is the phrases used to dispossess Blacks and the omission of explicitly racial language.

2. Step Two—Burden

Step Two of *Bruen* requires a showing of a shared burden between Section 922(g)(1) and a relevantly similar historical analogue.[534] A colorblind *Bruen* analysis may provide reviewing courts with permission to ignore the disproportionate burdens imposed on Blacks by Section 922(g)(1). Swept under the race neutral phrases of "dangerous," or "felon" courts may escape confronting these racial inequalities. This course not only disregards the importance of equality and the American promise of freedom, but it also neglects part of history that offers a relevantly similar analogue.

Burdens imposed by historical Black firearm prohibitions during the colonial, Founding, and Reconstruction eras are the most comparable to Section 922(g)(1) in three ways. First, like Section 922(g)(1), these statutes

528. QUARLES, *supra* note 317, at 226. There were over twenty race riots in 1919, the most serious of which occurred in Chicago leaving 38 dead and 537 injured. *Id.*

529. W.E.B. Du Bois, *Let Us Reason Together*, 18 THE CRISIS 231 (1919).

530. *Id*.

531. *Id*.

532. *Id*.

533. *Id*.; GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY, 1865–1940: LYNCHINGS, MOB RULE, AND "LEGAL LYNCHING" 160–61 (1990).

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

imposed a lifetime ban on firearm ownership. Secondly, historical restrictions hindered the ability of Blacks to defend themselves in the face of physical attack. The burden imposed by Section 922(g)(1) operates the same; felons cannot possess a firearm for self-defense even in the home. Finally, historical prohibitions had a disproportionate impact on the Black population. Section 922(g)(1) also has a disparate impact on the Black population.

a. Lifetime Ban

i. Section 922(g)(1)

Section 922(g)(1) functions as a lifetime prohibition on firearm possession, constructively divesting all federal felons of the right to bear arms for self-defense. Currently there is no viable process or adjudicative procedure available restore a federal felon's right to bear arms.[535] Congress defunded Section 925(c) in 1992 leaving federal felons without a remedy to reinstate Second Amendment rights.[536] A recent district court in 2023 identified this phenomenon as lifetime dispossession, connecting it to the lack of an operational procedure for "felons to regain their rights after demonstrating their ability to abide by the rule of law."[537]

Restoration of rights procedures vary jurisdictionally. Automatic restoration of rights (upon the expiration of a criminal sentence) occurs only in a few states.[538] Some jurisdictions provide a process whereby an individual can petition courts for restoration of rights.[539] Still others require an individual to show she is not a danger to the community before firearm liberties are restored.[540] With the denial of funds to support federal restoration of rights pursuant to Section 925(c), federal offenders are left without a remedy to reinstate the right to bear arms.

When Section 922(g)(1) was initially enacted, individuals convicted of a federal felony could petition the federal government for the restoration of their civil rights, including firearm privileges.[541] Pursuant to 18. U.S.C. § 925(c), the Secretary of the Treasury has the discretion to grant relief on a case-by-case basis.[542] The Secretary delegated this responsibility to the

535. United States v. Prince, 700 F. Supp. 3d 663, 675 (N.D. Ill. 2023).

536. *See* Treasury Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992) (defunding § 925(c)).

537. United States v. Prince, 700 F. Supp. 3d 663, 673 (N.D. Ill. 2023).

538. Deborah Bone, *The* Heller *Promise Versus the* Heller *Reality: Will Statutes Prohibiting the Possession of Firearms by Ex-Felons Be Upheld After* Britt v. State*?*, 100 J. CRIM. L. & CRIMINOLOGY 1633, 1639–40 (2010).

539. *Id*.

540. *Id*.

541. 18. U.S.C. § 925(c).

542. Kanter v. Barr, 919 F.3d 437, 439 (7th Cir. 2019); 18 U.S.C. § 925(c).

Bureau of Alcohol, Tobacco, and Firearms ("ATF").[543] To grant relief, the ATF would determine whether the applicant "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."[544] If an application is denied, the individual could then petition the federal district court for review. [545]

In 1992, Congress prohibited use of federal dollars to fund the provision.[546] The Committee on Appropriations determined that the nearly $4 million annual expenditure would be better spent on fighting crime.[547] The Committee further found that the federal restoration procedure was too difficult a task, considering there was no certainty that a felon could be trusted to bear arms.[548] Three years later, the Committee again denied funding for the restoration procedure, noting "too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms."[549]

In 2002, the Supreme Court determined that the Congressional decision to defund Section 925(c) was insulated from judicial review.[550] In *United States v. Bean*,[551] the Court found that judicial review was triggered only if there were an actual decision made by the ATF as opposed to "inaction" via agency failure or refusal to review.[552] Writing for the majority in *Bean*, Justice Thomas determined that defunding the statute resulted in an inaction to review.[553] To constitute an administrative action and prompt judicial review, an administrative determination had to be made on an application.[554] Without it, Section 925(c) petitions would be left undecided and federal offenders left without remedy.

Defunding Section 925(c) results in the constructive deprivation of armed self-defense for a lifetime. Federal felons are deprived of any opportunity to restore the right to self-defense because there is no one available to hear petitions and make determinations. Furthermore, blaming the difficulty of making dangerous determinations on the decision to defund

543. See United States v. Bean, 537 U.S. 71, 75–76 (2002); 27 C.F.R. §§ 178.144(b), (d) (2002).

544. 18. U.S.C. § 925(c).

545. *Id*.

546. Treasury Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992); *Bean*, 537 U.S. at 74. Congress barred the use of federal funds to "investigate or act upon [relief] applications." *Kanter*, 919 F. 3d. at 439; Logan v. United States, 552 U.S. 23, 28 n.1 (2007).

547. *Kanter*, 919 F. 3d at 439; H.R. REP. NO. 102-618, at 14 (1992).

548. H.R. REP. NO. 102-618, at 14 (1992).

549. H.R. REP. NO. 102-618, at 14 (1992); H.R. REP. NO. 104-183, at 15 (1995).

550. United States v. Bean, 537 U.S. 71, 78 (2002).

551. 537 U.S. 71 (2002).

552. *Id*. at 75.

553. *Id*. at 75–76.

554. *Id*.

the process is disingenuous at best and an unpersuasive argument to divest a group from exercising the right to bear arms for self-defense, now a fundamental right. Despite the difficulty in pinning down the meaning of the "dangerousness," these decisions are made every day in the American criminal system. The truth is that courts and probation offices across the country engage in risk assessments as a daily part of the administration of justice. Courts make dangerousness determinations at detention hearings when considering whether to provide bail to criminally charged defendants.[555] And for close to one hundred years, probation offices have employed risk prediction tools to gauge the risk and the appropriate level of supervision and needs of parolees and probationers.[556] In either context, certainty is never possible.

ii. Historical Analogues

Historical Black firearm prohibitions also imposed a lifetime ban on firearm possession, albeit through a different route: explicit racial exclusion. The more "nuanced" analytical approach the *Bruen* Court noted considers that relevantly similar historical and modern statutes may not be exact "historical twin[s]."[557] In the context of this comparison, one cannot expect a historical twin because unequivocal racial exclusions are unlawful. The explicit racial statutory exclusions of early American history were dropped from the official statutory vernacular and deemed unconstitutional making it an entirely reasonable that the language would not be exactly on point.

Reviewing courts either refrain from or are reticent to discuss American racial history. Instead, lower courts focus on government arguments making comparisons to surety and affray laws when reviewing Section 922(g)(1) cases.[558] While *Rahimi* decided a Section 922(g)(8) challenge, it provided the most extensive recitation of these two sets of laws.

At the Founding, surety laws were triggered by concerns about a variety of firearms related violence. The *Rahimi* Court cited spousal abuse and

555. Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1276 (2021).

556. E.W. Burgess, *Factors Making For Success or Failure on Parole, in* THE WORKINGS OF THE INDETERMINATE-SENTENCING LAW AND THE PAROLE SYSTEM IN ILLINOIS (Andrew A. Bruce et al. eds., 1928) (noting the original development of the tool in 1928 by E.W. Burgess for three year study in the Illinois Department of Corrections); *see generally* Kevin N. Wright, Todd R. Clear & Paul Dickson, *Universal Applicability of Probation Risk-Assessment Instruments - A Critique*, 22 CRIMINOLOGY 113, 113 (1984).

557. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2130–33 (2022).

558. *See* United States v. Neal, No. 20 CR 335, No. 21 CR 52, No. 21 CR 631, No. 21 CR 636-3, No. 22 CR 380, 2024 WL 833607, at *10 n.10 (N.D. Ill. Feb. 7, 2024); United States v. Melendrez-Machado, 677 F. Supp. 3d 623, 632–33 (W.D. Tex. 2023); United States v. Ware, 673 F. Supp. 3d 947, 959 (S.D. Ill. 2023).

misuse of a firearm as two bases for surety.[559] These laws required persons suspected of "future misbehaviour" to "give full assurance" that she would not misbehave.[560] "Full assurance" was guaranteed by the posting of a bond.[561]Failure to provide bond resulted in jail.[562] Posting bond and subsequently breaching the peace resulted in forfeiture of the bond.[563] However, surety laws were not imposed for a lifetime. There were temporal limitations on dispossession.[564] Indeed, the *Rahimi* Court noted that bonds could not be required for more than six months, and exceptions could be made for a legitimate reason including self-defense.[565]

Affray laws or "going armed" laws criminally punished and disarmed those that "menaced others with firearms."[566] The focus of these laws was the public carry of "dangerous or unusual weapons, [to] terrify[]."[567] The punishment for a violation was firearm forfeiture and imprisonment.[568] Justice Thomas noted a self-defense exception to "going armed" laws, finding historical evidence that "[a] person could 'go armed with a[n] . . . offensive and dangerous weapon' so long as he had 'reasonable cause to fear an assault or other injury.'"[569] Furthermore, he observed that affray laws targeted only public carry as opposed to possession in private places.[570] Unlike "going armed" laws, Section 922(g)(1) is not particularized to the carrying of "dangerous or unusual weapons," does not have a self-defense exemption and is not limited to carrying arms in public areas.

Post-*Rahimi*, lower courts considering Section 922(g)(1) challenges are evaluating surety and affray laws as possible analogues.[571] In *United States v. Duarte*,[572] the Ninth Circuit used the analysis in *Rahimi* to assess the similarity of surety and affray laws to Section 922(g)(1).[573] Adopting the *Rahimi* conclusion that surety and affray laws were intended to prevent credible acts of violence toward another, the Ninth Circuit determined that unlike 922(g)(8), which prohibited firearm possession by individuals that

559. United States v. Rahimi, 144 S. Ct. 1889, 1899–1900 (2024).
560. *Id*.
561. *Id*.
562. *Id*. at 1899–1900.
563. *Id*. at 1900.
564. *Id*. at 1900–01.
565. *Id*.
566. *Id*.
567. *Id*. at 1901 (citation omitted) (alterations in original).
568. *Id*.
569. *Id*. at 1942 (Thomas, J., dissenting).
570. *Id*.
571. United States v. Duarte, 108 F.4th 786, 790–91 (9th Cir. 2024); United States v. Lorenzo Lewis, No. 24-144(LLA), 2024 WL 3581347, at *2 (D.D.C. July 29, 2024).
572. 108 F.4th 786 (9th Cir. 2024).
573. *Id.* at 790–91.

posed a "threat of physical violence to another," Section 922(g)(1) excluded all felons, both violent and nonviolent felons.[574] The opposite conclusion was reached by the District Court for the District of Columbia in *United States v. Lorenzo Lewis*.[575] Also using *Rahimi*, the district court found surety and affray laws were similar to Section 922(g)(1).[576] Without analysis, the court stated that the principle of disarming individuals presenting a clear threat of physical violence "applie[d] with equal force to those previously convicted of a felony."[577]

Colorblindness allows for the complete disregard of an alternative set of laws enacted during the same time frame that are more comparable to Section 922(g)(1). However, this entire chronicle of laws seems to evaporate with Reconstruction used as a socio-racial resetting of American history. Because the U.S. Constitution was amended to guarantee racial equality, racism no longer legally existed after 1868. The racial legal history and tradition prior to Reconstruction is thus stricken from the historical record, not to be used in constitutional analysis. The Second Amendment gun cases, however, did use this history making it ever more appropriate to consider it in Section 922(g)(1) challenges. The historical fact is that these laws existed on the American legal books for over two hundred years and the burden imposed on targets of the legislation was lifetime disarmament. With this, both Section 922(g)(1) and historical Black firearm restrictions during colonial America, the Founding, and Reconstruction periods have identical burdens: lifetime bans on firearm possession.

b. Self-defense

Felon exclusions strike at the very heart of the Second Amendment individual right to bear arms: self-defense in the home.[578] In *Kanter,* Justice Barrett lamented that felon bans "target the whole right, including its core"; they restrict even mere possession of a firearm in the home for the purposes of self-defense.[579] There is an inconsistency between the theoretical underpinnings of the right to bear arms for self-defense and the restriction on exercising this right to a specific subset of people.[580] In *Heller*, the majority opinion cited Blackstone for the principle that the right to bear arms is

574. *Id*. at 790.

575. *Lorenzo Lewis*, 2024 WL 3581347, at *2.

576. *Id*.

577. *Id*.

578. Kanter v. Barr, 919 F.3d 437, 465 (7th Cir. 2019) (Barrett, J dissenting).

579. *Id*.

580. District of Columbia v. Heller, 554 U.S. 570, 644–45 (2008) (Stevens, J., dissenting); Sherwood, *supra* note 26, at 1456; *see also* 18 U.S.C. § 3142(f)(1).

connected to the natural right of self-preservation and self-defense.[581] The Lockean hierarchy of rights, understands that natural rights trump societal rights.[582] The Court also made several references to additional sources for this premise including treatises, state constitutional jurisprudence and writings of the Framers.[583] So too Justice Alito, the author of *McDonald*, understood the natural right of resistance to form the basis of the right to bear arms.[584] For the majority of the Court, the Second Amendment simply codified this natural right to ensure that everyone could bear arms for self-defense.[585] So, why are felons excluded?[586]

i. Section 922(g)(1)

Section 922(g)(1) prohibits possession by the group that likely needs to defend against violent physical attack the most in American society: Black felons. Disproportionately living in high-crime neighborhoods and without confidence in protection by the police, felons are often facing a prisoner's dilemma: die or go to prison. Section 922(g)(1) thus imposes a burden on the ability to defend oneself on a disproportionate number of American Blacks.

Practically speaking, the group most likely to move to an area where armed self-defense is critical is post-incarceration felons.[587] This population lives mainly in low-income, high-crime, racially segregated neighborhoods where there are more violent occurrences.[588] A study conducted in 2010 reported that the average violent crime rate is 327% higher in these neighborhoods than white neighborhoods.[589] North of 60% of Black adults

581. *Heller*, 554 U.S. at 593–94; McDonald v. City of Chicago, 561 U.S. 742, 767 (2010); Sherwood, *supra* note 26, at 1456–57.

582. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 238–40 (Legal Classics 1994) (1690).

583. *Heller*, 554 U.S. at 585.

584. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2157 (2022) (Alito, J., concurring).

585. Sherwood, *supra* note 26, at 1456–57.

586. *Heller*, 554 U.S. at 644 (Stevens, J., dissenting); Sherwood, *supra* note 26, at 1457; Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 426 (2009); Winkler, *supra* note 30, at 1568; *see generally* S. David Mitchell, *Notice(ing) Ex-Offenders: A Case Study of the Manifest Injustice of Passively Violating a "Felon-in-Possession" Statute*, 2015 WIS. L. REV. 289 (2015).

587. Kahn, *supra* note 35, at 130.

588. Jeffrey Fagan & Valerie West, *Incarceration and the Economic Fortunes of Urban Neighborhoods*, in ECONOMICS AND YOUTH VIOLENCE: CRIME, DISADVANTAGE, AND COMMUNITY 207, 227–31 (Richard Rosenthal et al. eds., 2013); Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, 139 DAEDALUS 20, 21–22 (2010); Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?* 38 CRIME & JUST. 201, 263 (2009); Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 ANN. R. SOC. 89, 102 (2003).

589. RUTH D. PETERSON & LAUREN J. KRIVO, DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL SPATIAL DIVIDE 79 (2010).

report knowing someone who was shot.[590] They themselves are crime victims and live in neighborhoods without the political capital necessary to warrant attention and care.[591]

Moreover, Blacks have less confidence in the police than their white counterparts.[592] The violence committed against Black males by law enforcement has resulted in an increase in distrust of the police.[593] Younger Blacks do not view the police as protections.[594] And the killing of unarmed Black males since 2020 has further exacerbated this skepticism. Thus, felons may experience a greater need to own a gun for self-defense than the "average" person.[595]

Violent crime rates in Black neighborhoods coupled with the neglect and distrust of law enforcement supports firearm freedoms for felons.[596] People living in under-policed neighborhoods are left with few self-defense choices.[597] Too poor to move out of the neighborhood, owning a gun is the only other option.[598] The social utility in allowing felons to bear arms lays in self-protection and violence deterrence.[599]

ii. Historical Analogue

Like Section 922(g)(1), historical firearm prohibitions burdened the ability of Blacks to defend against attack. Historically, Blacks have not had the right to self-defense, particularly against white violence.[600] During the American colonial, Founding, and Reconstruction eras, not only were Blacks completely disarmed, but Black self-defense was also suppressed directly by statute and constructively through white violence.

590. John Gramlich & Katherine Schaeffer, *7 Facts About Guns in the U.S.,* PEW RSCH. CT. (Oct. 22, 2019), https://perma.cc/E839-QD5F.

591. Zach Thompson, *Is it Fair to Criminalize Possession of Firearms by Ex-Felons?*, 9 WASH. U. JUR. REV. 151, 164–65 (2016); Walker, *supra* note 356, at 526; Visher & Travis, *supra* note 588, at 102; Tahmassebi, *supra* note 480, at 83 (1991).

592. Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do.*, PBS NEWS (June 5, 2020, 12:00 PM), https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do; Walker, *supra* note 356, at 526.

593. Michael Brooks, Courtney Ward, Myshalae Euring, Christopher Townsend, Nia White and Kim Lee Hughes, *Is There a Problem Officer? Exploring the Live Experience of African American Men and Their Relationship with Law Enforcement*, 20 J. AFR. AM. STUD., 346, 351 (2016).

594. *Id*.

595. Winkler, *supra* note 30, at 1568.

596. *Id*.; Walker, *supra* note 356, at 526; Robert J. Cottrol & Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 GEO. L.J. 309, 361 (1991).

597. Walker, *supra* note 356, at 526.

598. *Id*.

599. Thompson, *supra* note 591, at 165.

600. *See* ANDERSON, *supra* note 231, at 7–8.

During the colonial era, several of the American colonies enacted laws explicitly denying both free and enslaved Blacks the right to self-defense against whites.[601] For example, a 1680 Virginia statute explicitly denied Blacks the right to defend themselves against white attack.[602] Massachusetts did the same in 1680, enacting a statute prohibiting free Blacks and slaves from joining the militia to prevent arming them.[603]

Legislation was traditionally coupled with violent oppression, particularly as the number of slaves grew. South Carolina provides an example of the harshest repression of Black self-defense. Between 1671 and the early 1700s Blacks outnumbered whites.[604] To ensure control, whites worked to build and refine the slave patrols while doubling down on the violence.[605] Over 80% of slave-owning estates had firearms and those plantations with the largest number of slaves were 4.3 times more likely to have guns.[606] South Carolina also allowed for the killing of runaway Blacks in 1680 but took it a step further in 1712 when the colony statutorily authorized the killing of Blacks that refused to submit to a white directive to produce a slave ticket.[607]

During Reconstruction, white violence was cruel and brutal. While Congress was debating the Fourteenth Amendment, the Ku Klux Klan was taking form as an organized violent, white paramilitary force embarking on localized terror campaigns.[608] Klan efforts at Black suppression were made a bit easier with President Johnson systematically withdrawing Black troops from the Southern states completely by 1867.[609] Moreover, Southern Democrats launched a clandestine mutiny comprised of secrets societies during the ratification of the Fifteenth Amendment, resolving that the

601. *Id.*; Joyce Tang, *Enslaved African Rebellions in Virginia*, 27 J. BLACK STUD., 598, 601 (1997); Benjamin Quarles, *The Colonial Militia and Negro Manpower*, 45 MISS. VALLEY HIST. REV. 643, 645 (1959); Higginbotham, Jr., *supra* note 461, at 39.

602. Tang, *supra* note 601, at 601.

603. Quarles, *supra* note 601.

604. ANDERSON, *supra* note 231, at 13.

605. *Id.*; KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA 40 (2007).

606. James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM & MARY L. REV. 1777, 1800, 1803, 1806 (2002).

607. *See* "An Act for the Better Ordering of Slaves" [1698], in Cooper, Statutes at Large, 2: 156 ("And for the better security of all such persons that shall endeavor to take any run-away, or shall examine any slave for his ticket, passing to and from his master's plantation, it is hereby declared lawful for any white person to beat, maim or assault, and if such negro or slave cannot otherwise be taken, to kill him, who shall refuse to shew his ticket, or, by running away or resistance, shall endeavor to avoid being apprehended or taken.").

608. QUARLES, *supra* note 317, at 164–66.

609. Lang, *supra* note 497, 575–76 (2014); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 847 (1982).

government was intended to be a white man's government and declaring that it would continue to be a white man's government.[610]

Giving Blacks political power was sure to meet with violent resistance from American whites and it did. Whites randomly arrested and re-enslaved Blacks selling the Freedmen to farms, mines and lumber camps.[611] Klan violence was so vicious during Reconstruction that the federal government was compelled to step in. From 1870 to 1872, as Congress drafted and passed the Fifteenth Amendment it also enacted a series of Enforcement Acts to protect Blacks from Klan violence.[612] The Acts prohibited groups of people from intimidating individuals with the intention of violating their civil rights.[613] The laws targeted the Klan, prohibiting people from "go[ing] in disguise upon the public highway, or upon the premises of another" to terrorize citizens.[614] The Enforcement Acts, however, were no match for Klan violence. In the midst of the Enforcement Act legislative process, five hundred masked men attacked a local jail in South Carolina, killing Blacks whose principal crime was shooting whites in self-defense.[615]

The Supreme Court demonstrated early on that it would protect white firearm possession at the expense of Black self-defense. Decided in 1876, *Cruikshank* held that the Second Amendment applied only to the Federal Government and not the states or private individuals.[616] In a very limited discussion, the *Cruikshank* Court held that the Second Amendment is, "not a right granted by the Constitution . . . [or] in any manner dependent upon that instrument for its existence. The second amendment . . . means no more than that it shall not be infringed by Congress."[617] States, we said, were free to restrict or protect the right under their police powers. The Court further declared that the Due Process and Equal Protection Clauses of the Fourteenth Amendment restricted state government action but not that of private individuals.[618]

The facts of *Cruikshank*, however, involve a racial massacre in 1873 Louisiana. At the time, the South was dominated by the white Democratic

610. QUARLES, *supra* note 317, at 165.

611. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR 116 (2008).

612. Enforcement Act of 1870, ch. 114, 16 Stat. 140 (enacted May 31, 1870, effective 1871); An Act to amend an Act Approved May thirty-one, eighteen hundred and seventy, entitled "An Act to enforce the Rights of Citizens in the United States to vote in the several State of the Union, and for other Purposes." (February 28, 1871); An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes (Apr. 20, 1871).

613. *Id*.

614. Enforcement Act of 1870 § 6.

615. ANDERSON, *supra* note 231, at 85.

616. United States v. Cruikshank, 92 U.S. 542, 553–54 (1876).

617. *Id*. at 553.

618. *Id*.

legislatures that allowed the Klan to terrorize Black people, especially Black Republicans.[619] In a hotly contested election, where both candidates claimed victory, a federal judge declared the Republican the victor.[620] Fearing the Democrats would nonetheless try to take control of the regional government, an all-Black militia seized the courthouse.[621] A group of white men, led by an ex-Confederate, forced the Black militiamen to surrender and then murdered them on Easter Sunday in 1873.[622] The white mob shot or hanged the Black residents, after they were forced out of the courthouse by fire.[623] Though the total number of deaths is uncertain, it is estimated that between 60 and 150 Black people died that day.[624]

Initially, ninety-seven men were indicted.[625] Federal charges were brought under the Enforcement Act of 1870, charging the defendants with hindering the Second Amendment right of the Freedmen to keep and bear arms.[626] After two trials, the United States Attorney, James Beckwith, obtained three federal conspiracy convictions for three of the nine participants that went to trial, including Cruikshank.[627]

The Court's opinion overturned Cruikshank's conviction, gutted the Enforcement Act of 1870, and left Blacks defenseless.[628] Race was never mentioned in the *Cruikshank* opinion but in terms of human impact, Black citizens were left at the mercy of violent white supremacist groups.[629] To say *Cruikshank* was complicit in the fury of racial violence that continued for the next half century is generous. Now state and private individuals could constructively violate the Second Amendment and deprive Blacks of the ability to defend themselves.[630] The Klan was free to continue to use merciless violence to disarm, beat, and murder Black people, preventing this group from exercising constitutional rights and liberties. In the end, Blacks that armed themselves were subjected to brutal violence by whites.[631]

619. LANE, *supra* note 497, at 71 (2008).

620. *Id*. at 54; Itah, *supra* note 385, at 1198; Bill Decker, *Colfax: A Riot or Massacre?*, THE ADVOCATE (Mar. 7, 2013) https://www.theadvocate.com/nation_world/article_6ba52506-ed40-5fa3-a55b-c2ddb54e01f9.html (Decker discusses that people also refer to this incident as a riot); LANE, *supra* note 497, at 64.

621. Itah, *supra* note 385, at 1198.

622. *Id*.; LANE, *supra* note 497, at 12; Decker, *supra* note 620.

623. Decker, *supra* note 620.

624. *Id*.

625. McDonald v. City of Chicago, 561 U.S. 742, 757 (2010).

626. United States v. Cruikshank, 92 U.S. 542, 548–49 (1876); *McDonald*, 561 U.S. at 756.

627. LANE, *supra* note 497, at 54, 63.

628. Itah, *supra* note 385, at 1198.

629. Ethan T. Stowell, *Top Gun: The Second Amendment, Self-Defense, and Private Property Exclusion*, 26 REGENT UNIV. L.R. 521, 528 (2013).

630. *Cruikshank*, 92 U.S. at 549–54.

631. Kennett & Anderson, *supra* note 375, at 236–37.

Congressional efforts to aid and protect Blacks failed to stymie the aggressive political strategy to reestablish the racial caste system in the South.[632] The Second Amendment right to bear arms granted to newly freed Blacks turned out to be another American lie: Blacks could be disarmed by white mob violence despite constitutional and federal statutory protection. *Cruikshank* sent a clear message that the federal government would not support the principle of equality, not even in the context of racial domestic terrorism.

3. Disparate Effect

Since the colonial era, it seems that Blacks have never truly exercised the rights and liberties guaranteed by the Constitution. First slaves and now drug felons, a critical mass of Blacks continue to be divested of freedoms exercised by their white counterparts. Even the most natural rights, the rights to self-preservation and self-defense, remain out of reach to a disproportionate number of Black American men. Only historical Black firearm exclusions are comparable.

a. Section 922(g)(1)

As of 2010, 19 million people in the United States have a felony conviction.[633] All are subject to Section 922(g)(1), but the burden is particularly heavy on Black America. As demonstrated above, the War on Drugs produced an exorbitant amount of Black drug felons. At the start of the drug war approximately 13% of the Black male population had a felony conviction (compared with 5% of the total male population).[634] By 2010, one-third of Black males (33%) had a felony conviction (compared with 13% of all adult males).[635]

Unlike whites, Blacks are thus prosecuted at higher rates for drug offenses, triggering Section 922(g)(1) indictments. A Section 922(g)(1) conviction opens the door for an Armed Career Criminal sentence enhancement subjecting more Black federal defendants to life sentences. The statistics support this. In fiscal year 2021 the majority (41.6%) of Black federal prisoners were convicted of drug offenses while close to half (47.7%) of white prisoners were convicted of public order offenses of which 32.6%

632. Freedmen's Bureau Act of 1866, ch. 200, 14 Stat. 173 (1866); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

633. Sarah K. S. Shannon, et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1, 11 (2017).

634. *Id.*

635. *Id.*

were white collar criminal convictions.[636] A study in 2020 reported that Blacks comprised the largest number of people serving prison sentences in the Federal Bureau of Prisons ("FBOP") for weapons offenses (16,090), while most whites (13,196) were incarcerated for public order offenses.[637] In addition, a 2021 United States Sentencing Commission report showed that 56.2% of the people imprisoned for Section 922(g)(1) convictions were Black compared to 24.2% white,[638] while a 2019 report revealed that Blacks comprised 73.7% Armed Career Criminal enhancements compared to 15.7% whites in the most recent report issued in 2019.[639] The numbers suggest a targeting of Blacks.

The federal government engaged in special operations aimed at incapacitating dangerous gun offenders during the War on Drugs, which did often target Black communities. Known as Project Triggerlock, this started a series of federal operations to target "dangerous" people in 1991.[640] The stated goal was "to protect the public by putting the most dangerous offenders in prison for as long as the law allows."[641] Reimagined and beefed up, it was relaunched as Project Exile in 1997 and described as Project "Triggerlock on steroids."[642] The approach was straightforward: If a federal statute applied, an individual would be federally charged with a Section 922(g)(1).[643]

Project Exile was soon replicated in other American cities under the umbrella of Project Safe Neighborhoods ("PSN"), a Department of Justice initiative.[644] PSN target locations were in areas with a glaring racial imbalance.[645] For instance, in Richmond, Virginia, 90% of those charged with Section 922(g)(1) offenses were Black.[646] "'[S]tash-house' sting[s]," a

636. E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2021 – STATISTICAL TABLES 35 (2022).

637. MARK MOTIVANS, BUREAU OF JUST. STATS., FEDERAL JUSTICE STATISTICS, 2020 16 (2022).

638. U.S. SENT'G COMM'N, QUICK FACTS: FELON-IN-POSSESSION OF A FIREARM, FISCAL YEAR 2021 (2021).

639. COURTNEY R. SEMISCH ET AL., U.S. SENT'G COMM'N, FEDERAL ARMED CAREER CRIMINALS: PREVALENCE, PATTERNS, AND PATHWAYS 22, 34 (2021). Sixteen-point-three percent of armed career criminals had three or more prior convictions for a drug trafficking offense only and no prior violent. *Id.* at 34.

640. David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Objects*, 69 EMORY L. J. 1011, 1016–17 (2020).

641. Daniel Richman, *"Project Exile" and the Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369, 374 (2001).

642. *Id.* at 379 n.63.

643. *Id.* at 370.

644. See EDMUND F. MCGARRELL ET AL., PROJECT SAFE NEIGHBORHOODS—A NATIONAL PROGRAM TO REDUCE GUN CRIME: FINAL PROJECT REPORT iii (2009).

645. Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 316 (2007).

646. Patton, *supra* note 640, at 1022.

practice employed by ATF and DEA agents, was critiqued because of the extreme focus on communities of color.[647] The targets were overwhelmingly people of color, with one study reporting that of 144 targets, 141 were Black.[648] Prosecutors did not have an explanation of the process for selecting cases or a reason for the disparity.[649]

b. Historical Analogue

Historical Black firearm exclusions burdened the Black population in a similar way to Section 922(g)(1). However, it is difficult to make direct numerical comparison between those disarmed by historical Black exclusions and those prohibited by Section 922(g)(1). The chief issue is the lack of institutional studies or agency reports available that aggregate the total number of felons disarmed for life by Section 922(g)(1) since 1992, the year Congress defunded Section 925(c). Additionally, the temporal ratio for the population counts in each era would need to be considered to get accurate numbers for comparison. For example, one report estimates approximately 700,000 thousand slaves lived in America during the colonial era, a period of over 150 years.[650] Section 922(g)(1), however, was enacted fifty-six years ago, less than half the time of the colonial period. Once time is controlled, the results are likely to show very similar numerical outcomes. There are, however, knowable facts that can be used to compare the burdens imposed by firearm prohibitions during the historical period and Section 922(g)(1).

An approximate number of Blacks disarmed by historical firearm exclusions is known. There were approximately 700,000 slaves in colonial America, almost 18% of the American population.[651] With all Thirteen colonies prohibiting Black firearm possession at the Founding, 100% of the Black slave population was disarmed. Moreover, the final census taken before the American Civil War reported 4 million slaves in the southern states and 500,000 free Blacks.[652] All Blacks were disarmed by the southern states; all four million enslaved and 500,000 free Blacks.

Another important consideration is the sheer number of Black felons vulnerable to Section 922(g)(1) today. In terms of incarceration,

647. *Id*. at 1023. These stings used informants to communicate a misleading message about a "stash house" containing money and drugs to a group of would-be criminals and provide a meet up time to burgle or rob the location. When folks meet up, everyone is arrested. *Id.*

648. *Id*. (citing United States v. Garcia-Pena, No. 17 CR 363, 2018 WL 6985220, at *4 (S.D.N.Y. Dec. 19, 2018)).

649. *Id*. at 1022.

650. Aaron O'Neill, *Black and Slave Population in the United States 1790–1880*, STATISTA (2019), https://www.statista.com/statistics/1010169/black-and-slave-population-us-1790-1880/. The year for this estimate is 1790. *Id.*

651. *Id*.

652. *Id*.

contemporary America is keeping pace with the colonial era, imprisoning the same number of Black men in the 2000s as were enslaved in 1820.[653] Imprisonment often means a felony conviction. Although historical prohibitions disarmed Blacks at a much higher rate than felon dispossession statutes, the number of Black Americans disarmed by felony convictions is well into the millions of people. In 2010 alone, over 23 percent or 7 million adult Black Americans had felony convictions.[654] Most, if not all, of whom are subject to felon dispossession. America is eclipsing the total number of Blacks disarmed before the Civil War.

The burdens imposed by Section 922(g)(1) and historical Black firearm exclusions are quite comparable and should be used by reviewing courts when examining America's history and tradition of categorical felon exclusions. Both strip a specific group of exercising a critical constitutional right for life and continue to divest the Black population of the right to armed self-defense. Furthermore, the numerical comparison of those impacted by Section 922(g)(1) and historical Black firearm exclusions is troubling. That the numbers are analogous shows that America has much more work to do before it can call itself a colorblind society.

4. Summary

After applying *Bruen*, it is evident that Section 922(g)(1) is unconstitutional. Though felons constitute "the people," the justifications and burdens imposed by Section 922(g)(1) violate the American equality principle and look too much like the prejudiced of America from the past. Disarmament in the twentieth century may use distinctive wording but its messaging of the justification for firearm restrictions and its burden on the Black population have been almost identical to historical Black firearm restrictions. The only difference is the words used in the statute. The "Negroes" and "Mulattoes" of the colonial, Founding, and Reconstruction era statutes are the "felons," "dangerous," and "violent" people in Section 922(g)(1). Though there is an American history and tradition of disarming groups deemed "dangerous," many these historical restrictions existed prior to enactment of the Reconstruction Amendments. They were also based on categorical discriminations that would be considered unlawful today. However, when race-based exclusions became unconstitutional, racially motivated legislation and policy was coded to continue Black oppression. And the colorblind Constitution provided cover.

653. Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 846 (2002). *See* Jan M. Chaiken, *Crunching Numbers: Crime and Incarceration at the End of the Millenium*, NAT'L INST. OF JUST. J., 10, 14 (Jan. 2000).

654. See Table 2 in Shannon et al., *supra* note 439, at 1818.

When faced with Section 922(g)(1), reviewing courts applying *Bruen* should understand the test as an abandonment of colorblindness in favor of an accurate historical record and fidelity to originalism. Courts should also not be reticent to decode the statutory language of today and analyze the circumstances surrounding the enactment of the GCA and ACCA. To accept "dangerousness" as an appropriate basis for disarmament is to be, in most cases, complicit in the unwarranted divestment of a constitutional right.

CONCLUSION

History has taught us that disarmament is a tool of political oppression and a practice that has continued into modernity. For example, after the Nazis assumed power in Germany, they forcefully seized "weapons still remaining in the hands of the people inimical to the State."[655] In 1991 South Africa, the Arms and Ammunition Act of 1937, legislation used to restrict gun ownership to whites, remained on the books.[656] America, "the land of the free," should be careful in enacting disarmament statutes or fear resembling times reminiscent of the English Stuart Kings.

Section 922(g)(1) operates similar to the oppressive laws enacted in a time of American prejudice and is thus unconstitutional. Colorblindness shielded the statute from probing judicial review but a true application of *Bruen* would expose the racial motivations, coded or not, underlying both Section 922(g)(1) and historical Black firearm restrictions. *Heller*, *McDonald*, and *Bruen* all discuss race.

One recommendation to begin to restore the rights of federal offenders is to fund a pilot program pursuant to Section 925(c). Perhaps beginning with determinations of dangerousness as originally intended and delegating the decision-making power to an agency competent and confident in making such decisions is temporary solution. Possible agency candidates include the United States Probation Department or even the Office of the Pardon Attorney, offices familiar with making dangerousness decisions and assessing risk.

States are also modifying their laws. Some states are acting and striking down or modifying state felon bans. In 2009, the North Carolina Supreme Court in *Britt v. State*[657] became the first court in the United States to hold a felon firearm prohibition unconstitutional pursuant to the state constitution.[658] In 2014, Missouri voters amended Article I, Section 23 of the Missouri Constitution by ballot granting broad firearm possession to rights

655. LIBRARY OF CONGRESS, GUN CONTROL LAWS IN FOREIGN COUNTRIES 80 (1976).
656. P. VAN DEN BERGHE, SOUTH AFRICA: A STUDY IN CONFLICT 126 (1965).
657. 681 S.E.2d 320 (N.C. 2009).
658. *Id.* at 323.

to its citizens including non-violent felons and only excepting "convicted violent felons."[659]

But ultimately, Justice Thomas was right in his *Rahimi* dissent: "Only a subsequent constitutional amendment can alter the Second Amendment's terms . . . ."[660] The only true remedy for excluding felons from the right to bear arms for self-defense is to amend the constitutional text. In the interim, Section 922(g)(1) challenges will not and should not survive application of *Bruen*. To understand that Section 922(g)(1) looks and operates like historical Black firearms exclusions is to know the inequity and unfairness of the statute. An alternative outcome would only perpetuate the fallacy of colorblindness and maintain the systemic racial inequalities that Justice Stevens referenced in his dissent in *Heller*.[661] Moreover, it would be huge blow to American freedom and the conviction that the United States Constitution may be relied on to protect against tyranny. Instead of the Second Amendment being "a substantive right guaranteed to every individual *against* Congress, we would have a right controlled *by* Congress."[662]

659. Dotson v. Kander, 464 S.W.3d 190, 196 (Mo. 2015).

660. United States v. Rahimi, 144 S. Ct. 1889, 1945 (2024) (Thomas, J., dissenting).

661. District of Columbia v. Heller, 554 U.S. 570, 644–45 (2008) (Stevens, J., dissenting).

662. *Rahimi*, 144 S. Ct. at 1946 (Thomas, J., dissenting).