

# WOULD JUSTICE SCALIA THINK BLACK GUNS MATTER?

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## ABSTRACT

*Do Black Guns Matter?*<sup>1</sup> This Article considers what Justice Scalia's opinion in *District of Columbia v. Heller* tells us about how the law treats Black gun owners' rights. The opinion appears to tell two stories. One elevates white gun holders through three white paradigms: the colonial revolutionary, the frontiersman, and the hunter. The second excludes Black gun holders through repeated citations to instances where Black Americans have been denied the same gun rights extended to white Americans, and through a list of presumptively lawful gun regulations with racial consequences the opinion does not acknowledge. This unequal construction matters because *Heller* lays the foundation for the modern Second Amendment, and when we then take stock of Black Americans' ability to own and use guns—limited through enforcement of firearm prohibitions from police action to court determinations—Black Americans do not have access to the same scope of gun rights that white Americans do. If *Heller* is here to stay, then we should recognize this inequality as a problem. The national reckoning around race and police violence in recent years has renewed Americans' focus on guns and made this discussion particularly salient. This Article combines Second Amendment and critical race analysis to highlight a twofold problem: the doctrinal formulation of the Second Amendment and the broader cultural conception of whose gun rights merit protection.

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1. "Black Guns Matter" is a responsible gun education and civil rights organization founded by Maj Toure, and neither the author nor this publication is affiliated with this organization. See Isaac Scher, Barbara Corbellini Duarte, Hannah Jiang & Mark Abadi, *A Group Called "Black Guns Matter" Is Teaching Black Americans How to Use Firearms*, *BUS. INSIDER* (July 16, 2020, 12:29 AM), <https://www.businessinsider.in/international/news/a-group-called-black-guns-matter-is-teaching-black-americans-how-to-use-firearms/articleshow/76987951.cms> [https://perma.cc/6JKT-UQTB].

INTRODUCTION .....	2
I. RELATIONSHIPS BETWEEN GUNS AND RACE: NOW AND THEN .....	6
A. Guns and Black Lives Matter.....	6
1. Armed White Americans.....	7
2. Armed Black Americans .....	10
B. Long Tradition of Black Gun Ownership and Activism .....	14
II. EXCLUDING BLACK GUN OWNERS: <i>DISTRICT OF COLUMBIA V. HELLER</i> .....	19
A. White Identities in <i>Heller</i> .....	20
1. <i>Heller</i> and the Colonial Revolutionary .....	21
2. <i>Heller</i> and the Frontiersman.....	23
3. <i>Heller</i> and the Hunter.....	24
B. <i>Heller</i> Legitimizes the Exclusion of Black Gun Owners.....	25
1. Citations Connect Black Gun Usage with Disarmament .....	25
2. Presumptively Lawful List Has Unacknowledged Racial Consequences .....	29
III. APPLICATION OF <i>HELLER</i> AND UNEQUAL OUTCOMES.....	30
A. Black Gun Rights Are More Limited.....	31
B. Felon in Possession Laws Demonstrate Inequality .....	33
IV. WAYS FORWARD THROUGH LAW AND CULTURE .....	39
A. Proposals to Reconstruct Second Amendment Doctrine .....	40
B. Rethinking the Second Amendment Polity .....	46
CONCLUSION.....	48

## INTRODUCTION

Two cowboys ride into the scene. John Wayne stops his horse and says, “You wanted to learn to shoot?” He swings off his horse and strides a few paces, pointing into the horizon. “Right out there.” The second cowboy follows him, taking out his gun from the holster and aiming it unsteadily in the same direction. John Wayne quickly swats the gun out of his hands and sighs, “Ah, hold it, Mississippi, that’s no way to use a handgun.” He adds, “You gotta draw and fire, and you better be quicker than somebody else that’s doing the same thing.” In one motion, he whips the pistol up himself and shoots past the cacti into the distance.<sup>2</sup> End scene.

Open to a new scene in 2020 in Minneapolis. Protests are erupting in the wake of George Floyd’s murder by the police.<sup>3</sup> Maj Toure has flown into the city to teach firearm lessons, and he now stands on the street, introducing himself to a crowd gathered around him, “My name is Maj, and my organization is called

2. This scene is from the movie *El Dorado*. See *EL DORADO* (Paramount Pictures 1966).

3. Lauren Aratani, *George Floyd Killing: What Sparked the Protests – and What Has Been the Response?*, *GUARDIAN* (May 29, 2020), <https://www.theguardian.com/us-news/2020/may/29/george-floyd-killing-protests-police-brutality?mscl-kid=102e7fffad4c11eca456d0930af41a07> [<https://perma.cc/LK3A-YT9Q>].

Black Guns Matter.”<sup>4</sup> He asks the crowd, “Who has not touched a firearm before—you?” and points at a man in the circle. He hands the man a replica handgun, and the man takes it in both hands. He lifts it, arms outstretched in front of him, face scrunched in concentration. Maj stands calmly next to him and asks the crowd, “Is he going to be looking at the bad guy who’s trying to get him? No, he’s going to focus completely on that front sight,” testing the man’s grip, “Good. Good.”<sup>5</sup>

John Wayne, a white cowboy, is the quintessential picture of the American gun owner. Maj Toure, a Black man, is not—but he should be. This Article considers the way Black gun holders compare to white gun holders in the Second Amendment doctrine and polity—in particular, how the *District of Columbia v. Heller* opinion, which lays the foundation of the modern Second Amendment, informs gun rights and race.<sup>6</sup> The *Heller* opinion elevates white gun holders while excluding Black gun holders in two ways. First, Justice Scalia, who authors the majority opinion, weaves a narrative of three identities that are rooted in an almost mythical cultural conception of a white American gun holder: the colonial revolutionary, the frontiersman, and the hunter.<sup>7</sup> Second, Justice Scalia legitimizes the exclusion of Black gun holders through the opinion’s analysis. The opinion repeatedly cites laws and cases that deny Black Americans the same gun rights extended to white Americans. It also creates categories presumptively excluded from Second Amendment protection that disproportionately limit the gun rights of Black Americans—all without acknowledging the racial implications of these aspects of the opinion. *Heller*’s imbalanced construction should encourage reconsideration of both *Heller* itself and of the Second Amendment more broadly.

When we then take stock of Black Americans’ practical ability to own and use guns in our society, we find that Black Americans do not have access to the same scope of gun rights that white Americans do. This inequality is also reflected in Second Amendment culture. Many white proponents of the Second Amendment seem to reject Black gun owners from their conception of who is entitled to bear arms.<sup>8</sup> For example, the National Rifle Association (“NRA”), one of the most outspoken and influential pro-gun rights organizations in the country, has remained conspicuously silent on cases involving legal Black gun owners arrested or killed

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4. The following sequence is from a video profile on Maj Toure and his organization Black Guns Matter. Business Insider Today, *Black Guns Matter Pushes For Firearm Education*, Facebook (July 10, 2020), <https://www.facebook.com/BusinessInsiderToday/videos/2771694619602930/> [<https://perma.cc/DGY6-6VWM>].

5. *Id.*

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

7. *Id.* at 624–25, 590, 599.

8. See Carl Takei & Paige Fernandez, *Does the Second Amendment Protect Only White Gun Owners?*, ACLU (Dec. 5, 2018), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/does-second-amendment-protect-only-white-gun-owners> [<https://perma.cc/QMV8-9SRK>] (describing “the refusal of leading gun-rights proponents to sincerely defend” Black gun owners who are victims of police violence as demonstrative of Black gun owners’ exclusion from the Second Amendment).

by the police, like Philando Castile or Breonna Taylor’s boyfriend, Kenneth Walker, among many others.<sup>9</sup>

Black Guns Matter, founded by Maj Toure, provides Black Americans with education and training about how to responsibly use firearms.<sup>10</sup> For Toure, firearms guarantee self-defense where the state has failed.<sup>11</sup> In the past few years, activists and the media have emphasized and increased visibility of recurring violence against Black Americans.<sup>12</sup> Exposure to this violence reinforces Black Americans’ distrust of the state’s willingness to protect them from harm<sup>13</sup> and has prompted “growing interest among African Americans in arming themselves.”<sup>14</sup> To the crowd in Minnesota, Toure says, “We are here because a man’s life was taken, and we are not allowing that to happen again . . . I believe that more Black people would be alive if they were armed. . . . People somehow forgot that we have the right to defend our lives with firearms.”<sup>15</sup> Toure sees Black Guns Matter

9. See Ryan Grim, *NRA Silent as Amir Locke Slain by Police for Having a Gun He Legally Owned*, INTERCEPT (Feb. 7, 2022), <https://theintercept.com/2022/02/07/amir-locke-nra-gun-rights/> [<https://perma.cc/A4KB-VKPW>] (“[Philando Castile] was a licensed gun owner and told the officer he was carrying; he was gunned down anyway. The NRA, however, stayed conspicuously silent even under public pressure . . . . Police shot [Kenneth Walker]. The NRA was silent.”); see also U.S. *Gun Control: What Is the NRA and Why Is It so Powerful?*, BBC (Aug. 6, 2020), <https://www.bbc.com/news/world-us-canada-35261394> [<https://perma.cc/8XJT-3ANM>] (“The NRA spends about \$250m per year, far more than all the country’s gun control advocacy groups put together.”).

10. See Scher, Duarte, Jiang & Abadi, *supra* note 1; Harmon Leon, *In the “Black Guns Matter” Movement, “Make Racists Afraid Again” Is About Education, Not Violence*, MEL MAG. (2019), <https://melmagazine.com/en-us/story/black-guns-matter-make-racists-afraid-again> [<https://perma.cc/FJ23-SE2R>].

11. Toure says, “The police, as we see, will leave. They will not come to save you.” Scher, Duarte, Jiang & Abadi, *supra* note 1. With that said, gun violence disproportionately harms communities of color, and therefore guns also decrease the safety of Black Americans. See *infra* notes 117–118.

12. “A protest movement that was ignited by a horrific video of police violence—a white police officer pressing his knee against the neck of George Floyd, a [B]lack man, for nearly nine minutes—has now prompted hundreds of other incidents and videos documenting violent tactics by the police.” Shawn Hubler & Julie Bosman, *A Crisis That Began With an Image of Police Violence Keeps Providing More*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/06/05/us/police-violence-george-floyd.html> [<https://perma.cc/5EPL-HM9W>].

13. This distrust arises from a long history of state and police failure to protect Black Americans. See Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491, 1495–96, 1514 (2013) (describing various incidents of state-sanctioned violence against Black Americans up through the 20th century, Johnson concludes that “trusting the state has been an absurd proposition during most of the Black experience in America”).

14. Maya King, *“It’s My Constitutional Freaking Right”: Black Americans Arm Themselves in Response to Pandemic, Protests*, POLITICO (July 26, 2020, 7:00 AM), <https://www.politico.com/news/2020/07/26/black-americans-gun-owners-380162> [<https://perma.cc/XR2Q-XQ6Y>]; see also Tiya Miles, Opinion, *The Black Gun Owner Next Door*, N.Y. TIMES (Mar. 9, 2019), <https://www.nytimes.com/2019/03/09/opinion/sunday/gun-ownership-blacks.html> [<https://perma.cc/R4TD-RZ7Y>].

15. Business Insider Today, *supra* note 4.

as an important civil rights organization and guns as a means for Black Americans to protect a fundamentally American sense of safety and freedom.<sup>16</sup> He is not alone. For many Black Americans and activists, guns are tools of self-protection and equal rights, and safeguards of civil liberties.<sup>17</sup>

Furthermore, reconsideration of gun rights and race is important because *Heller*'s constitutionally enshrined "individual right to keep and bear arms" appears to be here to stay.<sup>18</sup> The Supreme Court itself has connected this right to race and Black civil rights in interpreting and expanding the Second Amendment's scope. Following *Heller*, in *McDonald v. Chicago* and again more recently in *New York State Rifle & Pistol Ass'n v. Bruen*, the Court explicitly leveraged Black civil rights to justify expanding the Second Amendment's individual right guarantee.<sup>19</sup> For all of these reasons, we must recognize the inequitable treatment of Black gun owners in our culture and legal doctrine as a problem, and now is a good time to do so.

This Article proceeds as follows. Part I considers the history of armed Black activism from slavery to the Civil Rights Movement through today. Part II examines *District of Columbia v. Heller* and its racial implications. Part III demonstrates how *Heller*'s application informs and limits Black gun owners' rights, using felon in possession statutes as one significant example. Part IV proposes ways to reconsider both the doctrine and the culture. I argue that the Court should factor race into its analysis of gun regulations through some form of equal protection analysis, or leave the Second Amendment to legislatures, who I argue are better equipped to account for minority interests and to evaluate gun regulations. Finally, I urge that we, as a culture and a legal community, correctly place modern Black

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16. Miles, *supra* note 14. Toure said, "They're calling it police brutality instead of terrorism and tyranny. . . . [I]t's wrong, and it's happening to Americans. . . . The reality is that the police force is over-militarized and acts in violation of the Constitution. It's tyranny, bro. It's tyranny." Logan Chipkin, *Philadelphia Freedom Fighter Maj Toure Has a Message – and a Plan*, BROAD & LIBERTY (June 19, 2020), <https://broadandliberty.com/2020/06/19/chipkin-philadelphia-freedom-fighter-maj-toure-has-a-message-and-a-plan/> [<https://perma.cc/W693-5RV6>].

17. See Qinling Li, *The Reawakening of the Black Gun-Rights Movement*, REASON (Oct. 13, 2020, 10:20 AM), <https://reason.com/video/2020/10/13/the-reawakening-of-the-black-gun-rights-movement/> [<https://perma.cc/ZL4T-YZSC>] (discussing "Second Amendment activist Brent Holmes," a Black gun rights activist, and noting that "[g]uns have been essential for protecting [B]lack civil rights since the antebellum period"); Grace Baek, *For Black and Latino Gun Owners, Being Armed "Evens the Playing Field"*, CBS (Oct. 28, 2021, 7:02 AM), <https://www.cbsnews.com/news/black-latino-gun-owners-armed-cbsn-originals/> [<https://perma.cc/5B5T-L5TN>] (discussing guns as a tool for self-defense for Black and Latino Americans).

18. *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008).

19. *McDonald v. Chicago*, 561 U.S. 742, 744, 767–80 (2010) (holding that the Second Amendment applies to the states, expanding on *Heller*'s rationale); *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2150–51 (2022) (holding that New York's proper cause requirement for obtaining an unrestricted license to carry a concealed firearm is unconstitutional, as a violation of the individual right to bear arms).

gun holders within the long American tradition of Black gun ownership and activism.

## I.

### RELATIONSHIPS BETWEEN GUNS AND RACE: NOW AND THEN

*“[T]he liberties of the American people [are] dependent upon the ballot-box, the jury-box, and the cartridge-box . . . .”*

Frederick Douglass<sup>20</sup>

*“Your rights rest in three boxes: (1) The Ballot Box (2) The Jury Box (3) The Cartridge Box #2A.”*

National Rifle Association<sup>21</sup>

Gun ownership and race have long been integrally connected, and modern Black activists who view guns as weapons of liberation lie within a long tradition of Black gun ownership and activism. Part A explores how Black activists have recentered guns in current conversation. Protests following the police killing of George Floyd, national momentum around Black Lives Matter, conservatives’ extreme rhetoric, and the global pandemic have all combined to refocus the country’s attention on both race and self-protection—in particular, self-protection through guns. Part B situates the current moment in the historical tradition of Black armed activism and gun ownership.

#### *A. Guns and Black Lives Matter*

In the past few years, the country has witnessed a national reckoning on race and police violence. Four polls estimating the scale of protests that broke out in the wake of George Floyd’s death suggest that “about 15 million to 26 million people in the United States have participated in demonstrations over the death of George Floyd and others,” making these protests potentially the “largest movement in the country’s history.”<sup>22</sup> This reckoning has renewed Americans’ focus on guns. Between March and July of 2020, economists estimate that “almost three million more firearms have been sold . . . than would have ordinarily been sold during these months. Half of that increase occurred in June alone.”<sup>23</sup>

20. FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS 481 (Dover Publ’ns 2003) (1892).

21. National Rifle Association (@NRA), TWITTER (June 9, 2020, 8:45 PM), <https://twitter.com/NRA/status/1270517423494569987> [<https://perma.cc/FYK6-MYD4>].

22. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/QU2P-PDSH>].

23. Phillip B. Levine & Robin McKnight, *Three Million More Guns: The Spring 2020 Spike in Firearm Sales*, BROOKINGS (July 13, 2020), <https://www.brookings.edu/blog/up-front/2020/07/13/three-million-more-guns-the-spring-2020-spike-in-firearm-sales/> [<https://perma.cc/QLA6-JVUR>].

Studies indicate that people buy guns for protection, and the feeling that they need better protection is influenced by a perception that the world has become more dangerous.<sup>24</sup> This perception has become an intensely racialized fear,<sup>25</sup> compelling an armed response for both white and Black Americans.<sup>26</sup>

### 1. Armed White Americans

First, more white Americans are turning to guns. In August 2020, the NRA, whose base is largely white and rural,<sup>27</sup> reported an increase of “1,000 new members each day since June.”<sup>28</sup> White gun owners are also organizing in “militia” groups.<sup>29</sup> For example, a member of the “Kenosha Guard,” a Facebook group, issued a “call to arms” in 2020 asking if there were “[a]ny patriots willing to take up arms and defend [our] City tonight from the evil thugs?”<sup>30</sup> Kyle Rittenhouse, a white 17-year-old, responded, arming himself with an AR-15 and later shooting three protesters, killing two.<sup>31</sup> Although Rittenhouse was charged with murder, he

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24. See Jennifer D. Carlson, *I Don't Dial 911: American Gun Politics and the Problem of Policing*, 52 BRIT. J. CRIMINOLOGY 1113, 1115 (2012) (discussing self-protection as motivation for gun ownership); Baek, *supra* note 17 (discussing Black gun rights activists' turning toward guns in self-defense following a sense of fear in 2020).

25. See, e.g., John Blake, *There's One Epidemic We May Never Find a Vaccine for: Fear of Black Men in Public Spaces*, CNN (May 27, 2020, 10:42 AM), <https://www.cnn.com/2020/05/26/us/fear-black-men-blake/index.html> [https://perma.cc/3U47-PKLR] (discussing key incidents in the past few years indicating that white perception of Black men as dangerous stems from racial bias); Edward Helmore, *Pandemic and Protests Spur Americans to Buy Guns at Record Pace*, GUARDIAN (July 31, 2020, 12:10 PM), <https://www.theguardian.com/us-news/2020/jul/31/americans-guns-coronavirus-protests> [https://perma.cc/9BV8-DFJE] (reporting from leading gun rights group that “a perception of rising crime . . . in the wake of anti-racism protests” is one factor that “sparked Americans to buy firearms at a record pace”).

26. Kerry O'Brien, Walter Forrest, Dermot Lynott & Michael Daly, *Racism, Gun Ownership and Gun Control: Biased Attitudes in US Whites May Influence Policy Decisions*, PLOS ONE, Oct. 2013, at 1, 1 (examining the connection between racism and gun ownership and finding a correlation between an increase in “symbolic racism” and an increase in the likelihood of gun ownership); Levine & McKnight, *supra* note 23 (“[S]tates where individuals are more likely to search for racial epithets experienced larger increases in June firearm sales, even after adjusting for the personal security concerns that likely generated the March spikes in gun sales.”).

27. Adam Winkler, *The NRA Will Fall. It's Inevitable.*, WASH. POST (Oct. 19, 2015, 9:47 AM), <https://www.washingtonpost.com/posteverything/wp/2015/10/19/the-nra-will-fall-its-inevitable/> [https://perma.cc/2N38-KQUJ].

28. Maxim Lott, *NRA's Political Spending Plunges as Lawsuits, Controversies Hit*, FOX NEWS (Aug. 14, 2020), <https://www.foxnews.com/politics/nras-political-spending-plunges-as-lawsuits-controversies-hit> [https://perma.cc/9WGU-6M7W].

29. See Charles Homans, *How Armed Protests Are Creating a New Kind of Politics*, N.Y. TIMES MAG. (Jan. 26, 2021), <https://www.nytimes.com/interactive/2021/01/26/magazine/armed-militia-movement-gun-laws.html> [https://perma.cc/9AX7-7F7C].

30. Ibram X. Kendi, *The Violent Defense of White Male Supremacy*, ATLANTIC (Sept. 9, 2020), <https://www.theatlantic.com/ideas/archive/2020/09/armed-defenders-white-male-supremacy/616192/> [https://perma.cc/P3ZD-MK35].

31. See Nicholas Bogel-Burroughs, *Key Moments from Kyle Rittenhouse's Testimony*, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/live/2021/11/10/us/kyle-rittenhouse-trial-testimony> [https://perma.cc/U6DW-VJPT].

was later acquitted on all counts, and soon after was welcomed as a conservative “hero” with a “standing ovation” at a conservative political rally.<sup>32</sup> In 2021, in response to the 2020 election, a group of more than 2,000 extremist and white supremacist “armed rioters” stormed the U.S. Capitol building, resulting in “hours of violence,” including the deaths of at least seven people.<sup>33</sup>

Racialized fear is a central factor driving white people to guns. Studies show that “gun owners are more likely to report higher levels of explicit bias toward [B]lack individuals,” suggesting that racial fear may be a motivating factor for white gun purchasers.<sup>34</sup> For decades, conservative politicians and media coverage of protests against racist policies and policing have played into alarm and stirred up fear of gun control by framing unarmed people as defenseless against lawless, armed mobs.<sup>35</sup> For example, then-President Trump defended Kyle Rittenhouse, suggesting he acted in self-defense because he “was trying to get away from *them*” and “‘probably would have been killed’ if he didn’t defend himself with lethal force.”<sup>36</sup> Although data shows the majority of protests from May 26 to August 22,

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32. Maya Yang, *Conservative Event Gives Rittenhouse a Standing Ovation a Month After Acquittal*, GUARDIAN (Dec. 21, 2021, 12:07 PM), <https://www.theguardian.com/us-news/2021/dec/21/kyle-rittenhouse-turning-point-usa-standing-ovation> [<https://perma.cc/4JHR-HP9K>].

33. H.R. REP. NO. 117-163, at 76 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf> [<https://perma.cc/2LVJ-XQU7>]; Sabrina Tavernise & Matthew Rosenberg, *These Are the Rioters Who Stormed the Nation’s Capitol*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/us/rioters-capitol.html> [<https://perma.cc/2LSM-PYWS>].

34. Michael C. Gearhart, Kristen A. Berg, Courtney Jones & Sharon D. Johnson, *Fear of Crime, Racial Bias, and Gun Ownership*, 44 HEALTH & SOC. WORK 241, 245 (2019) (citing numerous studies demonstrating correlation between racial biases against Black Americans and gun ownership).

35. See Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1365 (1993) (discussing the emphasis on guns in the aftermath of the Los Angeles protests regarding race and racist policing in the 1990s). The NRA, for example, has long emphasized this perception and encouraged an armed response by “[s]toking white fear of imaginary terrorists, [B]lack thugs and immigrants . . . .” Jason Johnson, *Black Guns Matter: My Day at the NRA Convention in the Age of Trump*, ROOT (May 3, 2017, 1:50 PM), <https://www.theroot.com/black-guns-matter-my-day-at-the-nra-convention-in-the-1794793669> [<https://perma.cc/LVR9-BTLC>]. “Journalists, academics, public advocates, and government policy makers have identified . . . [that] right-wing hate groups in the United States frequently assert the necessity of an armed citizenry . . . .” Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 3–4 (2010).

36. Kendi, *supra* note 30 (emphasis added).



2020, were largely peaceful demonstrations,<sup>37</sup> President Trump nonetheless characterized protesters as “THUGS . . . dishonoring the memory of George Floyd”<sup>38</sup> and “Lowlife & Scum [sic],”<sup>39</sup> and media sources consistently described protesters as “outside agitators.”<sup>40</sup> Considering that recent anti-racism protests are inherently connected to Blackness because they came about in response to the police killing of Black Americans, and Black and Hispanic individuals were overrepresented among protesters,<sup>41</sup> race has likely affected the perception of anti-racism protests as destabilizing and violent.<sup>42</sup> This perception is both informed by and

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37. Sanya Mansoor, *93% of Black Lives Matter Protests Have Been Peaceful*, *New Report Finds*, TIME (Sept. 5, 2020, 11:47 AM), <https://time.com/5886348/report-peaceful-protests/> [<https://perma.cc/5C9Y-E9CV>] (“The vast majority of Black Lives Matter protests—more than 93%—have been peaceful, according to a new report published Thursday by a nonprofit that researches political violence and protests across the world.”). Although there was some violence and looting, coverage of those events was vastly disproportionate to their actual occurrence. *See, e.g.*, Danielle K. Brown, *Riot or Resistance? How Media Frames Unrest in Minneapolis Will Shape Public’s View of Protest*, CONVERSATION (May 29, 2020, 3:04 PM), <https://theconversation.com/riot-or-resistance-how-media-frames-unrest-in-minneapolis-will-shape-publics-view-of-protest-139713> [<https://perma.cc/8Q85-CZGM>].

38. Donald Trump (@realDonaldTrump), TWITTER (May 29, 2020, 12:53 AM), <https://twitter.com/realDonaldTrump/status/1266231100780744704> [<https://www.thetrumparchive.com/?dates=%5B%222020-05-29%22%2C%222020-05-30%22%5D&results=1>] (“[T]hese THUGS are dishonoring the memory of George Floyd, and I won’t let that happen. Just spoke to Governor Tim Walz and told him that the Military is with him all the way. Any difficulty and we will assume control but, when the looting starts, the shooting starts. Thank you!”).

39. *See* Donald Trump (@realDonaldTrump), TWITTER (June 2, 2020, 9:33 AM), <https://twitter.com/realDonaldTrump/status/1267811637811187712> [<https://perma.cc/F4K2-VPME>] (“New York was lost to the looters, thugs, Radical Left, and all others forms of Lowlife & Scum.”).

40. *See, e.g.*, Chad Sokol, Emma Epperly & Adam Shanks, *Spokane Sheriff, Police Chief Blame Sunday’s Violence on Outside Agitators*, SPOKESMAN-REV. (June 2, 2020), <https://www.spokesman.com/stories/2020/jun/01/15-arrests-made-in-sundays-disturbances-in-downtown/> [<https://perma.cc/SM7W-VZ3L>]; Branden Hunter, *‘No Fly Zone’ Issued for Outside Agitators in Detroit Protests Against Police Brutality*, DETROIT FREE PRESS (June 1, 2020, 7:05 PM), <https://www.freep.com/story/news/local/michigan/detroit/2020/06/01/no-fly-zone-issued-outside-agitators-detroit-protests/5311310002/> [<https://perma.cc/R99N-89N8>]; Jim DeFede, *‘Professional Agitators are Here to Cause Trouble,’ Miami-Dade Mayor on Violence Incited at George Floyd Protest*, CBS MIAMI (May 31, 2020, 12:25 AM), <https://miami.cbslocal.com/2020/05/31/miami-dade-mayor-carlos-gimenez-blames-outside-agitators-inciting-violence-miami-george-floyd/> [<https://perma.cc/E8GK-CQYC>].

41. Amanda Barroso & Rachel Minkin, *Recent Protest Attendees Are More Racially and Ethnically Diverse, Younger than Americans Overall*, PEW RES. CTR. (June 24, 2020), <https://www.pewresearch.org/fact-tank/2020/06/24/recent-protest-attendees-are-more-racially-and-ethnically-diverse-younger-than-americans-overall/> [<https://perma.cc/Q38F-48SR>].

42. The way the media portrays protests reinforces “stereotypes of [B]lack incivility and denigrates the legitimacy of [B]lack outrage.” Sarah J. Jackson, *The Headlines That Are Covering Up Police Violence*, ATLANTIC (June 3, 2020), <https://www.theatlantic.com/culture/archive/2020/06/george-floyd-protests-what-news-reports-dont-say/612571/> [<https://perma.cc/5Q4U-7WRL>]. Media coverage “tends to dismiss or disparage protesters” by highlighting “conflict-based stories that fail to engage the complex social causes of protest.” *Id.*

further reinforces the racist stereotype that Blackness is associated with criminality.<sup>43</sup>

## 2. *Armed Black Americans*

Black Americans are also prioritizing self-protection and collective activism through firearms.<sup>44</sup> In the first half of 2020, gun purchases by Black Americans increased by 58% over the rate of purchases in the first half of 2019.<sup>45</sup> Guns have also been a tool for armed demonstrations around the country.<sup>46</sup> In 2020, armed Black citizens escorted a Black Michigan lawmaker to the Michigan state capitol to send a political message; the Michigan lawmaker said, “When traditional systems, whether it’s law enforcement or whatever, fail us, we also have the ability to take care of ourselves.”<sup>47</sup> Hundreds of Black gun owners peacefully marched to the Governor’s Mansion in Oklahoma, as part of a “pro-Second Amendment” demonstration to “send a message . . . that we aren’t going to allow people to come into our communities and brutalize us.”<sup>48</sup> In Georgia, dozens of Black demonstrators, armed with semi-automatic rifles, marched through a Confederate

43. See generally Kimberlé Williams Crenshaw, *Fear of a Black Uprising*, NEW REPUBLIC (Aug. 13, 2020), <https://newrepublic.com/article/158725/fear-black-uprising-confronting-racist-policing> [<https://perma.cc/D9MJ-7KJW>] (discussing violence against Black Americans and how 2020 protests shed light on racist white pathologies, including a “fear of being outnumbered and overrun by the indignant and unforgiving masses”). See also Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 168–69 (2016) (summarizing one study of shooter bias in which participants were more likely to “shoot” African Americans, which can be read to mean Black men are more readily associated with danger).

44. See, e.g., Matthew Delaney, *DC Area Joins Nationwide Trend of First-Time Gun Ownership*, WTOP NEWS (Sept. 22, 2020, 4:11 AM), <https://wtop.com/local/2020/09/dc-area-joins-nationwide-trend-of-first-time-gun-ownership/> [<https://perma.cc/B4YF-P4DA>] (“The sounds of gunfire ringing through her Southeast D.C. neighborhood had always kept Neta Vaught [a Black woman] away from firearms . . . . But after witnessing the national temperature rise over the past few months, between the COVID-19 pandemic and ongoing protests against police brutality, Vaught . . . decided it was time to . . . purchase her first gun.”).

45. See Solomon Jones, *I Bought My First Gun Because I No Longer Feel Safe in America*, INQUIRER (Aug. 4, 2020, 6:48 PM), <https://www.inquirer.com/opinion/gun-purchase-increase-2020-african-americans-black-20200804.html> [<https://perma.cc/P5RB-DWRR>].

46. See King, *supra* note 14 (“Since the beginning of the pandemic, there has been growing interest among African Americans in arming themselves . . . . While the vast majority of demonstrators across the U.S. this summer have been unarmed, some have sought to make a statement with their guns.”).

47. Lois Beckett, *Armed Black Citizens Escort Michigan Lawmaker to Capitol After Volatile Rightwing Protest*, GUARDIAN (May 7, 2020, 9:31 PM), <https://www.theguardian.com/us-news/2020/may/07/michigan-lawmaker-armed-escort-rightwing-protest> [<https://perma.cc/ER2H-Z68V>].

48. “The demonstration . . . is intended to bring attention to the fact that Black Americans’ constitutional rights to carry firearms are not often respected,” one of the organizers said. Adam Kemp, *Black Gun Owners Plan Pro-Second Amendment Walk in Oklahoma City on Day of Trump Rally*, OKLAHOMAN (June 18, 2020, 10:04 AM), <https://www.usatoday.com/story/news/nation/2020/06/19/oklahoma-city-black-gun-owners-2nd-amendment-walk-trump-rally/3221046001/> [<https://perma.cc/JPJ6-PGF3>].

memorial.<sup>49</sup> In Louisville, Kentucky, more than 300 members of the Atlanta-based Black militia group “Not F\*\*king Around Coalition” (NFAC) marched across the city carrying assault rifles and demanding justice for Breonna Taylor.<sup>50</sup>

The rise of overt racial hostility contributes to Black Americans’ fear for their safety and focus on self-defense. One man bought his first firearm because he felt “he was not safe raising a family in the South as a Black man,” and another bought his first gun because “[t]o be blunt, President Donald Trump has emboldened America’s racists, and I’ve come to the conclusion that it would be irresponsible to leave my family defenseless.”<sup>51</sup> The threat of racially motivated violence is particularly acute, given highly publicized murders of Black people, “a surging white nationalist movement that has been linked . . . with an increase in hate crime,”<sup>52</sup> and the increased visibility of violent white armed “vigilantes” who target Black citizens and “spark fear” that Black citizens will be victims of racialized violence.<sup>53</sup> The chapter president of the National African American Gun Association explicitly credits its marked increase in recent membership in part to the “rise in the number

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49. *Black Armed Protesters March Through Georgia Confederate Memorial on July 4th*, NBC NEWS (July 7, 2020), <https://www.nbcnews.com/video/black-armed-protesters-march-through-georgia-confederate-memorial-on-july-4th-87140421909> [<https://perma.cc/9QNY-5Q92>].

50. See Chris Kenning, Phillip M. Bailey, Hayes Gardner, Savannah Eadens & Ben Tobin, *Opposing Armed Militias Converge in Louisville, Escalating Tensions but Avoiding Violence*, COURIER J. (July 25, 2020, 8:32 AM), <https://www.courier-journal.com/story/news/local/2020/07/25/louisville-protests-nfac-three-percenters-expected-demonstrate/3288198001/> [<https://perma.cc/NSV4-GN7B>]. Breonna Taylor, a 26-year-old emergency room technician, was shot and killed by police officers in March 2020. See Richard Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/XZW4-VVT9>].

51. Melissa Chan, *Racial Tensions in the U.S. Are Helping to Fuel a Rise in Black Gun Ownership*, TIME (Nov. 17, 2020, 3:02 PM), <https://time.com/5912612/black-gun-owners/> [<https://perma.cc/XGD6-QE84>]; Jones, *supra* note 45.

52. According to the Southern Poverty Law Center’s annual report, the number of white nationalist groups increased by 55% between 2017 and 2019. *Executive Summary: 2019 Year in Hate*, S. POVERTY L. CTR. (Mar. 18, 2020), <https://www.splcenter.org/news/2020/03/18/executive-summary-2019-year-hate> [<https://perma.cc/9Q35-KS4U>].

53. Justin McFarlin, *I’m a Licensed Gun Owner but I Haven’t Carried in Years. Why? I’m Black and I’m Scared.*, USA TODAY (Sept. 9, 2020), <https://www.usatoday.com/story/opinion/policing/2020/09/09/guns-white-privilege-dangerous-for-black-veteran-like-me-column/5738354002/> [<https://perma.cc/G8EE-6JT4>] (describing African Americans’ fear of white individuals and counterprotesters who “use open carry not just as an expression of privilege but also as a way to intimidate Black Americans”); Maanvi Singh, *The Armed White Men Who Terrorized Philadelphia’s Black Lives Matter Supporters*, GUARDIAN (June 4, 2020), <https://www.theguardian.com/us-news/2020/jun/04/philadelphia-armed-white-men-george-floyd-protests> [<https://perma.cc/L4JK-VWGS>] (describing one example of how white armed vigilantes threatened a group of Black Lives Matter protesters in Philadelphia, and how the police “did little” to rein them in).

of hate groups in the United States.”<sup>54</sup> These groups, he explains, no longer seem like “fringe groups,” and “our community sees that, and it scares us. You know what, let me get a gun just in case something happens, just to make sure.”<sup>55</sup>

Police violence may also contribute to Black Americans’ fears for their safety and sense of needing guns for self-defense. Data from the Ferguson Police Department suggests that Black Americans are not only more likely to be stopped and arrested by the police, but are also at greater risk of violence from police once stopped.<sup>56</sup> Armed or unarmed, Black Americans are “nearly three times more likely than are white Americans to be killed by police—accounting for more than 40% of all police killings nationwide.”<sup>57</sup> Police killings of Black Americans are so recurrent that there are websites tracking annual deaths resulting from police interactions.<sup>58</sup> The widespread publication of these incidents broadens their impact and the fear they generate for Black Americans.<sup>59</sup> “Racism, like trauma, can be experienced vicariously,” including through coverage of “[p]olice killings of unarmed [B]lack Americans.”<sup>60</sup> “Modern instances of police racism are seared into the collective memory of minority communities: a beaten Rodney King lying prostrate in the street; the rape of Abner Louima; officers emptying their revolvers

54. The National African American Gun Association reported that its membership doubled between Election Day 2016 and February 2017. See Ryan Young, *African-American Gun Club Says Membership Surged in the Trump Era*, CNN (Feb. 27, 2017, 7:13 PM), <https://www.cnn.com/2017/02/27/us/african-american-gun-club-trump/index.html> [<https://perma.cc/DJ3G-9MBZ>].

55. *Id.*

56. When the U.S. Department of Justice investigated the Ferguson Police Department (“FPD”), the government found that “nearly 90% of the time that FPD officers used force, it was against African-Americans.” Paul Butler, *The System is Working the Way it Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1422 (2016) (citing U.S. DEP’T OF JUST., CIV. RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3, 19 (Mar. 4, 2019), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/TDE7-E7QD>]); see also Carbado & Rock, *supra* note 43 (exploring social psychology theories for why, beyond explicit racial animosity, police violence against African Americans persists).

57. Jacob Bor, Atheendar S. Venkataramani, David R. Williams & Alexander C. Tsai, *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302, 302 (2018); see also James W. Buehler, *Racial/Ethnic Disparities in the Use of Lethal Force by US Police, 2010–2014*, 107 AM. J. PUB. HEALTH 295, 295 (2017) (showing that the rate of police deaths among non-Hispanic Black males was 2.8 times greater than among white males).

58. See, e.g., *Mapping Police Violence*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org> [<https://perma.cc/T23H-JSZF>] (last visited Apr. 7, 2022).

59. See Jamil Smith, *Videos of Police Killings Are Numbing Us to the Spectacle of Black Death*, NEW REPUBLIC (Apr. 13, 2015), <https://newrepublic.com/article/121527/what-does-seeing-black-men-die-do-you> [<https://perma.cc/BDY2-7HB8>] (describing how the “uncensored horror” of police violence is “now available on demand” because of its dissemination on social media and other outlets).

60. Bor, Venkataramani, Williams & Tsai, *supra* note 57, at 302.

into an unarmed Amadou Diallo . . . .”<sup>61</sup> The “fear of becoming the next Rodney King is still here.”<sup>62</sup>

Yet the complicated reality is that guns may not make Black Americans any safer from police violence. Not only does racial bias inform police officers’ “split-second” decisions, often resulting in harm for Black Americans who encounter the police before there may even be time to react, but also guns increase the risk of violence in police encounters in general.<sup>63</sup> Perhaps this threat offers one explanation for why Black gun ownership in America has generally been less prevalent than white gun ownership.<sup>64</sup>

Furthermore, American culture does not receive these two groups of armed Americans equally. While white armed self-defense is perceived as patriotic, Black armed self-defense is treated as dangerous.<sup>65</sup> For example, various funds collectively raised over \$1 million to pay for the legal fees of Kyle Rittenhouse, the white teenage shooter who killed two protesters in Kenosha.<sup>66</sup> The white St. Louis couple who aimed their guns at Black Lives Matters protesters received a national platform to justify their use of weapons against an “out of control mob” at the 2020 Republican National Convention.<sup>67</sup> Yet Republican pundit Tucker

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61. Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1117 (2000).

62. Code Switch Podcast, *A Decade of Watching Black People Die*, NPR, at 04:32 (May 31, 2020), <https://www.npr.org/2020/05/29/865261916/a-decade-of-watching-black-people-die> [<https://perma.cc/LK5N-4MDG>].

63. See B. Keath Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 287 (2006) (reviewing research demonstrating racial biases in split-second decision making and considering connection to police violence against Black Americans); Daniel S. Nagin, *Firearm Availability and Fatal Police Shootings*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 49, 49–57 (2020).

64. For example, in 2017, about half of white respondents to a Pew Research Center survey reported living in a household that owns a gun, compared to a third of Black respondents. KIM PARKER, JULIANA MENASCHE HOROWITZ, RUTH IGIELNIK, J. BAXTER OLIPHANT & ANNA BROWN, PEW RESEARCH CTR., *AMERICA’S COMPLEX RELATIONSHIP WITH GUNS* 18 (2017), <https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2017/06/Guns-Report-FOR-WEBSITE-PDF-6-21.pdf> [<https://perma.cc/CF7K-WJH7>]; see Lydia Saad, *What Percentage of Americans Own Guns?*, GALLUP (Nov. 13, 2020), <https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx> [<https://perma.cc/L2RT-ET2R>] (about half of U.S. households report having a gun, compared to 28% of non-white Americans).

65. See Alicia L. Granse, *Gun Control and the Color of Law*, 37 L. & INEQ. 387, 388, 397 (2019) (describing racism in how gun owners are perceived: “White gun owners are heroes protecting their homes and their families, whereas Black gun owners are thugs, gangbangers, and super-predators”).

66. Kelly McLaughlin, *Nearly \$1 Million Has Been Raised for Kenosha Shooting Suspect Kyle Rittenhouse, According to a Christian Fundraising Site and the Teen’s Lawyers*, INSIDER (Sept. 3, 2020, 5:57 PM), <https://www.insider.com/fundraising-efforts-kyle-rittenhouse-hit-nearly-1-million-2020-9> [<https://perma.cc/KZ9Q-BHDH>]. Nearly half of that amount came from a Christian fundraising platform. *Id.*

67. Megan Henney, *McCloskeys, St. Louis Gun-Wielding Couple, Warn: “Your Family Will Not Be Safe in the Radical Democrats’ America”*, FOX NEWS (Aug. 24, 2020), <https://www.foxnews.com/politics/mccloskeys-st-louis-gun-toting-couple-republican-national-convention-trump> [<https://perma.cc/HR5B-8BR9>].

Carlson falsely characterized Breonna Taylor’s boyfriend, Kenneth Walker, a lawful gun owner, as a “supposed[] drug dealer” who “opened fire” on police officers.<sup>68</sup> Louisiana House Representative Clay Higgins, despite being a “big proponent of gun rights,”<sup>69</sup> “posted a picture of armed Black demonstrators on Facebook and captioned it with a threat: ‘I’d drop any 10 of you where you stand,’”<sup>70</sup> as if to say that “Black people exercising their Second Amendment right in peaceful protest is a threat to be eliminated.”<sup>71</sup> In addition, Attorney General Bill Barr publicly said in September 2020 that, instead of focusing on police violence, we should focus on “the issue of Black-on-Black crime” by “Black males” with guns.<sup>72</sup> This rhetoric minimizes the legitimacy of Black armed self-defense and distracts from state violence against Black Americans. It is also misleading and racist because it perpetuates the false idea that intraracial violence is more prevalent in, or unique to, the Black community—which it is not.<sup>73</sup>

### *B. Long Tradition of Black Gun Ownership and Activism*

The deeply ingrained narrative that Black gun owners are dangerous or that Black armed activists are subversive prevents the modern cultural recognition of Black gun owners’ well-established place in the Second Amendment sphere.<sup>74</sup> There is, in fact, a longstanding “[B]lack tradition of arms” which has leveraged

68. *Tucker Carlson Tonight* (Fox News television broadcast Sept. 23, 2020), <https://www.dailymotion.com/video/x7wevdi> [<https://perma.cc/D8EP-PNCT>]; Michael Levenson, *Prosecutors to Drop Charges Against Boyfriend of Breonna Taylor*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/05/22/us/Breonna-Taylor-Kenneth-Walker.html> [<https://perma.cc/DC2R-LTXC>].

69. Nathalie Baptiste, *GOP Congressman to Black Protesters: ‘I’d Drop Any 10 of You Where You Stand’*, MOTHER JONES (Sept. 2, 2020), <https://www.motherjones.com/anti-racism-police-protest/2020/09/gop-congressman-to-black-protesters-id-drop-any-10-of-you-where-you-stand/> [<https://perma.cc/DR68-GQEH>].

70. *Id.*

71. *Id.*

72. Chris Strohm, *Barr Says ‘Black Lives Matter’ Doesn’t Care About Black Lives*, BNN BLOOMBERG (Sept. 16, 2020), <https://www.bnnbloomberg.ca/barr-says-black-lives-matter-doesn-t-care-about-black-lives-1.1495196> [<https://perma.cc/9NLL-9WM5>].

73. According to the U.S. Department of Justice, violent crimes against white and Black victims were both predominately intraracial (committed by an offender of the same race). See RACHEL E. MORGAN & ALEXANDRA THOMPSON, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., CRIMINAL VICTIMIZATION, 2020 – SUPPLEMENTAL STATISTICAL TABLES 7 (2020), <https://bjs.ojp.gov/content/pub/pdf/cv20sst.pdf> [<https://perma.cc/MN8T-QNVZ>].

74. See, e.g., Safia Samee Ali, *‘Not by Accident’: False ‘Thug’ Narratives Have Long Been Used to Discredit Civil Rights Movements*, NBC (Sept. 27, 2020, 9:19 AM), <https://www.nbcnews.com/news/us-news/not-accident-false-thug-narratives-have-long-been-used-discredit-n1240509> [<https://perma.cc/J8AX-BBN6>] (describing how Black civil rights protesters have been characterized as “subversive” since the Civil Rights Movement); Intercepted Podcast, *White Supremacy and the Church of the Second Amendment*, INTERCEPT (Feb. 28, 2018), <https://the-intercept.com/2018/02/28/intercepted-podcast-white-supremacy-and-the-church-of-the-second-amendment/> [<https://perma.cc/KXU5-4BKV>] (describing Black armed activism, including the Black Panthers, and the white response that characterizes this activism as hostile).

guns as a legitimate and powerful tool of civil rights activism.<sup>75</sup> In this Part, I will briefly consider the history of armed Black activism from slavery to the Civil Rights Movement. A better understanding of that history would help correctly situate Black gun ownership and activism today.<sup>76</sup>

Black activists have considered gun ownership to be an essential civil right since before the Civil War, and Black armed activism also dates back to this time.<sup>77</sup> Key figures of Black resistance embraced guns as a tool for self-defense and liberation.<sup>78</sup> Nat Turner's revolt was supported by "arms and ammunition."<sup>79</sup> Frederick Douglass was "one of the earliest and most prominent" Black men "to wrestle publicly with the role of violence in the freedom struggle."<sup>80</sup> "African American women had a historical tradition of using weapons to protect their homes, communities, and selves."<sup>81</sup> Ida B. Wells, an anti-lynching activist, is famously quoted as saying, "[A] Winchester rifle should have a place of honor in every [B]lack home."<sup>82</sup> Harriet Tubman is "widely reported and depicted carrying a rifle, a musket, or a pistol,"<sup>83</sup> and "did not hesitate to point it, according to her biographer . . ."<sup>84</sup> Black pioneer "Mary 'Stagecoach' Fields . . . cultivated expertise with guns and . . . armed herself frequently and deliberately."<sup>85</sup>

75. See generally NICHOLAS JOHNSON, *NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS* 13 (2014) (narrating the Black tradition of arms from the pre-Civil War era to the 20th century to today).

76. Other scholars, such as Nicholas Johnson, Robert J. Cottrol, and Raymond T. Diamond, have covered the history of Black armed activism and the connection between gun control and race in greater depth in various works.

77. See JOHNSON, *supra* note 75, at 17–69 (cataloguing stories of enslaved people who resisted violence and oppression by enslavers through armed self-defense).

78. See LINDA O. MCMURRY, *TO KEEP THE WATERS TROUBLED: THE LIFE OF IDA B. WELLS* 164 (1998) (describing abolitionists who championed violent resistance against the fugitive slave law); Miles, *supra* note 14 (describing the story of Lewis Hayden, a man who escaped slavery and was a proponent of armed self-defense in the pre-Civil War era).

79. Thomas Wentworth Higginson, *Nat Turner's Insurrection*, *ATLANTIC* (Aug. 1861), <https://www.theatlantic.com/magazine/archive/1861/08/nat-turners-insurrection/308736/> [<https://perma.cc/GUR5-9YD6>] (describing Nat Turner's revolt and summarizing contemporary news reports); see also Lakeidra Chavis, *Black and Up in Arms*, *NPR* (Dec. 16, 2020), <https://www.npr.org/sections/codeswitch/2020/12/09/944615029/black-and-up-in-arms> [<https://perma.cc/DW6B-MANG>] ("Firearms helped aid Nat Turner's rebellion against white enslavers.").

80. JOHNSON, *supra* note 75, at 37. Douglass advocated for "armed self-defense," urging people to respond to a slave hunter with "a good revolver, a steady hand and a determination to shoot down any man attempting to kidnap . . ." *Id.* (citing CHRISTOPHER B. STRAIN, *PURE FIRE: SELF-DEFENSE AS ACTIVISM IN THE CIVIL RIGHTS ERA* 20, 15 (2005)).

81. Robyn C. Spencer, *Engendering the Black Freedom Struggle: Revolutionary Black Womanhood and the Black Panther Party in the Bay Area, California*, 20 *J. WOMEN'S HIST.* 90, 93 (2008).

82. MCMURRY, *supra* note 78, at 164.

83. JOHNSON, *supra* note 75, at 44.

84. Miles, *supra* note 14; see also Chavis, *supra* note 79 ("Harriet Tubman famously carried her pistol along the Underground Railroad.").

85. Spencer, *supra* note 81, at 93.

At the same time, guns were a tool of white oppression, framed in white discourse “as a protection against the slaves” in service of “violence [that] was frequently employed in the South both to subordinate slaves and to intimidate abolitionists.”<sup>86</sup> Nonetheless, Black “armed resistance” and “[a]rmed self-defense” were both “major tool[s] of survival in allowing some Black southern communities to maintain their integrity and existence in the face of white supremacist terror.”<sup>87</sup> Weaponized resistance “was critical to the efficacy of the southern freedom struggle and [later to] the dismantling of segregation and Black disenfranchisement.”<sup>88</sup> Black Americans also bore arms while serving in the military in the Civil War,<sup>89</sup> and Black American military service has remained integral to the U.S. military throughout the 20th century.<sup>90</sup>

Black armed resistance to white violence continued after the Civil War.<sup>91</sup> In the South, “[t]errorist violence was unleashed to secure the white planter elite in power and to perpetuate a system based on white supremacy . . . as a means of intimidation and social control.”<sup>92</sup> Despite and in response to white violence, Black Americans continued to rely on guns to organize resistance and to survive.<sup>93</sup> Black Mississippi State Senator and militia leader George Washington Albright remarked, following the Civil War, “Our militia helped to fight off the Klan which was organized by the old slave owners to try and make us slaves again in all but name.”<sup>94</sup> “Keeping [Black people] subjugated required that they be unarmed,” but they “fought state repression with the very tool the state wished to deny them: the gun.”<sup>95</sup> The “nascent Black establishment pressed hard for the freedmen’s civil right to keep and bear arms . . . .”<sup>96</sup> Practically “all outspoken [Black] American leaders . . . advocated self-defense on some level.”<sup>97</sup> In 1919, “when a white mob

86. Saul Cornell & Eric M. Ruben, *The Slave-State Origins of Modern Gun Rights*, ATLANTIC (Sept. 30, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-origins-of-public-carry-jurisprudence-in-the-slave-south/407809/> [<https://perma.cc/56E3-MZFQ>].

87. AKINYELE OMOWALE UMOJA, *WE WILL SHOOT BACK: ARMED RESISTANCE IN THE MISSISSIPPI FREEDOM MOVEMENT 2* (2013).

88. *Id.*

89. *See African-Americans in Combat*, PBS, <https://www.pbs.org/opb/historydetectives/feature/african-americans-in-combat/> [<https://perma.cc/TWK6-EWNZ>] (last visited Apr. 6, 2022) (providing an overview of African American military service in the 20th century).

90. *Id.*

91. As white violence persisted, “[g]uns remained essential to [B]lack self-defense into the twentieth century.” JAMES FORMAN, *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 67 (2017).

92. UMOJA, *supra* note 87, at 16. “The armed resistance of the post-Reconstruction period does not generally manifest as intentionally organized collective action but rather as emergency self-defense, often in the form of individual acts, in response to the threat of White violence.” *Id.* at 19 (describing instances of Black armed resistance in Mississippi).

93. *See id.* at 2.

94. *Id.* at 15.

95. FORMAN, *supra* note 91, at 66.

96. Johnson, *supra* note 13, at 1516–17.

97. STRAIN, *supra* note 80, at 20.



mobilized to attack [Black residents of] D.C., the city's [B]lack veterans were prepared to defend themselves and their families" with guns.<sup>98</sup> The armed Black resistance in Washington, D.C., and in other racial uprisings throughout 1919 have been characterized as the "landmark of the twentieth century [B]lack freedom struggle."<sup>99</sup>

Armed activism later became a critical component of the Civil Rights era.<sup>100</sup> As other scholars have argued, "armed resistance served as a complement to self-proclaimed nonviolent organizers and organizations from 1961 through 1964," enabling the key organizations we associate with the Civil Rights Movement like the National Association for the Advancement of Colored People ("NAACP"), Congress of Racial Equality ("CORE"), and Student Nonviolent Coordinating Committee ("SNCC") to organize and to transition from a posture of "[a]ccommodation to [a]ctivism."<sup>101</sup> Although "nonviolence was crucial to the gains made by the freedom struggle of the 1950s and '60s, those gains could not have been achieved without the complementary and still underappreciated practice of armed self-defense."<sup>102</sup> Armed activism was championed by key activist groups at this time. The Deacons for Defense and Justice, a prominent activist group that protested segregation and police brutality, consistently advocated for armed Black self-defense.<sup>103</sup> The Black Panthers emphasized the importance of Black self-defense, in particular "against an oppressive and racist police force,"<sup>104</sup> championed

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98. FORMAN, *supra* note 91, at 67.

99. DAVID F. KRUGLER, 1919, *THE YEAR OF RACIAL VIOLENCE: HOW AFRICAN AMERICANS FOUGHT BACK* 4–5 (2015).

100. See generally CHARLES E. COBB JR., *THIS NONVIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE* (2014) (offering an in-depth history of armed activism in the Civil Rights era). In addition, Dr. T.R.M. Howard, during his long activist career that also preceded the Civil Rights era, "emerged as an unapologetic advocate of armed self-defense." Johnson, *supra* note 13, at 1523. "From the beginning, armed self-defense was an important component of Howard's civil rights strategy. In this respect, he followed a long tradition that later found expression under the leadership of Robert Williams . . . and various civil rights activists in the Deep South." David T. Beito & Linda Royster Beito, *Blacks, Gun Cultures, and Gun Control: T.R.M. Howard, Armed Self-Defense and the Struggle for Civil Rights in Mississippi*, 17 *J. ON FIREARMS & PUB. POL'Y* 133, 133–34 (2005).

101. UMOJA, *supra* note 87, at 2, 30.

102. COBB, *supra* note 100, at 1.

103. See generally Christopher B. Strain, "*We Walked Like Men*": *The Deacons for Defense and Justice*, 38 *LA. HIST.* 43 (1997) (parsing the Deacons' use of guns in civil rights activism); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *GEO. L.J.* 309, 357 (1991) (describing Deacons for Justice's armed activism among other civil rights groups).

104. Granse, *supra* note 65, at 393; see generally JOSHUA BLOOM & WALDO E. MARTIN, JR., *BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY* (2013) (providing an in-depth exploration of the Black Panthers and the group's role in the Civil Rights Movement).

armed activism, and denounced discriminatory gun control legislation.<sup>105</sup> “Point seven of the Panthers’ ten-point platform . . . claimed the right to bear arms under the [S]econd [A]mendment and demanded ‘an immediate end to POLICE BRUTALITY and MURDER of [B]lack people.’”<sup>106</sup> As Robyn Ceanne Spencer documents, Black women too joined this movement to themselves “lay[] claim to the role of protector” and “counter[] white violence with self-defense.”<sup>107</sup> Southern-born SNCC members “spoke openly about their guns: ‘I keep a shotgun in every corner of my bedroom . . . .’”<sup>108</sup> Even Martin Luther King, Jr., “kept firearms for self-protection. In fact, he . . . applied for a permit to carry a concealed weapon.”<sup>109</sup> In short, “the list of African Americans who invoked gun ownership as a tool of racial self-defense reads like a Who’s Who of [B]lack America.”<sup>110</sup>

Importantly, at the same time that Black armed activism and the Civil Rights Movement were developing, gun control legislation was also evolving. While we may think of gun control legislation as an issue championed by liberals who otherwise support racial justice, this association has not always been clear cut. Gun control measures have often come about in response to the Black civil rights struggle, perpetuating a “historical record [that] provides compelling evidence that racism underlies gun control laws,” and that disarming Black Americans is a means of maintaining white supremacy.<sup>111</sup> For example, “[a]s far back as the seventeenth century, the British colonies expressly prohibited gun ownership among [B]lack people and Indians. Through Reconstruction, local judges and sheriffs administered gun permits in a racially discriminatory way.”<sup>112</sup> Author and lawyer James Forman comments, “By the late 1960s, [Black Americans] got a reminder about why they might want to hold on to their weapons: [l]ongtime gun control opponents suddenly became interested in restricting access to guns when [Black Americans] began to brandish them publicly and politically.”<sup>113</sup> One key incident

105. For example, Bobby Seale said, “The Black Panther Party for self-defense calls upon the American people in general, and the [B]lack people in particular, to take full note of the racist California legislature, which is now considering legislation aimed at keeping the [B]lack people disarmed and powerless . . . .” Intercepted Podcast, *supra* note 74, at 05:59.

106. Spencer, *supra* note 81, at 92.

107. *Id.* at 93.

108. FORMAN, *supra* note 91, at 69.

109. Adam Winkler, *MLK and His Guns*, HUFFPOST: THE BLOG (May 25, 2011), [https://www.huffpost.com/entry/mlk-and-his-guns\\_b\\_810132](https://www.huffpost.com/entry/mlk-and-his-guns_b_810132) [<https://perma.cc/H4AQ-N3FA>].

110. FORMAN, *supra* note 91, at 69.

111. Clayton Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL’Y 17, 17 (1995). For further discussion, see Pratheepan Gulasekaram, “The People” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV 1521 (2010); Cottrol & Diamond, *supra* note 103; Adam Winkler, *Gun Control Is “Racist”?*, NEW REPUBLIC (Feb. 4, 2013), <https://newrepublic.com/article/112322/gun-control-racist> [<https://perma.cc/47Z2-SB7Z>].

112. John Eligon & Frances Robles, *Police Shootings Highlight Unease Among Black Gun Owners*, N.Y. TIMES (July 8, 2016), <https://www.nytimes.com/2016/07/09/us/black-gun-owners-police-shootings.html> [<https://perma.cc/RHB5-DW8K>].

113. FORMAN, *supra* note 91, at 69; *see also* Cramer, *supra* note 111 (arguing gun control has a history of trying to limit the power of Black people).

exemplifies a reversal of the modern liberal-conservative divide, when in 1967, a group of Black Panthers “arrived at the California state capitol building openly carrying . . . pistols to protest” a California bill prohibiting carrying loaded weapons, a ban the Panthers viewed as subjugation of Black gun holders.<sup>114</sup> In response, California passed one of the most restrictive gun control measures to date.<sup>115</sup> The champions of this legislation? The NRA and Ronald Reagan, then-governor of California, who commented, “[T]here is absolutely no reason why out on the street, today, civilians should be carrying a loaded weapon.”<sup>116</sup>

Gun control is relevant to understanding the historical relationship between race and guns. It is also important to acknowledge that gun violence is a serious problem.<sup>117</sup> Statistics make clear that Black communities are those harmed the most by the proliferation of guns.<sup>118</sup> For these reasons, among others, gun control is necessary. However, to develop solutions that truly benefit Black communities, it is important to acknowledge the ways that gun control policies have also historically disenfranchised them.

## II.

### EXCLUDING BLACK GUN OWNERS: *DISTRICT OF COLUMBIA V. HELLER*<sup>119</sup>

*“That attitude of associating guns with nothing but crime is what has to be changed . . . . If you can’t get [your friends] into hunting, get them into skeet shooting, or anything that shows that guns are not things that are only used by bad people.”*

Justice Antonin Scalia<sup>120</sup>

In 2008, in *District of Columbia v. Heller*, the Court held that the Second Amendment protects an individual right to bear arms, not restricted to collective

114. Granse, *supra* note 65, at 393.

115. See Intercepted Podcast, *supra* note 74 (describing the Black Panther protest and response from NRA and Reagan, including the passage of the “Panther Bill,” which was one of “the strictest gun-control laws anywhere in the United States at the time—all because Black Americans exercised their right to carry loaded weapons”).

116. *Id.* at 05:12.

117. Gun violence in America is an “epidemic” that must be addressed. See Brooke Migdon, *Gun Violence Epidemic Is Exploding Across America*, HILL (Nov. 9, 2021), <https://thehill.com/changing-america/respect/580745-gun-violence-epidemic-is-exploding-across-america/> [<https://perma.cc/4MYC-GGQE>].

118. “Gun violence is the number one killer of African Americans aged 15 to 34. Despite the fact that African Americans make up only 13% of the U.S. population, we represent nearly 50% of all gun homicide victims.” *Gun Violence Prevention Issue Brief*, NAACP, <https://naacp.org/resources/gun-violence-prevention-issue-brief> [<https://perma.cc/7ZAB-PGMN>] (last visited Sept. 18, 2022).

119. 554 U.S. 570 (2008).

120. Antonin Scalia, Turkey Hunting, Address at the National Wild Turkey Federation Annual Convention (2006), in *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* 61, 63 (Christopher J. Scalia & Edward Whelan eds., 2017).

use in state militias.<sup>121</sup> In doing so, *Heller* became the law of the land, presenting a “new understanding” that the Second Amendment protects “the private possession of firearms.”<sup>122</sup> The Court in *Heller* thereby upended what had been a “well settled” understanding throughout most of the 20th century that the Second Amendment had a more limited scope.<sup>123</sup> The decision inspired “over a thousand” challenges to gun regulations.<sup>124</sup>

Yet *Heller* merits reconsideration with respect to race. Justice Scalia’s majority opinion contains two narratives. In Part A below, I examine one narrative that elevates white gun holders through three white paradigms the opinion suggests are representative of gun ownership—the colonial revolutionary, the frontiersman, and the hunter. In Part B, I consider a second narrative embedded in the opinion that connects Blackness with its conception of who can be excluded from gun ownership, through repeated citations to laws and cases that deny Black Americans the same gun rights extended to white Americans, and through a list of presumptively lawful gun regulations that have a disproportionate impact on Black Americans. Although the opinion does acknowledge Black gun ownership and civil rights post-Civil War, this does not offset the opinion’s fundamental suggestion that the Second Amendment may be legitimately racially imbalanced.<sup>125</sup>

I want to acknowledge up front that, in attempting to reexamine *Heller* and the way it constructs race and the Second Amendment, this Article raises some unanswerable questions about why the Court drew the lines where it did. It is possible that Justice Scalia himself could not say why exactly he chose this framing and these categorical determinations. Even recognizing those limitations, there is still room to draw potential inferences, and the inferences the Court tees up matter because *Heller* provides the core framework for the modern Second Amendment.

### A. White Identities in *Heller*

The majority opinion in *Heller* elevates three main white identities: the colonial revolutionary, the frontiersman, and the hunter.<sup>126</sup> Each of these identities is rooted in a certain, almost mythical, cultural conception of the American gun holder, and each of these identities is white. By emphasizing these categories, the

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121. *Heller*, 554 U.S. at 593.

122. Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1413 (2009) (“The Court presented this new understanding of the Second Amendment as the original public meaning of the Second Amendment . . . .”); Sanford Levinson, *United States: Assessing Heller*, 7 INT’L J. CONST. L. 316, 318 (2009) (“[T]he Supreme Court . . . granted constitutional protection to the private possession of firearms . . . .”).

123. See Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 708 (2012).

124. BRADY CENTER, 10 YEARS LATER: THE SECOND AMENDMENT AND PUBLIC SAFETY AFTER *HELLER* 5 (2018) (describing legal developments following *Heller*).

125. *Heller*, 554 U.S. at 614–20.

126. See, e.g., *id.* at 624–25, 590, 599 (referencing the colonial revolutionary, frontiersman, and hunting experiences, respectively).

Court inherently excludes Black Americans, and this exclusion, as discussed in Part IV, has tangible consequences for Black gun holders today. Part of what makes the Court's insistence on these identities so remarkable is that there is no basis for them in the merits of either the petitioner or the respondent's arguments. While there is some reference to colonial revolutionaries in the parties' briefs, neither discussed frontiersmen once—or cowboys, settlers, and pioneers.<sup>127</sup> Neither made affirmative arguments about frontiersmen at oral argument.<sup>128</sup> Likewise, neither party relied on hunting as a central right in their briefs or at oral argument. The petitioner's 80-page brief mentioned hunting only once.<sup>129</sup> The respondent's brief mentioned hunting twice, but only to cite laws explicitly *restricting* the use of firearms.<sup>130</sup> Yet the opinion insists on all three identities.

### *1. Heller and the Colonial Revolutionary*

First, *Heller* highlights colonial America, and the colonial revolutionary, as central to understanding the Second Amendment right, thereby elevating a white perspective. The majority opinion primarily does so throughout its originalist inquiry. As constitutional scholar Cass Sunstein notes, "*Heller* is the most explicitly and self-consciously originalist opinion in the history of the Supreme Court."<sup>131</sup> The majority opinion conducts a "laborious historical" analysis of pre- and post-ratification era sources to determine the original public meaning of the Second Amendment.<sup>132</sup> In *Heller*, Justice Scalia says, "In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by

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127. The respondent's brief relies on the colonial revolutionary explicitly, but the petitioner's brief does not. *See, e.g.*, Brief for Respondent at 25, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290). The petitioner's brief does mention the word "frontiersmen" in a parenthetical to describe "frontiersmen seeking state support for community self-defense organizations" in the context of arguing for a communal rather than individual right to bear arms—an interpretation the Court in *Heller* rejected. Brief for Petitioner at 31, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

128. *See* Transcript of Oral Argument *passim*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), <https://www.oyez.org/cases/2007/07-290> [<https://perma.cc/2U49-6FF3>].

129. Brief for Petitioner at 32, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) ("Subsequently, many states adopted constitutions that protect some right to bear arms. They are far from uniform, with a few tracking the Second Amendment . . . and some specifically including a right to hunt." (citation omitted)).

130. Brief for Respondent at 11, 13, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

131. Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 272 (2008). Another scholar has similarly argued that "*Heller* is more purely, more single-mindedly, originalist than any prior constitutional interpretation by the Supreme Court." Rory K. Little, *Heller and Constitutional Interpretation: Originalism's Last Gasp*, 60 HASTINGS L. J. 1415, 1418 (2009).

132. Little, *supra* note 131, at 1418 (arguing that *Heller* is an intensive originalist opinion that goes into "laborious historical detail" so robust as to be "unprecedented for a constitutional Supreme Court decision").

the voters.”<sup>133</sup> But, as Professor James Fox critiques, the voters whose perspective the opinion centers were “largely limited to white male property-holders,” many of whom were slaveowners.<sup>134</sup> In fact, original public meaning elevates a white perspective that “*meant* to support racial slavery”<sup>135</sup> because the group of people who ratified the Constitution “affirmatively ‘preserved and protected both slavery itself and slavery’s institutional infrastructure.’”<sup>136</sup> Therefore, “to the extent that originalism seeks to enforce the meanings of those past generations, it is seeking to now, in a post-slavery, post-Jim Crow democracy, enforce meanings from a racial slavery society” in a way that is “affirmatively hostile to persons of color, and ultimately, to racial progress today.”<sup>137</sup> To that end, although Justice Scalia asserts that the Second Amendment right “belongs to all Americans,”<sup>138</sup> the opinion does not address the limitations of its approach or this well-founded critique of originalism, known as the “exclusionary critique.”<sup>139</sup>

The *Heller* opinion further centers the narrative of the colonial gun holder through four additional references. First, Justice Scalia writes, “[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”<sup>140</sup> Second, he claims, “[T]he Second Amendment’s guarantee,” primarily addressed to the “citizens’ ‘militia’” and not limited to the government’s “*organized militia*,” is “a safeguard against tyranny.”<sup>141</sup> Third, he quotes Justice Story, saying, “One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people . . . .”<sup>142</sup> Fourth, he writes, “In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.”<sup>143</sup> The opinion’s references to colonial revolutionaries fighting against tyranny with guns represent a choice to center a very specific image of a white gun holder.

133. *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008).

134. See James W. Fox, Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 685 (2016).

135. *Id.* at 686.

136. *Id.* at 685–86 (quoting Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517, 519 (2011)).

137. *Id.* at 686.

138. *Heller*, 554 U.S. at 581.

139. Professor Fox describes the exclusionary critique of originalism:

Originalism is commonly criticized for being inherently hostile to the interests of minorities and women. One version of this criticism—the exclusionary critique—states that originalism, by adopting interpretive models from a time when minorities and women (and many lower class white men) were legally excluded from political participation, is not legitimate by contemporary standards and can be expected to produce answers that disadvantage women and minorities.

Fox, *supra* note 134, at 679.

140. *Heller*, 554 U.S. at 598.

141. *Id.* at 600.

142. *Id.* at 608–09 (quoting JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 450 (reprinted 1986) (1840)).

143. *Id.* at 624–25 (alteration in original) (quoting *State v. Kessler*, 614 P.2d 94, 98 (Or. 1980)).

## 2. *Heller and the Frontiersman*

Next, the Justices appear to conceive of a frontiersman as another central figure to the Second Amendment. Like the colonial revolutionary, the frontiersman is a white paradigm; the American frontier has become part of “America’s national mythology” that exalts “the conquest of the wilderness and the subjugation or displacement of the Native Americans who originally inhabited it” as a “means to our achievement of a national identity.”<sup>144</sup> As scholars have noted, “Examples of popular and influential narratives that embrace and disseminate the values of the mythology of the American frontier are numerous, and (almost) always recount the exploits of white men who have tested themselves against the ‘savage’ other.”<sup>145</sup>

*Heller* perpetuates this mythology by connecting the Second Amendment to the story of frontiersmen, and therefore to the story of “white men protecting their families from darker-skinned savages.”<sup>146</sup> Notably, at oral argument, Justice Anthony Kennedy asked counsel for the respondent, “[The right to bear arms] had nothing to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that?”<sup>147</sup> Later, Justice Kennedy also asked counsel for the petitioner, “So in your view this amendment has nothing to do with the right of people living in the wilderness to protect themselves . . . ?” to which counsel replied ambivalently, “I wouldn’t say that it has no application here.”<sup>148</sup> Neither party otherwise made any affirmative argument that the right *did* conceive of a “remote settler.”<sup>149</sup> Yet in this exchange, Justice Scalia stepped in to push the point himself, interrupting counsel for the respondent to assert, “Blackstone thought it was important. He thought the right of self-defense was inherent, and the framers were devoted to Blackstone.”<sup>150</sup> While we cannot know what ultimately swayed the “all important ‘swing voter’ Justice Kennedy,” who became the fifth vote for the majority in *Heller*, some believe he was persuaded by this mythology around gun ownership, which Justice Scalia confidently reinforced at oral argument.<sup>151</sup>

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144. JAMES J. DONAHUE, *FAILED FRONTIERSMEN: WHITE MEN AND MYTH IN THE POST-SIXTIES AMERICAN HISTORICAL ROMANCE* 1, 3 (2015).

145. *Id.* at 4.

146. *Id.* (explaining that in the creation of the American mythology, frontiersmen who established “civilization” are “white society,” while “savagery” in turn “always refers to the ethnic other (often Native Americans and African Americans)”).

147. Oral Argument at 7:00, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), <https://www.oyez.org/cases/2007/07-290> [<https://perma.cc/WK7L-AS6K>].

148. *Id.* at 31:34.

149. *Id.* at 7:12, 31:48.

150. *Id.* at 7:27.

151. William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism*, 13 *LEWIS & CLARK L. REV.* 349, 355 (2009).

### 3. *Heller and the Hunter*

*Heller* also elevates hunting as a core exercise of the Second Amendment, and in doing so promotes another white identity.<sup>152</sup> The “tie between hunting and identity began at colonization, when promoters portrayed North America as a hunter’s paradise,” and over time, the hunter’s identity has become “increasingly restricted to rural, white males.”<sup>153</sup> Justice Scalia weaves references to hunting throughout the *Heller* opinion. First, the opinion defines the phrase to “keep arms” as “simply a common way of referring to possessing arms, for militiamen *and everyone else*.”<sup>154</sup> To define “*everyone else*,” Justice Scalia cites a list of historical sources in a footnote, many of which describe the use of firearms in connection with hunting.<sup>155</sup> The sources paint the picture of a wealthy landowner who uses his guns to hunt. One footnoted source says, “Hath not every Subject power to keep Arms, as well as Servants in his House for defense of his Person?”<sup>156</sup> This quotation does not explicitly reference hunting but reinforces the image of the gun holder Justice Scalia envisions as an estate holder—a “Subject” who has “Servants in his House.” The other sources describe keeping “Arms in their Houses” for “Journeys or Hunting,”<sup>157</sup> or a person who keeps arms “in his House, or on his Estate, on the Account of Hunting, Navigation, Travelling . . . .”<sup>158</sup>

Later in the opinion, Justice Scalia urges that the scope of the Second Amendment is not limited by its prefatory clause because the right must include hunting: “[M]ost [Americans] undoubtedly thought [the right to bear arms] even more important for self-defense and hunting.”<sup>159</sup> The opinion explains that two of three “important founding-era legal scholars,” selected as representative of post-ratification commentary, defined the Second Amendment right in connection with hunting.<sup>160</sup> Justice Scalia asserts, “[George Tucker] believed that the English game laws had abridged the right by prohibiting ‘keeping a gun or other engine

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152. Hunting is a primarily white activity. For example, one study revealed that 96% of hunters in 2016 were white, while Black participation was statistically insignificant. U.S. FISH & WILDLIFE SERV., 2016 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION (2016), <https://www2.census.gov/programs-surveys/fhwar/publications/2016/fhw16-nat.pdf> [<https://perma.cc/Y9JF-VR37>].

153. Daniel Justin Herman, *Hunting and the American Identity: The Rise, Fall, Rise and Fall of an American Pastime*, 31 INT’L J. HIST. SPORT 55, 55 (2014).

154. *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

155. *Id.* at 582 n.7.

156. *Id.* (citing 3 A COMPLEAT COLLECTION OF STATE-TRYALS 185 (1719)).

157. *Id.* (citing THOMAS WOOD, A NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW 282 (4th ed. 1730)).

158. *Id.* (citing JOHN AYLIFFE, A NEW PANDECT OF ROMAN CIVIL LAW 195 (1734)).

159. *Id.* at 599.

160. *Id.* at 605.



for the destruction of game,”<sup>161</sup> and “[l]ike Tucker, Rawle regarded the English game laws as violating the right codified in the Second Amendment.”<sup>162</sup>

Oral argument further reveals the Justices’ fixation on hunting, independent of arguments made by counsel for either party. First, Justice Souter asked Solicitor General Paul Clement, arguing as an amicus in support of petitioners, whether “someone going out to hunt a deer would have thought of themselves as bearing arms?”<sup>163</sup> Clement essentially admitted no, saying that “‘bear arms’ in its unmodified form is most naturally understood to have a military context.”<sup>164</sup> Neither counsel made any affirmative arguments about hunting. Instead, Justice Scalia himself interjected to ask counsel for petitioner, “You mean you can’t have any more arms than you would need to take with you to the militia? You can’t have . . . you know, a turkey gun and a duck gun . . . ?”<sup>165</sup> Justice Kennedy also pressed counsel to answer, saying, “I’m asking about the constitutional standard you apply to a hypothetical statute which would prohibit the guns Justice Scalia described.”<sup>166</sup> Counsel for petitioner could not provide a clear response, and both Justice Scalia and Justice Kennedy sided with the respondent in the five-Justice majority.

### *B. Heller Legitimizes the Exclusion of Black Gun Owners*

While the *Heller* opinion elevates these white paradigms, it also legitimizes the exclusion of Black gun holders in two main ways: first, by repeatedly citing laws and cases that deny Black Americans the right to bear arms; and second, by including “felons” in the categories of those “presumptively” excluded from Second Amendment protection, a category that disproportionately includes Black Americans.<sup>167</sup>

#### *1. Citations Connect Black Gun Usage with Disarmament*

Throughout the *Heller* opinion, Justice Scalia references Black disarmament through various citations, without engaging with the apparent consequences of the sources he chooses to include. The cumulative effect of this repeated choice is a subtle but pernicious message that Black Americans can be legitimately excluded from the Second Amendment. There are several key examples. First, the opinion

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161. *Id.* at 606 (quoting 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES app. at 300 (Rothman Reprints 1969) (1803)).

162. *Id.* at 607.

163. Oral Argument at 38:30, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), <https://www.oyez.org/cases/2007/07-290> [<https://perma.cc/WK7L-AS6K>].

164. *Id.* at 38:37. Clement did also add, strategically softening his initial response, that he thought it was “highly relevant” that Madison and Jefferson had written a hunting bill that used the phrase “bear a gun.” *Id.* at 38:58.

165. *Id.* at 1:34:05.

166. *Id.* at 1:35:28.

167. *Heller*, 554 U.S. at 626–27, 627 n.26.

cites a legal dictionary and a law that prohibit “[s]ervants and labourers” and “any [Black person]” from bearing arms to demonstrate that the Amendment applies to weapons “not specifically designed for military use.”<sup>168</sup> Second, to define “keep arms,” Justice Scalia cites to a case that references state law making it “a misdemeanor for a member of certain racial groups ‘to carry about his person or keep in his house any shot gun or other arms.’”<sup>169</sup> Next, to reinforce that the right was unconnected to military service, the opinion cites a “Virginia case in 1824 holding that the Constitution did not extend to free [B]lacks”<sup>170</sup> and thus “free [B]lacks” had no right to bear arms—Justice Scalia repeats this asserted limitation more than once.<sup>171</sup> The opinion also cites a Maryland case holding that “because free [B]lacks were treated as a ‘dangerous population,’” they could not bear arms.<sup>172</sup> Justice Scalia summarily concludes that these restrictions support his interpretation that the Second Amendment “obviously” protects an individual right, but he does not otherwise acknowledge their clear racial import.<sup>173</sup> He also does not articulate that pre-Civil War restrictions were wrong, and by relying on these sources, he inherently legitimizes the racist understanding of the Second Amendment they support. Justice Stevens appears to raise this concern in dissent. Justice Stevens calls attention to these sources’ racial implications directly and suggests they support a different conclusion—that Black Americans were denied Second Amendment protection, so Justice Scalia’s “assert[ion]” that these sources support

168. *Id.* at 581. The first source cited is Cunningham’s legal dictionary, which provides the example: “Servants and labourers shall use bows and arrows on *Sundays*, &c. and not bear other arms.” The law cited is a Delaware law that makes it unlawful for “any [Black person] . . . to carry any guns, swords, pistols, fowling-pieces, clubs, or other arms and weapons whatsoever . . . .” An Act for the trial of Negroes, 1797 Del. Laws ch. XLIII, § 6, in 1 *First Laws of the State of Delaware* 102, 104 (J. Cushing ed. 1981 (pt. 1)).

169. *Heller*, 554 U.S. at 584 n.7 (quoting *State v. Dempsey*, 31 N.C. (9 Ired.) 384, 385 (1849)).

170. Justice Scalia uses the word “Blacks” as a noun to refer to Black people as a group. This usage does not reflect the views of the author or the publication. Rather, it is included throughout this paragraph and in accompanying footnotes to highlight Justice Scalia’s chosen language, as well as the language used in sources from which he quotes.

171. *Heller*, 554 U.S. at 611; *see id.* at 600 (“That is why the first Militia Act’s requirement that only whites enroll caused States to amend their militia laws to exclude free blacks.”). Justice Scalia describes the Virginia case in detail:

A Virginia case in 1824 holding that the Constitution did not extend to free blacks explained: “[N]umerous restrictions imposed on [blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms.”

*Id.* at 611 (alterations in original) (citing *Aldridge v. Commonwealth*, 2 Va. Cas. 447, 449 (General Ct. 1824)).

172. *Id.* at 611–12 (quoting *Waters v. State*, 1 Gill 302, 309 (Md. 1843)). “Blacks were routinely disarmed by Southern States after the Civil War,” the opinion states. *Id.* at 614.

173. *Id.* at 611.

his individual rights conclusion “is not obvious at all.”<sup>174</sup> Yet Justice Scalia dismisses Justice Stevens’ point in a footnote. No, he argues, obfuscating the issue, it is not that these laws denied Black Americans the “right to bear arms” under the Second Amendment, as Justice Stevens suggests; rather, they were simply “laws prohibiting free [B]lacks from keeping weapons.”<sup>175</sup>

Justice Scalia’s citations do not end there. He cites a Georgia Supreme Court case, *Nunn v. State*, written by Georgia Chief Justice Joseph Henry Lumpkin, who was “a champion of both slavery and of the Southern code of honor,”<sup>176</sup> to demonstrate Justice Scalia’s grammatical interpretation of the operative clause of the Second Amendment.<sup>177</sup> He also raises the Court’s decision in *United States v. Cruikshank*,<sup>178</sup> described by historians as the “bloodiest single instance of racial carnage in the Reconstruction era,”<sup>179</sup> where a white mob slaughtered a group of armed Black citizens. The Supreme Court overturned the convictions of all the mob participants, in part by concluding that the Second Amendment did not bind the states.<sup>180</sup> Without grappling with the case’s racial consequences, Justice Scalia simply states that “[t]he limited discussion of the Second Amendment in *Cruikshank* supports, if anything, the individual-rights interpretation.”<sup>181</sup>

In sum, these dozen laws and cases show that the law has consistently excluded Black Americans from Second Amendment protection, and the *Heller* opinion does not discuss how that routine exclusion should inform a modern understanding of the Second Amendment. Justice Scalia’s failure to address the racial implications of the sources he brings into the fold leaves the opinion, at best, incomplete. Relying on laws and cases that prohibited people of color from owning guns—and even sanctioned the murder of those who did—to argue discrete points about how to interpret words in the Amendment, unrelated to race, seems to miss the point. Without any admonishment that the conclusions those cases reached are wrong, one might infer that the signal is intentional. Given the breadth

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174. *Id.* at 662 n.29 (Stevens, J., dissenting).

175. *Id.* at 612 n.21 (majority opinion) (citation omitted).

176. Cornell & Ruben, *supra* note 86 (“The U.S. Supreme Court cited *Nunn* . . . for the first time in over 200 years . . . Why courts or gun-rights advocates think Lumpkin’s view of the right to bear arms provides a solid foundation for modern firearms jurisprudence is puzzling.”).

177. *Heller*, 554 U.S. at 612–13 (citing *Nunn v. State*, 1 Ga. 243, 251 (1846)).

178. 92 U.S. 542 (1876).

179. In *Cruikshank*, the Supreme Court overturned the convictions of Cruikshank and a white mob, “most former Confederate soldiers and members of the Ku Klux Klan and the White League,” who killed over 100 armed Black citizens who had taken control of a local courthouse in Colfax, Louisiana. The mass murder is known as the Colfax Massacre. It was one of the “worst incidents of racial violence after the Civil War” during Reconstruction. Danny Lewis, *The 1873 Colfax Massacre Set Back the Reconstruction Era*, SMITHSONIAN MAG. (Apr. 13, 2016), <https://www.smithsonianmag.com/smart-news/1873-colfax-massacre-crippled-reconstruction-180958746/> [<https://perma.cc/N2RB-KD3K>].

180. *Cruikshank*, 92 U.S. at 548, 553 (describing charges at issue and asserting that the Second Amendment “has no other effect than to restrict the powers of the national government”); *McDonald v. City of Chicago*, 561 U.S. 742, 757 (2010) (describing *Cruikshank*).

181. *Heller*, 554 U.S. at 620.

of sources cited in the 63-page majority opinion<sup>182</sup> and the two-century period from which they are drawn, it is hard to imagine that there were no other sources available to make the same points about nuances of the Amendment's language.<sup>183</sup> Any potential objection that the opinion is constrained by a faithful, methodical originalist analysis is undermined by the sheer two-century scope of the sources it references. In fact, this lack of constraint has drawn criticism from the legal field, including, for example, from two notable federal judges, Richard Posner and J. Harvie Wilkinson, who have both criticized *Heller*'s reasoning and historical analysis—in particular for the opinion's lack of “clarity of the historical materials.”<sup>184</sup>

Further, because *Heller* instructs courts and legislators to look to “historical understanding” by using “analogies to ‘longstanding’ ‘laws . . .’ to determine whether modern regulations are constitutionally permissible,” *Heller* tells us to prioritize an understanding of the Second Amendment from a time period that understood Black Americans to be excluded from that right.<sup>185</sup> *Heller* thereby establishes the modern Second Amendment doctrine by reference to laws that have consistently been designed and enforced to exclude Black gun holders. Even worse, if one applies Justice Scalia's logic that “longstanding” tradition justifies modern regulation, the opinion's historical references tee up the inference that historical precedent would justify disarming Black Americans today.

One potential objection to this argument may be that Justice Scalia discusses Black gun ownership and civil rights post-Civil War in the opinion, acknowledging that laws, including the Freedmen's Bureau Act, Civil Rights Act of 1871, and the Fourteenth Amendment, were intended to “secure constitutional rights for newly free slaves,” including “the constitutional right to bear arms.”<sup>186</sup> But this discussion does not change the overall impact of the opinion with respect to race, and we should be skeptical of its inclusion for a few reasons. First, although these laws plainly implicate race, Justice Scalia does not actually discuss race, but rather leverages these laws to conclude only that “plainly . . . the Second Amendment protected an individual right to use arms for self-defense.”<sup>187</sup> Even if, at best, the reference to these laws acknowledges that Black Americans are entitled to a baseline package of fundamental civil rights that includes the Second Amendment, this passage pays only lip service to the notion of racial equality. Justice Scalia does not conclude from these references that the Second Amendment should be racially inclusive in a modern context. Further, as discussed in Part II.B.2 and Part III, the opinion otherwise explicitly creates exceptions that leave gaping holes in the

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182. *Id.* at 573–636.

183. *See, e.g., id.* at 597 (citing VA. DECLARATION OF RIGHTS § 13 (1776)) (example of source from 18th century); *id.* at 601 (citing 19 COLONIAL RECORDS OF THE STATE OF GEORGIA 137–39 (Allen Daniel Candler ed., 1911)) (example of source from 20th century).

184. Levinson, *supra* note 122, at 320 (describing Wilkinson's critique).

185. *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2117–19 (2022) (quoting *Heller*, 554 U.S. at 626).

186. *Heller*, 554 U.S. at 614–15.

187. *Id.* at 618.

Second Amendment's protection for Black Americans, effectively establishing a Second Amendment doctrine that is racially imbalanced. It is also worth noting that reference to laws passed 75 years after the ratification of the Second Amendment violates originalist methodology, which should be temporally limited.<sup>188</sup> Even prominent “devotee[s] of originalism” and conservative Second Amendment scholars have criticized the opinion’s historical “a-temporality” as “a betrayal of originalist methodology.”<sup>189</sup> Justice Scalia’s willingness to deviate from the framework by which he claims to abide should make us question the rigor of his analysis, and it lends further support to the argument that his analysis is more values-driven than he represents.

## 2. *Presumptively Lawful List Has Unacknowledged Racial Consequences*

The opinion’s second blow to Second Amendment protection for Black Americans is its allowance of categorical prohibitions on gun ownership that disproportionately exclude people of color. Justice Scalia leverages Black gun rights to justify his individual rights interpretation even as he sanctions restrictions that disproportionately exclude Black gun holders in practice. Justice Scalia says, “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . .”<sup>190</sup> He adds in a footnote that these prohibitions are “presumptively lawful regulatory measures.”<sup>191</sup> This sentence has “received more attention than any other part of the *Heller* opinion” for two reasons: first, because the opinion endorses these limitations, although unnecessary to resolve the issues before the Court, without providing “any clear guidance” for lower courts; and second, because “it seems quite odd that Scalia would want to offer even a tentative view . . . without undertaking [the kind of] historical analysis” upon which he otherwise insists.<sup>192</sup>

This list is also noteworthy because the exclusion of “felons” applies disproportionately to Black Americans, who are dramatically overrepresented in persons convicted of felonies because of systemic inequality and compounding, pervasive

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188. As Professor Steven Calabresi explains, “Originalists believe that the constitutional text ought to be given the original public meaning that it would have had *at the time that it became law*.” Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NAT’L CONST. CTR. (emphasis added), <https://constitutioncenter.org/the-constitution/white-papers/on-originalism-in-constitutional-interpretation> [<https://perma.cc/3JRX-HXQY>] (last visited May 20, 2023).

189. Levinson, *supra* note 122, at 320–21. Professor Nelson Lund has commented, “[T]he Court’s reasoning is at critical points . . . so transparently defective in some respects . . . that *Heller* should be seen as an embarrassment for those who joined the majority opinion.” *Id.* at 321 (quoting Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1345 (2009)). Mark Tushnet also argues that the majority opinion evidences as much discretion as Justice Breyer’s dissent: “Despite the tone of Justice Scalia’s opinion, he is on the same methodological page as Justice Breyer, though he cannot admit the fact.” Mark Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 428 (2009).

190. *Heller*, 554 U.S. at 626.

191. *Id.* at 627 n.26.

192. Rostron, *supra* note 123, at 712–14.

racial discrimination in the criminal legal system and other institutions.<sup>193</sup> Within the context of the opinion, this list further adds to the peripheral narrative of the Black gun holder who does not fall within the opinion's central paradigms. The "felon" is othered and, as a result, excluded from Second Amendment protection, as Part III further shows.

Given the foreseeable racial effects of these categorical prohibitions, it is troubling that the "majority simply declares that the Constitution allows . . . gun control regulation" with respect to "felons and the mentally ill,"<sup>194</sup> without acknowledging the racial consequences, or attempting to provide any "detailed historical analysis of original understandings."<sup>195</sup> Constitutional scholar Sanford Levinson remarks, "There is almost no trace of originalist analysis—or, it is fair to say, any other kind of analysis—in part III . . . . [O]ne can certainly ask why *all* felons, including those convicted of distinctly nonviolent crimes, should be deprived of this right."<sup>196</sup> Justice Breyer comments in dissent, "I am similarly puzzled by the majority's list . . . . Why these? Is it that similar restrictions existed in the late eighteenth century? The majority fails to cite any colonial analogues."<sup>197</sup> Justice Scalia does not address Justice Breyer's critique, and the absence of any explicit legal or historical justification leaves us with the impression that a more modern cultural understanding informs this list.<sup>198</sup> Justice Scalia apparently regards that cultural understanding as so uncontroversial, he can assert these exclusions without justification.<sup>199</sup>

### III.

#### APPLICATION OF *HELLER* AND UNEQUAL OUTCOMES

Courts' application of *Heller* contributes to a larger legal context in which the law treats Black gun holders unequally, from arrests to sentencing. In this Part, I

193. For example, one study shows that Black Americans were represented among felony defendants convicted in state courts at 4.3 times the rate for white defendants. CHRISTOPHER HARTNEY & LINH VUONG, *CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM* 14 (2009), [https://www.nccdglobal.org/sites/default/files/publication\\_pdf/created-equal.pdf](https://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf) [<https://perma.cc/9Q77-YEDC>]; see also THE SENTENCING PROJECT, *REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM* (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/YR9L-SS9B>].

194. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 198 (2009); *Heller*, 554 U.S. at 626.

195. Rostron, *supra* note 123, at 713.

196. Levinson, *supra* note 122, at 322. Although Scalia characterizes these measures as "longstanding," in fact "many do not date back to the Framing era." Enrique Schaefer, *What the Heller?: An Originalist Critique of Justice Scalia's Second Amendment Jurisprudence*, 82 U. CIN. L. REV. 795, 811 (2018).

197. *Heller*, 554 U.S. at 721 (Breyer, J., dissenting).

198. Professor Reva Siegel agrees that Justice Scalia derives authority from cultural developments: "[A]s this passage makes plain, *Heller* also takes guidance from the lived experience . . . of Americans in times since the founding . . . [which] the majority is prepared to elevate over the considered views of 'hundreds of judges' in the twentieth century." Siegel, *supra* note 194, at 201.

199. See generally Levinson, *supra* note 122; Siegel, *supra* note 194.

consider the broader legal treatment of Black Americans' gun rights and the application of *Heller* to felon in possession statutes, as one key example of how *Heller* limits Black gun rights in practice.

### *A. Black Gun Rights Are More Limited*

The criminal legal system makes it more difficult for Black people to own or use a gun.<sup>200</sup> Disparities exist at every stage of enforcement. Police disproportionately focus on making arrests and combatting “gun crime” in minority communities despite “little statistical evidence” of any resulting decrease in violent crime.<sup>201</sup> Black people are more likely to be convicted of a firearm offense. In 2020, for example, Black Americans made up over half of the convictions for firearm offenses, despite comprising just 13.5% of the U.S. population.<sup>202</sup> Black defendants are more likely than white defendants to face gun-related charges that carry mandatory minimums, and once convicted, Black defendants receive longer sentences for similar crimes.<sup>203</sup> One example of laws that “deepen . . . vast racial disparities in the legal system” are self-defense laws like Stand Your Ground laws, which allow people facing a threat of bodily harm to defend themselves with

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200. See Granse, *supra* note 65, at 388.

201. See, e.g., Memorandum from Working Group of U.S. Att’y’s Off.-D.C. Black Assistant U.S. Att’y’s to U.S. Att’y’s Off.-D.C. Leadership 5 (June 16, 2020), <https://www.dailysignal.com/wp-content/uploads/Working-Group-Proposals-Submitted-6.16.20.pdf> [<https://perma.cc/RW26-3RGY>] (calling for change of District of Columbia police department practice of “target[ing] poor, predominantly Black neighborhoods” when making arrests for felon in possession violations); Brad Heath, *Investigation: ATF Drug Stings Targeted Minorities*, USA TODAY (July 20, 2014), <https://www.usatoday.com/story/news/nation/2014/07/20/atf-stash-house-stings-racial-profiling/12800195/> [<https://perma.cc/88R3-2WW7>] (describing the Bureau of Alcohol, Tobacco, Firearms and Explosives’ use of drug stings to combat gun crime).

202. See U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES, FISCAL YEAR 2020 18 (2021), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf) [<https://perma.cc/J74U-C4AP>] (firearms convictions by race); U.S. CENSUS BUREAU, POPULATION DIV., METHODOLOGY FOR THE 2020 DEMOGRAPHIC ANALYSIS ESTIMATES 21 (2020), [https://www2.census.gov/programs-surveys/popest/technical-documentation/methodology/2020da\\_methodology.pdf](https://www2.census.gov/programs-surveys/popest/technical-documentation/methodology/2020da_methodology.pdf) [<https://perma.cc/EP4U-B6LP>] (population).

203. See U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2018), [http://www.vtlex.com/wp-content/uploads/2018/03/20180315\\_Firearms-Mand-Min.pdf](http://www.vtlex.com/wp-content/uploads/2018/03/20180315_Firearms-Mand-Min.pdf) [<https://perma.cc/QD4V-CNF7>]. In 2016, “Black offenders convicted under section 924(c) received an average sentence of 165 months, compared to 140 months for White offenders.” *Id.* at 6. The sentencing disparity for weapons offenses corresponds to the overarching disparity in rates of incarceration and severity of sentences for any offense in the criminal legal system. See, e.g., Cassia Spohn, *Race and Sentencing Disparity*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 169 (Erik Luna ed., 2017) (cataloguing disproportionate rates of convictions and sentences).

comparable force without retreating.<sup>204</sup> One expert review of Stand Your Ground cases after Trayvon Martin’s death revealed that “homicides were ruled justified in 45% of cases involving a white shooter and Black victim, but just 11% of cases involving a Black shooter and white victim.”<sup>205</sup>

Studies in different jurisdictions confirm that racial disparities in enforcement of gun laws exist across the country. For example, Harvard researchers “found significant racial disparities in the handling of weapons and drug cases [in Massachusetts], crimes they noted ‘carry longstanding racialized stigmas.’”<sup>206</sup> Even after they controlled for “charge severity and additional factors,” the racial disparities remained.<sup>207</sup> Black Americans were represented disproportionately in defendants of firearms crimes, constituting nearly half of those convicted for all firearms offenses in Massachusetts, and they also received “substantially longer sentences.”<sup>208</sup> These statistics were particularly stark when compared to the prosecution of crimes involving primarily white defendants; the same study revealed that in the offense of operating under the influence, for which 82.2% of people convicted were white, 79.8% of convictions did not lead to a sentence of incarceration, with probation being the most common disposition.<sup>209</sup> Another study in Washington evaluating the “implementation of extreme risk protection orders (ERPOs)”<sup>210</sup> found that “[B]lack people were overrepresented in gun removal orders by a factor of nearly 2 to 1 compared to their share of the county population.”<sup>211</sup> Criminal history was a factor in favor of gun removal, which, given

204. GIFFORDS LAW CTR., “STAND YOUR GROUND” KILLS 9–10 (2021), <https://files.giffords.org/wp-content/uploads/2021/05/Stand-Your-Ground-Report-May-2021-1.pdf> [<https://perma.cc/55XQ-A48V>]; Elizabeth Elkin & Dakin Andone, *What You Need to Know About “Stand Your Ground” Laws*, CNN (July 29, 2018), <https://www.cnn.com/2018/07/29/us/stand-your-ground-law-explainer-trnd/index.html> [<https://perma.cc/XV2T-DMHN>] (explaining Stand Your Ground laws).

205. GIFFORDS LAW CTR., *supra* note 204, at 9–10.

206. *New Report Highlights Racial Disparity in Massachusetts Drug and Weapons Charges*, WBUR NEWS (Sept. 9, 2020), <https://www.wbur.org/news/2020/09/09/racial-disparity-mass-drug-weapons> [<https://perma.cc/62RR-VXH7>] (describing the Harvard study). For the study itself, see ELIZABETH TSAI BISHOP, BROOK HOPKINS, CHIJINDU OBIOFUMA & FELIX OWUSU, HARVARD LAW SCH. CRIMINAL JUSTICE POLICY PROGRAM, RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM 43 (2020), <https://hls.harvard.edu/wp-content/uploads/2022/08/Massachusetts-Racial-Disparity-Report-FINAL.pdf> [<https://perma.cc/NSQ3-69A7>].

207. *New Report Highlights Racial Disparity in Massachusetts Drug and Weapons Charges*, *supra* note 206.

208. BISHOP, HOPKINS, OBIOFUMA & OWUSU, *supra* note 206, at 43, 50.

209. *Id.* at 49.

210. ERPOs are measures that give municipal police officers increased authority to remove firearms “from people who are deemed to pose an imminent risk of causing serious harm to others or themselves.” Jeffrey W. Swanson, *The Color of Risk Protection Orders: Gun Violence, Gun Laws, and Racial Justice*, 7 INJ. EPIDEMIOLOGY 46 (2020); see Shannon Frattaroli, Elise Omaki, Amy Molocznik, Adelyn Allchin, Renee Hopkins, Sandra Shanahan & Anne Levinson, *Extreme Risk Protection Orders in King County, Washington: The Epidemiology of Dangerous Behaviors and an Intervention Response*, 7 INJ. EPIDEMIOLOGY 44 (2020).

211. Swanson, *supra* note 210.



broader statistics about the criminal justice system, increased the likelihood that those facing gun removal orders would be Black.<sup>212</sup> Similarly, recent data in Minnesota demonstrates that Minnesota gun laws appear to act “as a method of racialized social control” by linking disarmament to misdemeanor convictions, marijuana use, and gang membership.<sup>213</sup> Black people are convicted of these crimes disproportionately, and that disproportionate effect is compounded because those initial convictions result in subsequent convictions of Black Americans for gun possession crimes at rates “shockingly disproportionate to their percentage of the population—sometimes six times what would be their ‘fair share.’”<sup>214</sup> In sum, firearm regulations, self-defense laws, and their enforcement by police departments and in courts all make it more difficult for Black Americans to own or use a gun.

*B. Felon in Possession Laws Demonstrate Inequality*

Felon in possession laws, and the enforcement of these laws, are a key example of gun regulations’ disproportionate racial impact—one that is in part a product of *Heller*. The federal Gun Control Act of 1968 prohibits people with felony convictions from possessing, shipping, or receiving firearms.<sup>215</sup> Most states have

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212. The “study reports that 37% of ERPO respondents indeed had a criminal history.” *Id.* Black Americans are overrepresented in those with criminal histories. *See* THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS (2018), <https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf> [<https://perma.cc/KQ4Z-WLJL>] (providing data about sentencing trends and showing that African Americans are overrepresented in those incarcerated).

213. Granse, *supra* note 65, at 413.

214. *Id.* at 389, 413.

215. 18 U.S.C. § 922(g)(1); *see* Carly Lagrotteria, *Heller’s Collateral Damage: As-Applied Challenges to the Felon-in-Possession Prohibition*, 86 *FORDHAM L. REV.* 1963, 1964 (2018).

comparable prohibitions.<sup>216</sup> These laws merit attention because they affect a substantial number of people. The federal felon in possession law is the “fifth-most charged offense in the federal system.”<sup>217</sup>

Courts contribute to the unequal position of Black gun owners when applying *Heller* to felon in possession laws. The relevant portion of *Heller* is Justice Scalia’s assertion: “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill”<sup>218</sup> which are “presumptively lawful.”<sup>219</sup> Because of this line, felon in possession laws are essentially untouchable when challenged on constitutional grounds.<sup>220</sup> Eleven circuits, in applying *Heller*, “have directly addressed [the] question” of whether the federal felon in possession statute infringes on individuals’ Second Amendment rights “and all have upheld the statute’s constitutionality.”<sup>221</sup> “Relying on the ‘presumptively lawful’ language in *Heller* . . . every federal court of appeals to address the issue has held that [the statute] does not violate the Second Amendment on its face.”<sup>222</sup> Similarly, “every state court in the modern era to consider the propriety of disarming felons under analogous state

216. State felon in possession statutes vary, and some only apply to violent felonies or repeat offenders, but most states have a comparable provision. *See, e.g.*, Possession of firearms, etc., by felon prohibited, N.C. GEN. STAT. § 14-415.1 (2020); Possession of firearm or ammunition by person convicted of felony, MICH. COMP. LAWS § 750.224f (2020); Person convicted of felony owning, purchasing, receiving or possessing firearm, CAL. PENAL CODE § 29800 (Deering 2019); Possession of firearm or carrying concealed weapon by person convicted of certain felonies, LA. STAT. ANN. § 14:95.1 (2018); Convicted felons, possession of firearms prohibited, GA. CODE ANN., § 16-11-131 (2019); Other Illegal Weapons, VA. CODE ANN. § 18.2-308.2 (2020); Possession of weapons by felons, OR. REV. STAT. § 166.270 (2009); Possession, receipt, transportation, or dominion and control of firearms, offensive weapons, and ammunition by felons and others, IOWA CODE ANN. § 724.26 (West 2010); Persons prohibited from possessing firearms, W. VA. CODE, § 61-7-7 (2013); Unlawful Possession of Firearm, TEX. PENAL CODE ANN. § 46.04 (West 2021); Possession of a firearm, WISC. STAT. ANN. § 941.29 (West 2021); Possession of a deadly weapon by a prohibited person, NEB. REV. STAT. § 28-1206 (2019); Possession by felon, MISS. CODE ANN. § 97-37-5 (2018); Felons and delinquents, FLA. STAT. ANN. § 790.23 (West 2018); Possession of firearm by convicted felon, KY. REV. STAT. ANN. § 527.040 (West 2018); Persons not to possess, use, manufacture, control, sell or transfer firearms, 18 PA. CONS. STAT. § 6105 (2019); Firearm possession—Restrictions, ARK. CODE ANN. § 5-73-103 (2009); Firearms or destructive devices, N.M. STAT. ANN. § 30-7-16 (2011); Possession of weapons by previous offenders, COLO. REV. STAT. ANN. § 18-12-108 (West 2003); Convicted felons and delinquents, OKLA. STAT. tit. 21, § 1283 (2020); Unlawful possession of firearm by serious violent felon, IND. CODE § 35-47-4-5 (2017); Criminal possession of a firearm by a convicted felon, KAN. STAT. ANN. § 21-6304 (2020); Ownership or possession of firearm by certain persons prohibited, NEV. REV. STAT. § 202.360 (2010); Unlawful possession of firearm, D.C. CODE § 22-4503 (2013).

217. Lagrotteria, *supra* note 215, at 1964.

218. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

219. *Id.* at 627 n.26.

220. *See United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (noting that “[s]ome courts have treated *Heller*’s listing of ‘presumptively lawful regulatory measures,’ for all practical purposes, as a kind of ‘safe harbor’ for unlisted regulatory measures”).

221. Lagrotteria, *supra* note 215, at 1978.

222. *Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019) (cataloguing cases).

constitutional provisions has concluded that step to be permissible,”<sup>223</sup> and “[n]o state law banning felons from possessing guns has ever been struck down.”<sup>224</sup> When “convicted felons assert Second Amendment defenses . . . judges often simply parrot *Heller*’s dicta and move on.”<sup>225</sup> *Heller*’s “presumptively lawful” list gives courts license to rubber stamp felon in possession statutes, and in doing so, courts disproportionately disarm Black citizens, who are overrepresented among those with felony convictions.<sup>226</sup> In fact, Black gun owners consistently represent over half of felon in possession violations,<sup>227</sup> even though Black Americans typically represent closer to 13% of the population<sup>228</sup> and gun owners are more often white than Black.<sup>229</sup>

Yet courts do not account for racial disparities when evaluating the constitutionality of felon in possession statutes, perpetuating a clear disparate impact through their inaction.<sup>230</sup> For example, in *United States v. Jones*, a three-judge panel from the Eastern District of Virginia considered a challenge to federal prosecution of felon in possession laws, in which the defendant argued that the state’s selective prosecution based on race violated his due process rights.<sup>231</sup> While “the court found that there was a disparate impact on Black defendants, it stated that it was ‘unwilling to ascribe an unconstitutional intent to those responsible . . . .’”<sup>232</sup>

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223. *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010).

224. *Id.* (citing Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 721 (2007)).

225. Darrell A. H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 867 (2013). In a footnote, the article catalogues cases from various state courts where courts cite to *Heller*’s “presumptively lawful” language as essentially the extent of their analysis, as they uphold state restrictions on firearms. The article cites cases from Montana, California, Maine, and Florida, as well as the Ninth and Eleventh Circuits. *Id.* at 867 n.63.

226. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 123, 183, 221 (2012).

227. For example, in 2017, 53% of those convicted were Black, and in 2014, 52.4% of those convicted were Black. See U.S. SENTENCING COMM’N, *QUICK FACTS: FELON IN POSSESSION OF A FIREARM* (2017), [https://www.supremecourt.gov/opinions/URLs\\_Cited/OT2018/17-9560/17-9560-1.pdf](https://www.supremecourt.gov/opinions/URLs_Cited/OT2018/17-9560/17-9560-1.pdf) [<https://perma.cc/B3QE-HR4Y>]; U.S. SENTENCING COMM’N, *QUICK FACTS: FELON IN POSSESSION OF A FIREARM* (2014), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Felon\\_in\\_Possession\\_FY14.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_FY14.pdf) [<https://perma.cc/87SZ-4DUD>].

228. *Profile: Black/African Americans*, HHS OFFICE OF MINORITY HEALTH, <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=61> [<https://perma.cc/QNB9-69JW>] (last visited Apr. 17, 2022) (African Americans made up 12.8% of the total population in 2019).

229. See PARKER, HOROWITZ, IGIELNIK, OLIPHANT & BROWN, *supra* note 64, at 18 (indicating that more white respondents report owning a gun or living in a household with a gun than Black respondents).

230. Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation’s Century-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 157–64 (2018) (discussing disparate racial impact of felon in possession statutes, from their prosecution, sentencing, and treatment in courts, including courts’ refusal to intervene to address racial disparities).

231. *United States v. Jones*, 36 F. Supp. 2d 304, 309–10 (E.D. Va. 1999).

232. Shreefter, *supra* note 230, at 162 (quoting *Jones*, 36 F. Supp. 2d at 313).

The court's inaction permitted the program to continue, and the challenged program in that case later became the "'footprint' for today's national program, 'Project Safe Neighborhoods.'"<sup>233</sup>

Furthermore, as courts have coalesced around intermediate scrutiny to evaluate statutes challenged on Second Amendment grounds,<sup>234</sup> we should consider whether racial biases may inform the outcomes they reach. Intermediate scrutiny involves a means-ends analysis to weigh the nature of the conduct and governmental interest being advanced against the burden imposed by restrictions on that conduct.<sup>235</sup> Intermediate scrutiny, "consistently critiqued by judges and scholars who point to its indeterminacy and its invitation to judicial activism,"<sup>236</sup> does not impose any real kind of restriction on judicial discretion, leaving it up to judges to balance whose rights should be protected.<sup>237</sup> *Heller*'s language, including the language that legitimizes the exclusion of Black gun holders, outlines the parameters of the Second Amendment that lower courts reference when evaluating Second Amendment challenges to gun laws.<sup>238</sup> Where *Heller* fails to provide rigorous guidance for lower courts, the racial biases inherent in the opinion provide both ambiguous and racially problematic guidance for lower courts. Where intermediate scrutiny leaves greater room for judicial discretion,<sup>239</sup> the exercise of judicial discretion is likely to be informed by the judges' own racial biases, whether express or implicit. Studies have measured the effect of these biases: "A recent report

233. *Id.* at 163 (quoting Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 311 (2007)).

234. Todd E. Pettys, *The N.R.A.'s Strict-Scrutiny Amendments*, 104 IOWA L. REV. 1455, 1462, 1465 (2019) ("Nearly all federal courts that have addressed the issue have concluded that a lenient application of intermediate scrutiny is ordinarily appropriate . . ."). The standard courts adopt moving forward will likely change, however, in light of the Supreme Court's opinion in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), in which the majority articulated, "Courts of Appeals' second step is inconsistent with *Heller*'s historical approach and its rejection of means-end scrutiny" and instead directed courts to invoke a textual analysis "informed by history." *Id.* at 2128–29.

235. "To uphold a regulation under intermediate scrutiny . . . (1) the government's stated objective must be significant, substantial, or important; and (2) there must be a 'reasonable fit' between the challenged regulation and the asserted objective." *Silvester v. Harris*, 843 F.3d 816, 821–22 (9th Cir. 2016) (interpreting intermediate scrutiny in the context of the Second Amendment).

236. Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 301 (1998) ("Justice Rehnquist declared that the test was 'so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation.'" (quoting *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting))).

237. *See, e.g., Wilson v. Cook County*, 937 F.3d 1028, 1033 (7th Cir. 2019) (balancing factors to determine appropriate Second Amendment protections).

238. *See Eric Ruben & Joseph Blocher, From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1441 (2018) ("As expected, post-*Heller* litigation has focused on justifying, limiting, extending, or reasoning by analogy from the restrictions that the Court seemed to approve.").

239. Even "Justice Scalia . . . has signaled that 'intermediate scrutiny' is not really much of a test at all, but frequently a way for judges to 'load the dice.'" Miller, *supra* note 225, at 871 (quoting *United States v. Virginia*, 518 U.S. 515, 568 (Scalia, J., dissenting)).

by two sociologists showed that white federal judges are about four times more likely to dismiss race discrimination cases outright.”<sup>240</sup> When courts consider gun regulations based on *Heller*’s presumptively lawful categories, the effect of these biases may be particularly problematic. As Michelle Alexander writes in *The New Jim Crow*, there are longstanding racial biases with respect to those with felony convictions:

[W]e . . . label people of color ‘criminals’ and then engage in all the practices we supposedly left behind. Today it is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against [Black] Americans . . . . Once you’re labeled a felon, the old forms of discrimination . . . are suddenly legal . . . .<sup>241</sup>

In fact, courts dismiss challenges to felony gun prohibitions using morally charged language that suggests these racial biases are at play. For example, in upholding the federal felon in possession law, federal courts have stated that the Second Amendment only applies to “virtuous citizens,”<sup>242</sup> or “*law-abiding*, responsible citizens.”<sup>243</sup> State court opinions echo this rationale, finding that individuals with felony convictions fall outside the “*law-abiding*, responsible” class

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240. Jeff Guo, *Researchers Have Discovered a New and Surprising Racial Bias in the Criminal Justice System*, WASH. POST (Feb. 26, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/24/researchers-have-discovered-a-surprising-racial-bias-in-the-criminal-justice-system/> [https://perma.cc/T6CV-DUMX].

241. ALEXANDER, *supra* note 226, at 2.

242. *Binderup v. Att’y Gen. U.S.*, 836 F.3d 336, 348 (3d Cir. 2016) (“[M]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm ‘unvirtuous citizens.’” (quoting *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010))); *see also* *United States v. Carpio-Leon*, 701 F.3d 974, 979–80 (4th Cir. 2012) (“[F]elons ‘were excluded from the right to arms’ because they were deemed unvirtuous.” (quoting Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995))); *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) (“[T]he right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals) . . . .” (quoting Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 L. & CONTEMP. PROBS. 143, 146 (1986))); *United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009) (“In the parlance of the republican politics of the time, these limitations were sometimes expressed as efforts to disarm the ‘unvirtuous.’” (quoting Reynolds, *supra*, at 480)).

243. *Kanter v. Barr*, 919 F.3d 437, 445, 450 (7th Cir. 2019) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634–35).

of citizens to whom *Heller* applies,<sup>244</sup> even for self-defense in the home<sup>245</sup> or in response to deadly force.<sup>246</sup> Given that those with felony convictions are more likely to be Black, courts' approaches seem to evidence Michelle Alexander's admonition that the "criminal" or "felon" label serves as a proxy for deeper racial biases.<sup>247</sup> Furthermore, courts' rationales perpetuate a long history of "the desire to keep weapons out of the hands of 'socially undesirable' groups," which "in America [has meant] . . . racial minorities," namely Black and Indigenous people.<sup>248</sup>

Furthermore, the inference that courts' moral language is racially coded is reinforced by the fact that the federal felon in possession statute does not prohibit firearm possession for all lawbreakers. Those with felony convictions from "anti-trust violations, unfair trade practices . . . or other similar offenses relating to the regulation of business practices" are explicitly permitted to buy and use guns.<sup>249</sup> Because white collar defendants are mostly white, the delineation between which "criminals" are and are not entitled to Second Amendment protection becomes more apparently racially problematic.<sup>250</sup> The cumulative effect is that, with respect to the Second Amendment, predominately Black groups are relegated to

244. See, e.g., *Johnston v. State*, 735 S.E.2d 859, 875–76 (N.C. App. 2012) ("The right in *Hel-ler* is 'the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense[.]' The right in the instant case is the right of a convicted felon to bear arms." (quoting *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)) (alteration in original)); *State v. Fernandez*, 808 S.E.2d 362, 368 (N.C. App. 2017) ("Like the plaintiff in *Hamilton*, Defendant in this case is a convicted felon. He therefore cannot show he is a 'law-abiding, responsible citizen' under *Hamilton*, or rebut the challenged Act's presumption of lawfulness."); *People v. Yankaway*, No. 3-15-0689, 2020 WL 1986954, at \*3 (Ill. App. Ct. Apr. 22, 2020) ("The holding [of the state supreme court] in *McFadden* seems to indicate that the possession of firearms by felons historically falls outside of the scope of the [S]econd [A]mendment's protection."); see also *People v. Campbell*, 8 N.E.3d 1229, 1241 (Ill. App. Ct. 2014) (holding "felon-based firearm bans . . . do not impose a burden on conduct falling within the scope of the Second Amendment").

245. See, for example, *State v. Beeman*, 417 P.3d 541, 544 (Or. Ct. App. 2018), where the court articulated that "contrary to defendant's assertions," felons may be prohibited from using firearms in self-defense even in the home. "Defendant fails to account for the fact that, if the legislature can determine that having felons in possession of weapons has an obvious relationship to public safety—which it can—then that safety extends to the home." *Id.*

246. See, e.g., *State v. Litaker*, No. COA19-189, 2020 WL 64798, at \*3 (N.C. Ct. App. Jan. 7, 2020) (finding that felon in possession statute "was constitutional under the Second Amendment," so felon-defendant was not within the class of "law-abiding, responsible citizens" entitled to bear arms under the Second Amendment, and therefore, he was not entitled to use a firearm in self-defense, even when confronted with deadly force).

247. See *supra* notes 227–30.

248. Cottrol & Diamond, *supra* note 103, at 319.

249. 18 U.S.C. § 921(a)(20) (defining applicable crimes under section 922(g)(1)).

250. See Ernest Poortinga, Craig Lemmen & Michael D. Jibson, *A Case Control Study: White-Collar Defendants Compared with Defendants Charged with Other Nonviolent Theft*, 34 J. AM. ACAD. PSYCH. 82, 87 (2006) ("[F]inal regression model showed that white collar defendants had a higher likelihood of white race . . .").

“permanent second-class status.”<sup>251</sup> Courts’ application of *Heller* to felon in possession statutes is a clear example of this systemic discrimination.

I want to note that while I draw attention to racial disparities in this context, and courts’ willingness to ignore them, I do not argue that felon in possession statutes should be eradicated. Gun control should exist, and it should be tailored to minimize violence, which may mean limiting gun ownership for individuals convicted of a subset of violent crimes.<sup>252</sup> But many felon in possession laws in their current form are discriminatory in practice, and though evidence is mixed, some studies suggest these laws are not effective in harm reduction.<sup>253</sup> There may be a variety of ways to mitigate the effects of discrimination with respect to these laws and other gun regulations—like by reimagining the criminal justice response by changing prosecutorial practices, or by committing resources toward background checks, social services, and community-based intervention programs, for example.<sup>254</sup> Yet the fundamental racial disparity in the construction and application of these statutes should provoke reflection, especially for proponents of the Second Amendment. If *Heller* enshrines a constitutional right for all individuals, then the disenfranchisement of Black gun holders is a problem that should matter.

#### IV.

#### WAYS FORWARD THROUGH LAW AND CULTURE

As Parts I through III have shown, Second Amendment doctrine and culture are not race-neutral because both prioritize white gun holders’ rights yet exclude Black gun owners’ rights from the same protections. In the following Part, I propose ways to reckon with this disparity.

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251. ALEXANDER, *supra* note 226, at 61.

252. It is imperative to focus on and implement measures that reduce harm, especially harm caused by gun violence in Black communities. The NAACP proposes several measures, acknowledging that gun violence “disproportionately impacts communities of color in the United States.” *Gun Violence Prevention Issue Brief*, *supra* note 118.

253. See Samuel Peterson & Shawn Bushway, *Law Enforcement Approaches for Reducing Gun Violence*, in CONTEMPORARY ISSUES IN GUN POLICY: ESSAYS FROM THE RAND GUN POLICY IN AMERICA PROJECT 77, 89 (Rajeev Ramchand & Jessica Saunders eds., 2020) (summarizing studies evaluating the effectiveness of enhanced prosecution of felon in possession and concluding the “research evidence regarding the effectiveness of this approach is mixed, with only some studies finding support . . . . Moreover, even the potential deterrent effect of this approach has been questioned by new criminological deterrence research that shows [longer sentences do not actually deter people, especially] young men”).

254. Measures like community-based intervention programs would mitigate discrimination without compromising safety. See Jeffrey A. Butts, Caterina Gouvis Roman, Lindsay Bostwick & Jeremy R. Porter, *Cure Violence: A Public Health Model to Reduce Gun Violence*, 36 ANN. REV. PUB. HEALTH 39 (2015) (arguing that a deterrent approach to gun control through aggressive law enforcement and state punishment does not necessarily result in lasting progress or reduction in harm and advocating for a community-based “public health” approach to reducing harm and gun violence). See also Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449 (2022) (cataloguing a variety of proposals to minimize gun violence and reliance on the criminal law while achieving public safety).

*A. Proposals to Reconstruct Second Amendment Doctrine*

The Supreme Court's construction of the Second Amendment in *Heller* does not properly account for the interests of Black gun holders, by appearing to place the Black gun holder at the periphery of Second Amendment protection, as discussed in Part II, with identifiable consequences that perpetuate this inequality, as discussed in Part III. The Court's racially imbalanced Second Amendment doctrine betrays its own articulated aims in *Heller* because it does not include "all Americans" in its protection.<sup>255</sup> It also fails, in cases following *Heller*, to follow through on its guarantees with respect to race, despite relying on race as a justification for more expansive individual gun rights, including in *McDonald v. Chicago*<sup>256</sup> and *New York State Rifle & Pistol Ass'n v. Bruen*.<sup>257</sup>

*Heller* held that there is an individual right to keep and bear arms.<sup>258</sup> Two years later, in *McDonald v. Chicago*, the Court expanded *Heller*'s reach, holding the Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.<sup>259</sup> Justice Alito's majority opinion in *McDonald* made race and Black civil rights central to the Court's articulated understanding of the Second Amendment, even though Justice Alito's jurisprudence has consistently and staunchly undermined minority interests.<sup>260</sup> *McDonald* found that the Fourteenth Amendment was passed in order "to provide full protection for the rights of [B]lack,"<sup>261</sup> and among those rights was "the right to keep and bear arms."<sup>262</sup> In 2022, in *New York State Rifle & Pistol Ass'n v. Bruen*, the Court again expanded upon the foundation it laid in *Heller* and *McDonald*, striking down a

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255. *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008).

256. 561 U.S. 742 (2010) (holding the Second Amendment applies to the states, thereby expanding *Heller*'s reach, and in the process, reaffirming *Heller*'s rationale).

257. 142 S. Ct. 2111, 2117 (2022) (holding New York's proper cause requirement for obtaining an unrestricted license to carry a concealed firearm violates *Heller* and *McDonald*'s individual right to keep and bear arms as protected by the Second and Fourteenth Amendments).

258. *Heller*, 554 U.S. at 593.

259. *McDonald*, 561 U.S. at 767–80.

260. *Id.* at 771–78 (discussing race and Black civil rights in evaluating how the Fourteenth Amendment relates to the Second Amendment). Justice Alito has favored expansive police authority, opposed affirmative action, and upheld the death penalty, for example. *See, e.g.*, *Birchfield v. North Dakota*, 579 U.S. 438, 438 (2016) (holding that police can conduct blood tests of unconscious drivers); *Fisher v. University of Texas at Austin*, 579 U.S. 365, 389–437 (2016) (Alito, J., dissenting) (arguing against affirmative action in higher education); *Glossip v. Gross*, 576 U.S. 863, 893 (2015) (holding the Eighth Amendment was not violated despite evidence that lethal injection method demonstrated risk of gruesome pain).

261. Justice Alito uses the word "Blacks" as a noun to refer to Black people as a group. This usage does not reflect the views of the author or the publication. Rather, it is included to highlight Justice Alito's chosen language.

262. *McDonald*, 561 U.S. at 775.



New York concealed carry regulation as violative of *Heller*'s individual right.<sup>263</sup> In doing so, the Court leveraged the racial history of gun possession laws, discussing “freedmen[']s guarantee of] . . . ‘the full and equal benefits of all laws . . . including the constitutional right to keep and bear arms,’” and Black Americans’ use of guns during Reconstruction to “‘protect themselves’ with ‘vigor and audacity.’”<sup>264</sup>

The impact of *McDonald* and *Bruen* is complicated. On the one hand, the Court appears to recognize what this Article urges—that race and Black civil rights are integral to a correct, complete understanding of the Second Amendment. *Bruen* ostensibly invalidated the New York regulation at least in part because it historically discriminated against certain racial groups, including Black gun holders, as several of the amicus briefs (some authored by Black Second Amendment activists) urged the Court to consider.<sup>265</sup> Yet we should be skeptical of the Court’s expansion of gun rights in the name of racial equality. Republican Attorneys General, House members, and conservative organizations, who otherwise have advocated for laws that disenfranchise minorities, leveraged arguments about racial discrimination to advocate for striking down the New York law.<sup>266</sup> Law professor Darrell A.H. Miller called out the “hypocrisy” of this “situational wokeness,” articulating, “These right-wing leaders have suddenly discovered the merits of concepts like white privilege, anti-Blackness and structural racism—but only when it applies to gun rights, it seems.”<sup>267</sup>

Unfortunately, despite the Court’s dicta on race in *Bruen* and *McDonald*, it appears the Court nods to racial injustice only in service of expanding the Second Amendment’s scope. Although *Bruen* and *McDonald* may still have a positive impact by invalidating racially discriminatory laws, they will also result in racial harm for which the Court does not account. First, both emphasize a doctrinal

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263. *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2117 (2022) (“New York’s proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms . . .”).

264. *Id.* at 2151 (first quoting § 14, 14 Stat. 176 (1866); then quoting S. Exec. Doc. No. 43, 39th Cong., 1st Sess., at 8).

265. *See, e.g.*, Brief of the Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners *passim*, *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843); Brief for Amicus Curiae National African American Gun Ass’n, Inc. in Support of Petitioners *passim*, *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843); Brief of Black Guns Matter, A Girl & A Gun Women’s Shooting League & Armed Equality as Amici Curiae in Support of Petitioners *passim*, *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843).

266. Darrell A.H. Miller, *Conservatives Sound Like Anti-Racists – When the Cause is Gun Rights*, WASH. POST (Oct. 27, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/10/27/gun-rights-anti-racism-bruen-conservative-hypocrisy/> [<https://perma.cc/C7XA-27QM>]; Blocher & Siegel, *supra* note 254, at 461 (“It is possible that the Justices . . . will act consistently and find the cases requiring deference to prosecutorial discretion in the criminal justice system an intolerable threat to equal protection rights. We doubt it.”).

267. Miller, *supra* note 266.

approach centered on text and history that, as discussed in Parts II and III, is likely to perpetuate racial inequality.<sup>268</sup> Second, neither incorporates race or equal protection factors into the Second Amendment doctrine, despite their reliance on the Fourteenth Amendment—meaning courts are not expressly required to evaluate race when considering gun regulations moving forward. In practice, we may find that courts only do so out of the situational wokeness Darrell A.H. Miller identifies in *Bruen*.<sup>269</sup> In addition, given *Heller*'s fundamentally imbalanced Second Amendment doctrine and the racial disparity in gun rights in practice, *McDonald* and *Bruen*'s invalidation of gun laws, without doctrinal guideposts to address racial inequality, seem unlikely to bring about any real change with respect to racial injustice. Finally, the unilateral expansion of gun rights fails to account for the larger context of how guns and race intersect through the competing harms of discrimination through disenfranchisement and the disproportionate effects of gun violence in Black communities.<sup>270</sup> As Second Amendment scholars Joseph Blocher and Reva B. Siegel agree, "*Bruen* might provide interim relief from New York's licensing regime, but it will not address racial bias in the criminal justice system, and . . . it will secure whatever relief it does at high cost by restricting the democratic authority of communities to seek freedom from gun violence through law."<sup>271</sup> In sum, the Court's doctrine falls short.

Advocates should encourage the Court to better account for race discrimination in Second Amendment doctrine in a few ways. Namely, the Court should formally implement some form of equal protection analysis, as the "central purpose" of the Equal Protection Clause is to address "official conduct discriminating on the basis of race."<sup>272</sup> The current equal protection framework, after the Court's decision in *Washington v. Davis*, requires a showing of intentional discrimination to state an equal protection claim.<sup>273</sup> However, because discriminatory laws are often facially neutral, proving intent directly or indirectly is a heavy burden, so the Court's current doctrine may not be particularly helpful.<sup>274</sup> Instead, courts

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268. See *supra* Parts II–III; see generally *McDonald v. Chicago*, 561 U.S. 742 (2010); *Bruen*, 142 S. Ct. 2111 (2022).

269. Miller, *supra* note 266.

270. See *supra* notes 117–18.

271. Blocher & Siegel, *supra* note 254, at 451.

272. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

273. *Id.* at 242 (holding a plaintiff must prove "invidious racial discrimination," and that disparate impact alone could not carry an equal protection claim).

274. See Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection*, 98 GEO. L.J. 967, 998 (2010) ("Yet advocates for racial equality find themselves in a bind when trying to establish intent because when the Supreme Court gutted disparate impact theory—at least for purposes of constitutional analysis—the Court simultaneously increased the showing required to recover in cases alleging intentional discrimination."); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 767 (2011) ("[S]tate action that perpetuates the subordination of historically disadvantaged groups will tend to express itself in facially neutral terms."); see also Shreefter, *supra* note 230, at 161–62 (discussing a case in which the Eastern District of Virginia refused to invalidate a gun regulation on equal protection grounds because it determined discriminatory intent could not be shown).

could evaluate race discrimination in gun regulations using a slightly modified version of the *Arlington Heights* factors.<sup>275</sup> In *Arlington Heights*, the Court evaluated equal protection by considering categories of circumstantial evidence that could demonstrate intentional discrimination, including the extent of disparate racial impact, the “historical background of the decision,” and the legislative or administrative history, to determine whether “discriminatory purpose was a motivating factor” behind a given law.<sup>276</sup> The Court could apply these factors to assess circumstantial evidence in the context of gun regulations but without requiring that this evidence amount to proving intent. If courts applied these factors to gun regulations, it would enable more ready acknowledgement of race discrimination in gun laws, by prompting consideration of the historical context of a regulation and the disparate impact of its effect in practice. Other scholars propose different equal protection formulations that might also better account for race discrimination. Professor Girardeau Spann proposes that we return to recognizing racially disparate impact alone as a “cognizable form of racial discrimination”<sup>277</sup> because it would allow courts to recognize racial harm that exists because of unequal treatment,<sup>278</sup> and “offer the most realistic hope of ever successfully invoking the legal system to help us overcome our cultural compulsion to discriminate against racial minorities.”<sup>279</sup> Professor Robin A. Lenhardt suggests an equal protection framework that takes into account the racial stigma of a given law as the “main source of racial harm.”<sup>280</sup> That “stigmatic harm occurs when a given act or policy sends the message that racial difference renders a person or a group inferior to Whites, the category constructed as the racial norm,”<sup>281</sup> standing “as a barrier to full acceptance into the wider community.”<sup>282</sup> Certainly that stigma exists for Black Americans in the Second Amendment context, where gun regulations link disarmament with factors connected to race and exclude Black Americans from the full scope of protection. As previously noted, in *Bruen*, although the Court discussed racially disparate impact, it did not invalidate the New York law on equal

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275. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

276. *Id.*

277. Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1150 (2010).

278. Professor Spann argues that recognizing disparate impact as a cognizable form of discrimination would help to correct for racial inequalities by “permit[ting] us to allocate societal resources in a nondiscriminatory manner.” *Id.*

279. Professor Spann argues that disparate impact would act like “a precommitment strategy that will force [our society’s] behavior to approximate the behavior of a culture that has somehow managed to transcend its discriminatory racial attitudes.” *Id.*

280. Robin A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 803 (2004). Professor Lenhardt proposes a four-part test to address this harm. Courts should: 1) “examine the specific historical origins of the constitutional provision,” 2) “consider the socio-historical context of the challenged act or policy,” 3) “evaluate the current context . . . including consideration of a possible disparate impact on members of racial minorities,” then 4) “consider the probable future effects of the act or policy in terms of its likely citizenship effects on members of racial minorities.” *Id.* at 803–04.

281. *Id.* at 803.

282. *Id.* at 809.

protection grounds, and the opinion provided no formal framework for courts to evaluate race and gun regulations.<sup>283</sup> The incorporation of these doctrinal factors into Second Amendment analysis would provide courts with better guideposts moving forward.

Yet in practice, it seems unlikely the Court will change its jurisprudence to a Second Amendment doctrine that does not discriminate. As this Article has discussed, not only does the Court's jurisprudence fail to adequately protect Black Americans' affirmative right to use guns, but it has also prevented Black Americans from voting to curtail the use of guns. In both *Heller* and *McDonald*, the Court overruled gun legislation passed in cities with majority Black populations, where gun violence has disproportionately harmed minority communities.<sup>284</sup> Nonetheless, despite the Court's interference, the best remaining option for Black gun owners to challenge racial bias in the law is the political process.<sup>285</sup> As Professor Lenhardt proposes, "[l]egislators and policymakers, unfettered by the prudential constraints placed on judges, are arguably in the best position to develop broad, creative solutions that . . . [address] the stigmatizing effects" of laws and policies.<sup>286</sup> Of course, the American political process has been, and continues to be, imbued with racism—from campaigns to policies that range from dog-whistle tactics to the systemic exclusion of Black Americans from fundamental programs.<sup>287</sup> Nonetheless, where the choice is between the political process—where "minority interests will receive whatever degree of deference their innate strength can command" through voting<sup>288</sup>—and relying on the Supreme Court—which,

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283. *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2149–54 (2022).

284. In *Heller*, the Court overturned D.C. gun laws that were passed by a legislature that was elected by a majority Black population, in a year when Black residents were dramatically overrepresented in homicide deaths. See U.S. CENSUS BUREAU, POPULATION BY AGE, SEX, AND RACE (2000), <https://www2.census.gov/library/publications/2001/compendia/ccdb00/tabC2.pdf> [<https://perma.cc/6GGN-NPVF>]; METRO. POLICE DEP'T D.C., MURDER ANALYSIS: A STUDY OF HOMICIDES IN THE DISTRICT OF COLUMBIA (2001), [https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/homicidereport\\_0.pdf](https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/homicidereport_0.pdf) [<https://perma.cc/F793-87MB>] (D.C. Police Department official data about crime and proportion of deaths); see also Brief for NAACP Legal Defense & Education Fund as Amici Curiae Supporting Petitioners, *District of Columbia v. Heller* at 1, 554 U.S. 570 (2008) (No. 07-290) ("The effects of gun violence on African-American citizens are particularly acute."). Likewise, in *McDonald*, the Court overturned Chicago gun laws that were passed in 2009, when about one in every three Chicago residents was Black, when 83.4% of murders in the city were from shootings, and 75.3% of murder victims were Black. See CHI. POLICE DEP'T, 2011 CHICAGO MURDER ANALYSIS REPORT (2011), <https://home.chicagopolice.org/wp-content/uploads/2014/12/2011-Murder-Report.pdf> [<https://perma.cc/77MK-ZXUB>].

285. See Blocher & Siegel, *supra* note 254, at 449 (arguing that "racial justice concerns" regarding gun rights "should be addressed in democratic politics rather than in the federal courts").

286. Lenhardt, *supra* note 280, at 878.

287. See generally IAN HANEY LOPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE-CLASS (2016) (discussing racism in American politics, including Republican campaign rhetoric that appeals to racist ideologies and the more fundamental, systemic exclusion of Black Americans from New Deal and Great Society policies).

288. Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1992 (1990).

“consistent with its veiled majoritarian design,”<sup>289</sup> has “always been complicit in the practice of sacrificing racial minority interests for the benefit of the white majority”<sup>290</sup>—the better choice is likely the political process. Voting allows “minorities to assume ultimate responsibility for their own interests.”<sup>291</sup> Advocates can, and should, “maximize their influence in that process” by “voting, running for office, or making campaign contributions,” and also by participating in “demonstrations, boycotts,”<sup>292</sup> and social activism online.<sup>293</sup> The last few years have made clear that Black activism does shape politics, and that activism forces elected officials to listen to Black communities, as demonstrated through campaigns from organizations like Color of Change, community organizing like Stacey Abrams’ efforts to combat voter suppression, and Black activists’ policy proposals that have influenced Democratic candidates’ platforms.<sup>294</sup>

Finally, it is important to address that reimagining *Heller* and courts’ treatment of gun regulations in the way I propose would likely make it harder to implement gun regulations, a consequence that some, including Black civil rights activists, would argue is inherently harmful.<sup>295</sup> But mitigating the racially disparate impact of gun laws does not require striking down every gun regulation; for example, felon in possession laws would be less racially discriminatory if limited to only violent crimes, and markers for disarmament could be unlinked from categories that disproportionately affect minorities, among many other

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289. *Id.* at 1991.

290. Spann, *supra* note 277, at 1134. Decisions “such as, *Dred Scott*, *Plessy*, and *Korematsu*” have evidenced “relatively transparent” racial biases, while the Court’s modern equal protection and affirmative action doctrines perpetuate racial discrimination more tacitly. *Id.* at 1134–36.

291. Spann, *supra* note 288, at 1993.

292. *Id.* at 1992.

293. Brooke Auxier, *Social Media Continue to Be Important Political Outlets for Black Americans*, PEW RES. CTR. (Dec. 11, 2020), <https://www.pewresearch.org/fact-tank/2020/12/11/social-media-continue-to-be-important-political-outlets-for-black-americans/> [<https://perma.cc/A9JD-4ZJL>] (discussing social media platforms as “venues for political engagement and social activism for many years, especially for Black Americans”).

294. See COLOR OF CHANGE, <https://colorofchange.org/> [<https://perma.cc/9TNE-BGT6>] (last visited Dec. 28, 2022); Candice Norwood, “*This is How You Change Politics*”: *How Black Activism is Shaping 2020*, PBS (Mar. 10, 2020), <https://www.pbs.org/newshour/politics/this-is-how-you-change-politics-how-black-activism-is-shaping-2020> [<https://perma.cc/K8ZA-Q3R4>] (describing “a new wave of [B]lack activism” and Movement for Black Lives’ effect on institutional Democratic politics); Karen Cook Bell, *Stacey Abrams’s Fight Against Voter Suppression Dates Back to the Revolution*, WASH. POST (Apr. 13, 2021), <https://www.washingtonpost.com/outlook/2021/04/13/stacey-abrams-has-taken-up-fight-against-voter-suppression-that-dates-back-revolution/> [<https://perma.cc/Z8MA-DA9E>] (discussing Stacey Abrams’ efforts and Black women’s activism).

295. See, e.g., *Gun Violence Prevention Brief*, *supra* note 118 (“All-too easy access to guns and ammunition as well as the resulting gun violence are a major and deadly problem in the United States. . . . Given the disproportionate damage gun violence is having on our communities, the NAACP has advocated for a number of sane, sensible laws which will help eliminate or decrease the damage and death caused by gun violence.”).

possibilities.<sup>296</sup> It is imperative to acknowledge and redress discrimination in application of the Second Amendment, and it is also “critical for those designing public safety strategies to reduce reliance on the criminal law and to involve other parts of government in implementing policies that prevent violence, with the goal of making criminal law the strategy of last rather than first resort.”<sup>297</sup> In sum, it is possible to both acknowledge the harm that results from gun violence and think the current construction of the Second Amendment is a problem, and—with both in mind—work to conceive of a new legal framework.<sup>298</sup>

In addition, because this Article is situated within the current legal framework, where the Court has already decided there is an individual right to bear arms in *Heller*, the issue also is about holding the Court accountable to what it says the Constitution means.<sup>299</sup> Justice Scalia told us that the Second Amendment “belongs to all Americans.”<sup>300</sup> Justice Alito told us Black Americans’ right to bear arms is a “fundamental right deserving of protection.”<sup>301</sup> Justice Thomas said that “to keep and bear arms” is an essential citizenship right for Black Americans.<sup>302</sup> The Court’s doctrine should follow through on those promises. Proponents of the Second Amendment and of faithfulness to the Constitution should care that the law withholds an articulated constitutional right from so many Americans. Advocates of equality must recognize that if we are to continue to rely on a system in which what the Court says matters, it is important to advocate for equality in this system.

### *B. Rethinking the Second Amendment Polity*

As we reconsider the law, we must also reconsider the Second Amendment’s political and social culture. Namely, we must recognize that the Black tradition of arms is the kind of “longstanding” tradition that should guide our understanding of the Second Amendment<sup>303</sup>—from Ida B. Wells and Frederick Douglass, to the Deacons for Justice, and to modern-day activists like Maj Toure.<sup>304</sup> Philip Smith, the founder of the National African American Gun Association (“NAAGA”), says,

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296. See *supra* notes 253–54 for discussion of ways to adjust construction and prosecution of felon in possession laws to limit their disproportionate racial impact.

297. Blocher & Siegel, *supra* note 254, at 457.

298. Moreover, there are organizations like Giffords, who “organize responsible gun owners who understand that the Second Amendment is fully consistent with a wide range of gun safety laws.” Sarah Duval, *The Past and Present of Black Gun Ownership in America*, GIFFORDS (Feb. 23, 2021), <https://giffords.org/blog/2021/02/the-past-and-present-of-black-gun-ownership-in-the-us/> [<https://perma.cc/7JJV-F38S>].

299. *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008).

300. *Id.* at 580.

301. *McDonald v. Chicago*, 561 U.S. 742, 775 (2010).

302. *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2151 (2022).

303. See, e.g., *Heller*, 554 U.S. at 626.

304. See *supra* Part I for discussion of Maj Toure and Part II for discussion of preceding history.

“We’re the ultimate American citizen because we were fighting for this country when we weren’t even considered a human—we were slaves, we were three-fifths of a person [and] we still fought and died for this country . . . . We deserve to be who we are in terms of having the right to carry firearms.”<sup>305</sup> Black gun owners have long fought against the oppressive state with guns in the way Justice Scalia exalts in *Heller*<sup>306</sup>—like Nat Turner, leading an armed revolt, or Kenneth Walker, a legal gun owner, defending himself against armed police who wrongfully invaded his home.<sup>307</sup>

Finally, Black armed activism is also about community and the kind of collective activism that is central to American democracy.<sup>308</sup> Black activists have highlighted the power of this collective action. NAAGA founder Philip Smith says, “We are strong people, but that strength is always trying to be diminished, or controlled, or pushed down, and in some cases literally extinguished through killing us . . . . But if you’re able to come together—and that’s the reason why we have NAAGA—you can make a lot of gains.”<sup>309</sup> Black gun rights advocate Kenn Blanchard says he began teaching firearm lessons because “I had to show my people first that you have the right to do this . . . .”<sup>310</sup> Anubis Heru, Black owner of a firearms store and gun club, agrees, “The value of these groups is learning with people who know your struggle and understand what’s happening and has been happening with this country.”<sup>311</sup> For all of these reasons and on behalf of all of these people, despite American culture’s proclivity to accept the stigmatization and exclusion of Black people, history and equality demand we recognize Black gun owners’ rightful claim to the political and cultural community of the Second Amendment.<sup>312</sup>

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305. Chavis, *supra* note 79.

306. *See Heller*, 554 U.S. at 598.

307. *See* Thomas Wentworth Higginson, *supra* note 79; Annie Reneau, *Where Are the Gun Rights Activists Defending Breonna Taylor’s Boyfriend, Kenneth Walker?*, UPWORTHY (May 16, 2020), <https://www.upworthy.com/gun-rights-activists-silent-in-breonna-taylor-case> [<https://perma.cc/9HCG-N3WR>] (discussing Kenneth Walker’s case, silence of NRA in his defense, and how he was within his lawful rights); *see also supra* Part II for further history.

308. *See* AARON SCHUTZ & MARIE G. SANDY, *COLLECTIVE ACTION FOR SOCIAL CHANGE* 47 (2011).

309. Chavis, *supra* note 79.

310. Jason Johnson, *Black Gun Ownership Is Growing. Can It Make Black People Safer?*, SLATE (July 31, 2021), <https://slate.com/news-and-politics/2021/07/black-gun-ownership-rates-second-amendment.html> [<https://perma.cc/27EC-KNWQ>].

311. *In a City Torn by Violence, Black Philadelphians Are Buying Guns to Respond to Crime, Racism*, PENN CAP. STAR (Sept. 22, 2021), <https://www.penncapital-star.com/civil-rights-social-justice/in-a-city-torn-by-violence-black-philadelphians-are-buying-guns-to-respond-to-crime-racism/> [<https://perma.cc/C38V-F768>].

312. *See* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 14 (1976) (“Unconscious racially selective indifference may also be a causal factor in the adoption or retention of practices” that disproportionately impact minorities “toward whom the majority is indifferent because of their race or status”).

## CONCLUSION

The Second Amendment doctrine as it exists now does not work. The foundation for the Second Amendment in *Heller* promotes racial inequality by elevating white gun owners while legitimizing the exclusion of Black gun owners. In practice, Black Americans have fewer gun rights than white Americans do. *Heller* contributes to this picture by allowing lower courts to readily dismiss Second Amendment claims by Black Americans, and by leaving many Black gun holders with limited recourse because the doctrine “presumptively” excludes them.

The law should account for this discrimination. One answer lies in changing the role the Supreme Court plays in the Second Amendment—either by changing its doctrine or by limiting the power the Court holds to define the scope of the Second Amendment. At the very least, advocates should argue for, and the Court should adopt, a formal framework to address the racial discrimination and stigmatization in the current application of the Second Amendment. But if the Court cannot reconceive of the Second Amendment, gun regulation is better left to legislatures. If the Second Amendment framework is to be consistent with its own design and is to accommodate—even prioritize—the interests of minority rights holders, then the political process is almost certainly the better channel, as it allows minorities to represent their own interests through voting, holding office, and democratically deciding to pass legislation.

In addition, as we account for this disparity in the law, we must also reconsider how we think of Black gun owners in our culture. Black gun ownership and activism have long been important dimensions of civil rights activism and of the Second Amendment. If the Second Amendment is to mean what Justice Scalia says it does, it must mean that Black Guns Matter.