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THE NONRACIST AND ANTIRACIST HISTORY OF FIREARMS PUBLIC CARRY REGULATION

Mark Anthony Frassetto*

I. INTRODUCTION

This term, the Supreme Court will consider *New York State Rifle & Pistol Ass'n v. Bruen*, a Second Amendment challenge to New York State's concealed carry weapon licensing system.¹ *Bruen* is the first major Second Amendment case that the Court will decide on the merits in more than a decade.² Briefing by the plaintiffs and gun rights scholars has in large part focused on arguments that laws regulating the carrying of guns in public, as well as gun regulation more generally, were historically intended to discriminate against minority groups.³ This argument is consistent with a broader effort in the conservative legal movement to tie conservative goals—using public funds to support parochial schools, prohibiting abortion, and banning affirmative action—to racial justice or minority rights.⁴ The argument essentially goes: present day gun laws are

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1. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (U.S. Apr. 26, 2021), <https://www.supremecourt.gov/docket/docketfiles/html/public/20-843.html> [<https://perma.cc/5DQT-ZLUY>].

2. The last major Second Amendment case decided on the merits is *McDonald v. City of Chicago*, 561 U.S. 742 (2010); in 2020, the Court heard a challenge to New York City's rules about transporting handguns, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020), but it dismissed the case as moot after changes in both municipal and state law.

3. See, e.g., Brief for Petitioners at 2, 10–13, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (U.S. July 13, 2021), 2021 WL 3017303; Brief for Amicus Curiae National African American Gun Ass'n, Inc. in Support of Petitioners at 2–11, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (U.S. July 16, 2021), 2021 WL 3072862 [hereinafter Amicus Brief for NAAGA].

4. See *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020) (using anti-Catholic history of Blaine Amendment to strike down Montana prohibition on funding religious schools); see also Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2027–28, 2030–31, 2062–67 (2021) (discussing

unconstitutional because gun laws of the past were intended to discriminate.

But the plaintiffs and gun rights scholars cherry-pick this history of expressly racist laws primarily from the antebellum and early Reconstruction South.⁵ These states enacted broad restrictions on the rights of both enslaved persons and free people of color, including restrictions on the possession and carrying of firearms.⁶ In contrast, there is a long history of gun regulation across the country, including carry regulations, which has been applied to the general population without an intent to discriminate against minority groups. This tradition of gun regulation is the forebearer of modern gun laws, not historical laws targeted at minority groups. When assessing the historical scope of the Second Amendment, courts should look to this nonracist history, not cynical arguments about racist Southern laws.

A word of caution before beginning: like many areas of the law, the relationship between race and firearms regulation across American history is an extremely complicated and context-specific issue. Several books have been written about it, and more scholarship needs to be done.⁷ This article does not purport to address the issue in its entirety. This piece also does not deny that some regulations were expressly racist or that discriminatory law enforcement has occurred. This piece does take issue with the gun lobby's narrative that modern gun regulation, especially public carry regulation, is the product of, and primarily motivated by, racist traditions of the slave South. That view of history is clearly wrong.

This article will first lay out the overwhelming tradition of nonracist⁸ gun laws, which are the predecessors to modern gun regulation. The article will then discuss how the originalist analysis should address explicitly racist historical laws and why courts should look to the nonracist history of gun regulation when assessing the scope of the Second Amendment right.

efforts to tie abortion to eugenics); David Nakamura, *Republicans Leverage Attention on Anti-Asian Hate Incidents in Bid to Overturn Affirmative Action*, WASH. POST (Apr. 6, 2021, 7:57 PM), https://www.washingtonpost.com/national-security/asian-americans-affirmative-action/2021/04/06/355454a8-96fa-11eb-a6d0-13d207aad78_story.html [<https://perma.cc/YPA7-ZGQX>].

5. Brief for Petitioners, *supra* note 3, at 9–13; Amicus Brief for NAAGA, *supra* note 3, at 4–10.

6. *Race and Slavery Based, Repository of Historical Gun Laws*, DUKE CTR. FOR FIREARMS L., <https://firearmslaw.duke.edu/subjects/race-and-slavery-based/> [<https://perma.cc/Y3LQ-S2BN>]; see also Patrick J. Charles, *Racist History and the Second Amendment: A Critical Commentary*, 43 CARDOZO L. REV. (forthcoming Mar. 2022) (manuscript at 10), <https://ssrn.com/abstract=3897310> [<https://perma.cc/7X5Y-L75T>].

7. See, e.g., JENNIFER CARLSON, *POLICING THE SECOND AMENDMENT: GUNS, LAW ENFORCEMENT, AND THE POLITICS OF RACE* (2020); STEPHEN P. HALBROOK, *THE RIGHT TO BEAR ARMS: A CONSTITUTIONAL RIGHT OF THE PEOPLE OR A PRIVILEGE OF THE RULING CLASS?* (2021); CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* (2021); PATRICK J. CHARLES, *ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY* (2018); NOAH SHUSTERMAN, *ARMED CITIZENS: THE ROAD FROM ANCIENT ROME TO THE SECOND AMENDMENT* (2020).

8. By “nonracist” the author means both (1) not explicitly targeting minority groups in the statute’s text and (2) not intended to be applied solely or primarily to a minority group. In most cases a broader definition of nonracist—not perpetuating racial inequality—would also clearly apply, at least to the initial enactment and enforcement.

II. THE NONRACIST TRADITION OF PUBLIC CARRY REGULATION

There is extensive historical evidence of laws regulating the carrying of weapons in public that were (1) racially neutral without evidence of racist intent; (2) applied only to the white population; or (3) enacted to apply neutrally but intended to protect the black population from racist attacks by whites. This history is more than sufficient to show that gun regulation in the United States has not been uniformly or even predominantly motivated by racism.

The foundational weapon carry law passed by the English Parliament in 1328, the Statute of Northampton, applied to everyone, stating “no Man great nor small, of what Condition soever he be” should go armed.⁹ This broad restriction applied to all but “the King’s Servants in his presence, and his Ministers in executing of the King’s Precepts.”¹⁰ While there would have been little opportunity for racist enforcement in premodern England, the limited surviving enforcement records show the law being applied equitably across classes, with two cases where upper class members were prosecuted and two where the defendant was likely a commoner.¹¹ This stood in contrast to later English weapon regulations, which did not make their way to the colonies, that applied unequally based on class.¹² It also stood in contrast to the English Bill of Rights’ provision protecting the right to have arms, which was limited based on both religion and class.¹³ In the colonies, broad restrictions on carrying weapons similar to the Statute of Northampton were adopted,¹⁴ which applied to everyone and did not require a threat to “any person in particular” or “any particular act

9. Statute of Northampton, 2 Edw. 3 c. 3 (1328); *see also* Statutes for the City of London, 13 Edw. 1 (1285) (“[N]one be so hardy to be found going or wandering about the Streets of the City, after Curfew tolled at St. Martins le Grand, with Sword or Buckler . . .”).

10. Statute of Northampton, 2 Edw. 3 c. 3 (1328). Those who went armed could also be compelled to find sureties to keep the peace. Peace (1662) 83 Eng. Rep. 900; 1 Keble 203 (“[T]o go armed is good cause to bind him to good behaviour.”).

11. For an upper class case, see EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES* 162 (London, Miles Flesher 1648) (discussing arrest of Sir Thomas Figgett who “went armed under his garments, as well in the Palace, as before the Justices of the Kings Bench.”). *See also* *Rex v. Sir John Knight* (1686) 90 Eng. Rep. 330; Comberbach 39. For a not discernably upper class case, see *Rex v. Harwood*, Quarter Sessions at Malton (Oct. 4–5, 1608), in 1 North Riding Record Society, Quarter Sessions Records 132 (Rev. J.C. Atkinson ed., 1883) (discussing man arrested for committing “outrageous misdemeanours” by going “armed” with “pistolls[] and other offensive weapons”). *See also* Middlesex Sessions: Justices’ Working Documents (1751), <https://www.londonlives.org/browse.jsp?div=LMSMPS50410PS504100085> [<https://perma.cc/9EEU-DSMA>] (noting prison time and a fine for “going Armed with a Cutlass Contrary to the Statute.”).

12. 22 & 23 Car. 2 c. 25, § 2 (1671) (prohibiting firearms possession for those with an annual income of less than 100 pounds).

13. An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1 W. & M. 2 c. 2 (1689) (“That the Subjects, which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law.”).

14. An Act Against Wearing Swords, etc., ch. 9, 1686 N.J. Laws 289, 290 (applying to “planters” who made up the vast majority of the population); An Act for the Punishing of Criminal Offenders, No. 6, 1694 Mass. Laws 12, <https://firearmslaw.duke.edu/lawslaw/1694-mass-laws-12-no-6-an-act-for-the-punishing-of-criminal-offenders/> [<https://perma.cc/BE2B-JEW7>] (allowing arrest of all “such as shall ride or go armed”).

of violence.”¹⁵

The English tradition of generally prohibiting carrying weapons in public was modified by Massachusetts in 1836 to include an express exception for those carrying arms because of a specific need for self-defense.¹⁶ Massachusetts’s law was clearly not intended to target any minority group. The law was enacted as part of a wholesale revision of Massachusetts legal code drafted by a committee that was chaired by Horace Mann, famed education reformer and antislavery advocate.¹⁷ Among the code’s other provisions was a repeal of Massachusetts’s rarely used law prohibiting black immigration.¹⁸ Over the next few years, the Massachusetts model spread to Wisconsin, Michigan, Pennsylvania, and Minnesota.¹⁹ It also notably spread to Oregon and Virginia.²⁰ In both states, the law would have only applied to the white population. Virginia had separate laws regulating firearms possession by enslaved persons and free blacks.²¹ Oregon’s law would have applied only to white residents because the state prohibited nonwhite immigration.²² The law also spread to Ohio, where abolitionist Republican Governor Salmon Chase signed a law that prohibited carrying concealed weapons except when the circumstances would “justify a prudent man in carrying [a] weapon.”²³ Enforcement records indicate these laws were enforced as general prohibitions on going armed, regardless of race.²⁴

In a recent book chapter, George Mason law professor Robert Leider implies Massachusetts’s law was enforced in a discriminatory manner, pointing to an example of the law being enforced against black residents of the state.²⁵

15. Michael Treves, Note, *A Call for Sensible Gun Reform Outside of the Home*, N.Y.U. PROC. n.53 (April 15, 2019) (first quoting JAMES EWING, A TREATISE ON THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE 546 (n.p. 1805); and then citing JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 550 (Boston, Little, Brown, & Co. 3d ed. 1865) (noting no requirement that “peace must actually be broken[] to lay the foundation for a criminal proceeding.”)). <https://proceedings.nyumootcourt.org/2019/04/a-call-for-sensible-gun-reform-outside-of-the-home/> [<https://perma.cc/L5FY-AXV8>].

16. Acts of Feb. 1836, ch. 134, § 16, 1836 Mass. Laws 748, 750.

17. See *id.* at vi–vii; see also Lawrence A. Cremin, *Horace Mann: American Educator*, BRITANNICA, <https://www.britannica.com/biography/Horace-Mann> [<https://perma.cc/CH33-33TE>] (noting that Horace Mann was an education advocate and “fierce enemy of slavery”)

18. KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA’S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 58 (2021).

19. An Act to Prevent the Commission of Crimes, § 16, 1839 Wis. Sess. Laws 379, 381; Act of May 18, 1846, ch. 162, § 16, 1846 Mich. Pub. Acts 690, 692; Act of Sept. 1851, ch. 112, § 18, 1851 Minn. Rev. Stat. 526, 528; Act of Mar. 31, 1860, § 6, 1860 Pa. Laws 248, 250.

20. Act of Dec. 5, 1853, ch. 16, § 17, 1853 Or. Laws 218, 220; Act of Mar. 14, 1848, ch. 14, § 16, 1848 Va. Acts 127, 129.

21. An Act Concerning Free Negroes and Mulattoes, ch. 94, 1805 Va. Acts 51.

22. Greg Nokes, *Black Exclusion Laws in Oregon*, OR. ENCYCLOPEDIA, https://www.oregonencyclopedia.org/articles/exclusion_laws/ [<https://perma.cc/A7H8-7XW5>] (July 6, 2020).

23. An Act to Prohibit the Carrying or Wearing of Concealed Weapons, § 2, 1859 Ohio Laws 56, 57.

24. *City Intelligence*, BOS. COURIER, Mar. 7, 1853, at 4 (carrying a concealed pistol); *Boston and Vicinity*, BOS. J., Oct. 10, 1867, at 2 (concealed pistol); *City Items*, RICHMOND DAILY WHIG, Sept. 25, 1860, at 3 (sureties payment for carrying concealed weapons); *City and Suburban*, RICHMOND WHIG, Sept. 18, 1866 (peace bond for carrying concealed weapon).

25. Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, IN NEW HISTORIES OF GUN RIGHTS AND REGULATIONS: ESSAYS ON THE PLACE OF GUNS IN

However, the most famous cases of enforcement of the law actually came in efforts to prevent the return of black residents to slavery.²⁶ In the 1850s, on at least two occasions, local officials arrested and prosecuted U.S. Marshals—who were pursuing escaped slaves—for carrying weapons, although they were eventually cleared because of their position.²⁷ These are examples of gun regulations being used to protect Black Americans.

Northerners and especially abolitionists often criticized Southerners for the frequency with which they carried arms, and tied carrying weapons to the need to oppress enslaved persons.²⁸ In an 1846 speech, abolitionist and future Senator Charles Sumner, whom the Supreme Court quoted at length in *District of Columbia v. Heller*,²⁹ compared the South, where “mortal affrays [were] so frequent” because “it [was] supposed essential to personal safety to go armed with pistols and bowie-knives,” with the North and East where few murders occurred because people were “unprovided with such facilities for taking life.”³⁰ The Ohio *Anti-Slavery Bugle* discussed “the style of civilization that slavery creates” where “the people go armed” and “a murder in a private fight makes less sensation than the escape of a negro.”³¹ A speech published in the *Boston Liberator* attributed the need for slaveholders to “go armed with a dirk and pistol” to the guilt of slavery.³²

Ironically, the antebellum South is another area where we can be confident certain gun laws were not enacted with racist intent.³³ These states were not subtle about their racist laws and enacted explicit prohibitions known as “Slave Codes” or “Black Codes” on enslaved persons and free blacks engaging in a variety of activities, including possessing firearms.³⁴ In addition to the racist

AMERICAN LAW AND SOCIETY 1, 15 (Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller eds., forthcoming) <https://ssrn.com/abstract=3697761> [<https://perma.cc/2CT6-SPN2>].

26. See Brief of Amicus Curiae Mountain States Legal Foundation’s Center to Keep and Bear Arms in Support of Petitioners at 26–29, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, No. 20-843 (U.S. July 16, 2021), 2021 WL 3072866.

27. *Mr. Hughes’ Statement*, RICHMOND WHIG AND PUB. ADVERTISER, Nov. 29, 1850, at 1; *Disturbance in Worcester*, SALEM REG., Nov. 2, 1854, at 2.

28. *Claims of Millions South*, BOS. RECORDER, Oct. 17, 1844 (describing southern society as a military camp: “I, my sons, my drivers, go armed; my bed chambers are military arsenals, my pistols lie beneath my pillow . . .”); *From Washington*, N.Y. DAILY TRIB., June 6, 1856, at 6 (“Now we take it that no such doctrine as this could be born into being anywhere out of a region where it was thought perfectly proper for every legislator to go armed and to take the defense of his own person, and the avenging of his own wrongs, into his own hands.”); *Letter to the Editor*, WKLY. DEMOCRATIC STATESMAN (Austin, Tex.), Dec. 31, 1874, at 3 (“[I]t might not mean anything for a man in Massachusetts, when he had an altercation, to put his hands under his coat tail, but that in South Carolina it might mean a good deal.”).

29. 554 U.S. 570, 609 (2008).

30. CHARLES SUMNER, EXTRACTS FROM “THE TRUE GRANDEUR OF NATIONS;” AN ORATION 25 (Liverpool, D. Marples, Lord Street 1846).

31. *Copious Illustrations*, ANTI-SLAVERY BUGLE (New Lisbon, Ohio), July 7, 1860, at 2.

32. *Speech of Rev. Perry*, LIBERATOR (Bos., Mass.), Jan. 18, 1834, at 11.

33. See Robert J. Cottrol & Raymond T. Diamond, “Never Intended to Be Applied to the White Population”: *Firearms Regulation and Racial Disparity—The Redeemed South’s Legacy to a National Jurisprudence?*, 70 CHL.-KENT L. REV. 1307, 1320–21 (1995) (discussing the distinction between southern laws targeting enslaved persons and free blacks and laws applying to the white population).

34. See *Race and Slavery Based, Repository of Historical Gun Laws*, *supra* note 6.

laws, these states also enacted racially neutral, complete prohibitions on carrying concealed weapons.³⁵ This was close to a complete prohibition on carrying arms in public because carrying guns concealed was the norm as opposed to “the extremely unusual case of the carrying of such weapon in full open view.”³⁶ These laws were both frequently broken by and consistently enforced against the white population.³⁷

After the Civil War, many southern states adopted Black Codes limiting the liberties of Freedmen, which were intended to restore slavery in all but name.³⁸ Among the restrictions were prohibitions on Freedmen possessing or carrying firearms, or serving in the militia.³⁹ Radical Republicans and Freedmen railed against these discriminatory restrictions.⁴⁰ When Congress imposed military governments on southern states during Reconstruction, those governments were quick to do away with these racist laws.⁴¹

Notably, while the Radical Republicans repealed facially discriminatory gun laws, they did not oppose gun regulation generally. For example, while gun rights activists frequently cite Reconstruction General Dan Sickles’s General Order No. 1, which removed prohibitions on gun possession by Freedmen in North and South Carolina, they fail to mention Sickles’s subsequent General Order No. 10, which completely prohibited carrying firearms in the states.⁴²

35. See, e.g., An Act Against Carrying Concealed Weapons, and Going Armed in Public Places in an Unnecessary Manner, § 1, 1813 La. Acts 172, 172–73; An Act to Prevent Persons in This Commonwealth from Wearing Concealed Arms, Except in Certain Cases, ch. 89, § 1, 1813 Ky. Acts 100, 100–01; Act of Mar. 10, 1838, ch. 44, § 13, 1838 Ark. Acts 278, 280; An Act to Prevent Any Person in This Territory from Carrying Arms Secretly, ch. 860, No. 38, 1835 Fla. Laws 423; Act of Dec. 19, 1861, § 4413, 1861 Ga. Laws 856, 859.

36. State v. Smith, 11 La. Ann. 633, 634 (1856); R.S. Morrison, *Carrying Concealed Weapons*, in THE COLORADO LAW REPORTER 277, 278 (Denver, Pierson & Gardner 1884) (“[I]t is a practical disarmament where a man is not allowed to carry such weapon in the only way which common sense allows it to be carried. No one but a fool will parade the streets with a revolver outside the person”); *Presentment of the Grand Jury*, WKLY. UNION TIMES (Union, S.C.), June 25, 1880, at 2 (“It is apparent to every good citizen and man of sense, that any gentleman would blush and feel deply [sic] ashamed to be caught parading the streets on a public occasion, or, for the matter of that, on a private occasion, with a revolver swinging around his neck like a powder horn, or sticking vulgarly and threateningly out of his hip pocket, making him a picture of a pirate.”).

37. See, e.g., Hall v. State, 9 Ala. 827, 832–33 (1846) (discussing forfeiture of surety bond imposed under Alabama law prohibiting carrying concealed weapons without an immediate need for self-defense); State v. Click, 2 Ala. 26, 28–29 (1841); BATON ROUGE GAZETTE, Mar. 8, 1845, at 2 (discussing a man fined \$20 and made to provide a \$500 peace bond after his conviction for carrying concealed weapons); *Assault with Dangerous Weapons*, DAILY CRESCENT (New Orleans, La.), Apr. 26, 1848, at 3 (discussing a man fined \$5 for carrying a concealed knife); *Fined*, MEMPHIS DAILY APPEAL, Dec. 1, 1857, at 3 (reporting on a prosecution in St. Louis for carrying concealed weapons).

38. See ANDERSON, *supra* note 7, at 86.

39. See, e.g., *id.*; An Act to Punish Certain Offences Therein Named, and for Other Purposes, ch. 23, § 1, 1865 Miss. Laws 165, 165; see also Amicus Brief for NAAGA, *supra* note 3, at 19–20.

40. ANDERSON, *supra* note 7, at 86.

41. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 908–09 (1866).

42. Amicus Brief for NAAGA, *supra* note 3, at 19–20; Headquarters Second Military District, General Orders No. 10 (Apr. 11, 1867), in A POLITICAL MANUAL FOR 1867, 202, 204 (D.C., Philp & Solomons 1867) (“The practice of carrying deadly weapons, except by officers and soldiers in the military service of the United States, is prohibited. The concealment of such weapons on the person will be deemed an aggravation of the offence.”).

Other military governors issued similar orders prohibiting carrying concealed weapons or regulating the carrying of weapons at public gatherings.⁴³

When southern states elected new Republican-controlled governments, which included many Freedmen, they enacted laws regulating public carry to protect Freedmen from the extreme levels of racist violence from groups like the Klu Klux Klan. South Carolina enacted a version of the Statute of Northampton.⁴⁴ This law was understood as a prohibition on carrying weapons in public.⁴⁵ Georgia prohibited carrying weapons at public assemblies.⁴⁶ Louisiana passed a law prohibiting carrying weapons on or near voting sites.⁴⁷ And Kentucky passed a prohibition on carrying concealed weapons with an exception for those facing specific threats.⁴⁸

The most instructive example of Reconstruction gun legislation came from Texas. In 1871, the Republican-controlled state legislature passed a law prohibiting carrying handguns and many other weapons in public without a specific threat to a person's safety.⁴⁹ Notably, all twelve of the state assembly's Black members and both of the state's Black senators supported passage of the law.⁵⁰ "[O]pposition to the law consisted primarily of Democrats, and conservative Republicans, who had served in the Confederate Army."⁵¹ The law was enforced by a multiracial police force and helped bring a level of calm to Texas.⁵²

Toward the end of the nineteenth century, Congress enacted a public carry

43. *Headquarters, District of Louisiana, General Orders No. 11* (Sept. 16, 1867), OPELOUSAS COURIER (St. Landry, La.), Sept. 21, 1867, at 1 (prohibiting "the assembling of armed men for political[] or other purposes" and "post[ing] [them] as sentinels"); *Headquarters, Fourth Military District, General Order No. 28* (Sept. 9, 1867), WKLY. PANOLA STAR (Panola, Miss.), Sept. 21, 1867, at 2 (broadly prohibiting carrying concealed weapons).

44. An Act to Define the Criminal Jurisdiction of Trial Justices, No. 288, § 4, 1870 S.C. Acts 402, 402–03.

45. *Concealed Weapons*, YORKVILLE ENQUIRER (S.C.), Apr. 28, 1870, at 2 (describing a judge stating the 1870 law will satisfy the state's need for a law prohibiting concealed carry).

46. ORVILLE PARK, PARK'S ANNOTATED CODE OF THE STATE OF GEORGIA 1914, Vol. 6, Penal Code, 9th div., art. 3, § 348 (§ 342).

47. An Act to Regulate the Conduct and to Maintain the Freedom and Purity of Elections, No. 100, § 73, 1870 La. Acts 145, 159–60.

48. An Act to Prohibit the Carrying of Concealed Deadly Weapons, ch. 1888, §§ 1–2, 5, 1871 Ky. Acts 89, 89–90. Because Kentucky never left the Union, it was not subject to Reconstruction in the manner of the Confederate states. The 1871 law was passed during the relatively progressive administration of Democratic Governor Preston Leslie who also succeeded in repealing the prohibition on blacks testifying in court and established an education system for Freedmen and black children. *Gov. Preston Hopkins Leslie*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/governor/preston-hopkins-leslie/> [<https://perma.cc/JC5E-2EDW>].

49. An Act to Regulate the Keeping and Bearing of Deadly Weapons, 12th Leg., R.S., ch. 34, § 1, 1871 Tex. Gen. Laws 25.

50. Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 106 (2016).

51. *Id.* at 106–07.

52. *Id.* at 103, 107; see also Brennan Gardner Rivas, *Enforcement of Public Carry Restrictions: Texas as a Case Study*, U.C. DAVIS L. REV. (forthcoming Mar. 2022) (manuscript at 5–6, 10–12), <https://ssrn.com/abstract=3941466> [<https://perma.cc/X9JT-TVMC>] (examining Texas public-carry-enforcement records and finding race neutral enforcement from 1870 to 1890 and increasing racial disparities beginning in the 1890s following the collapse of Black political power).

licensing law for Washington, D.C.⁵³ The law was modeled after the 1871 Texas law, limiting the issuance of concealed carry permits to those who could show “necessity” to carry a weapon.⁵⁴ The law was supported primarily by Northerners and Republicans, while opposition came almost exclusively from Southerners, who had spent the prior decades enacting the structures of Jim Crow in their states.⁵⁵

In 1906, Massachusetts passed a public carry licensing law like that adopted in D.C. and similar to the 1836 Massachusetts law already in effect.⁵⁶ New York State adopted the same public carry licensing standard in 1913.⁵⁷ The 1913 New York law—which is the law at issue in *Bruen*—expanded statewide the need-based licensing standard for concealed carry that had existed in New York City since 1881.⁵⁸

Some gun rights proponents have argued that the 1913 New York law was motivated by anti-Italian sentiments.⁵⁹ These claims confusingly focus on the allegedly anti-Italian motivations of the 1911 Sullivan Act, which required a permit to purchase and possess handguns, rather than the 1913 public carry law.⁶⁰ Presumably, the argument goes that if New York passed an anti-Italian gun law in 1911, a law passed in 1913 must also have been anti-Italian. This does not make a lot of sense given that most New York Italians would have already been subject to public carry restrictions from the 1881 New York City law.⁶¹ The 1913 Act also appears to have been passed, at least in part, to limit the discretion of law enforcement to deny licenses to possess firearms as well as to carry for those who showed an actual need.⁶² And in any event, while anti-

53. An Act to Punish the Carrying or Selling of Deadly or Dangerous Weapons Within the District of Columbia, and for Other Purposes, ch. 159, 27 Stat. 116 (1892).

54. 22 CONG. REC. 228–29 (1890) (statement of Rep. Grosvenor); *id.* at 229 (statement of Rep. Lanham).

55. Mark Anthony Frassetto, *The First Congressional Debate on Public Carry and What it Tells Us About Firearm Regionalism*, 40 CAMPBELL L. REV. 335, 351–52 (2018) (highlighting that the only Republican vote against the bill came from Connecticut, the heart of the firearms industry at the time).

56. An Act to Regulate by License the Carrying of Concealed Weapons, ch. 172, 1906 Mass. Acts 150; *see also* Acts of Feb. 1836, ch. 134, § 16, 1836 Mass. Laws 748, 750.

57. An Act to Amend the Penal Law Generally, in Relation to the Carrying, Use and Sale of Dangerous Weapons, ch. 608, 1913 N.Y. Laws 1627–30.

58. N.Y.C., N.Y., ORDINANCES art. 27, §§ 264–65 (1881).

59. *See, e.g.*, Amici Curiae Brief of Italo-American Jurists & Attorneys in Support of Petitioners at 1, 27–29, N.Y. State Rifle & Pistol. Ass’n v. Bruen, No. 20-843 (U.S. July 15, 2021), 2021 WL 3072816 [hereinafter Amici Brief of Italo-American Jurists]; *The Racist History of Handgun Bans in America*, NRA-ILA (Jan. 15, 2003), <https://www.nraila.org/articles/20030115/the-racist-history-of-handgun-bans-in-a> [https://perma.cc/X7XJ-WN8M] (“The law was aimed at preventing handgun ownership by Italians and Irish immigrants of the period, then considered untrustworthy by New York legislators and police chiefs with different bloodlines.”).

60. Amici Brief of Italo-American Jurists, *supra* note 59, at 1–3, 19–20.

61. ORDINANCES art. 27, §§ 264–67.

62. *Dangerous Weapons Act: Senator Foley Explains How He Would Protect Household*, N.Y. TIMES, Feb. 22, 1913, at 10; *Pistol Law Amended: Magistrate Required to Issue Permits Where Arms Are Necessary*, N.Y. TIMES, May 23, 1913, at 9 (“It requires Magistrates to issue licenses for carrying concealed weapons . . . to persons of good moral character when they show that it is necessary for them to be armed.”).

Italian sentiment was real during the period, other factors clearly motivated passage of the Sullivan Act and the 1913 law.⁶³ One of the most immediate causes of the Sullivan Act's passage was the high-profile murder of novelist David Graham Phillips, who was gunned down in front of the Princeton Club, in a murder-suicide by a delusional man who believed Phillips had used his sister as the model for the heroine in one of his novels.⁶⁴ That, combined with a doubling of the city's homicide rate⁶⁵ and an assassination attempt on New York Mayor William Gaynor in Hoboken a year earlier, resulted in broad support for stricter firearms laws.⁶⁶

The standard adopted in the early twentieth century in D.C., Massachusetts, and New York was then adopted by the United States Revolver Association (USRA) in 1923 as part of a model law drafted by USRA President and National Rifle Association (NRA) Vice President Karl Frederick, a lawyer and Olympic gold medalist in pistol shooting.⁶⁷ Frederick drafted the model law, including the public carry licensing provision, in an effort to deter more states from enacting laws requiring a permit to purchase or possess handguns, which had been adopted in several states across the country.⁶⁸ Licensing public carry, as opposed to licensing possession, was fairly uncontroversial at the time.⁶⁹ The model law was eventually adopted by the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission) and was enacted in states across the country in part because of lobbying by the newly politically active NRA.⁷⁰ These laws remained in effect across the United States until the late 1980s when the NRA began its efforts to deregulate public carry.⁷¹

63. See Patrick J. Charles, *A Historian's Assessment of the Anti-Immigrant Narrative in NYSRPA v. Bruen*, DUKE CTR. FOR FIREARMS L. (Aug. 4, 2021), <https://firearmslaw.duke.edu/2021/08/a-historians-assessment-of-the-anti-immigrant-narrative-in-nysrpa-v-bruen/> [https://perma.cc/56JQ-8YY4] (critiquing the argument that anti-Italian sentiment motivated passage of the Sullivan Act). Charles points out that the claim that Italians made up 70% of prosecutions for violating the act in the early years appears to be completely unsupported. *Id.*

64. CHARLES, *supra* note 7, at 175.

65. ERIC H. MONKKONEN, MURDER IN NEW YORK CITY 21 (2001). At the turn of the century, the homicide rate in New York was around 3 per 100,000; at the time of the Sullivan Act, it approached 6. *Id.* During prohibition, it approached 10; during the crack epidemic of the late 1980s and early 1990s, it exceeded 25. *Id.*

66. *Story of Shooting Told by Witnesses*, N.Y. TIMES, Aug. 10, 1910, at 3.

67. Charles V. Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767, 767–68 (1926); HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-SIXTH ANNUAL MEETING 571, 573 (1926); Paul Hicks, *A Bit of Local History*, RYE REC. (Mar. 19, 2017), <https://ryerecord.com/a-bit-of-rye-history/> [https://perma.cc/L6XQ-AX5U].

68. Imlay, *supra* note 67.

69. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING 718–19 (1924).

70. Imlay, *supra* note 67, at 767; Note, *Sportsmen Fight Sullivan Law*, 23 J. CRIM. L. & CRIMINOLOGY 665, 665 (1932).

71. See *Gun Law Navigator, Permitting Process*, EVERYTOWN FOR GUN SAFETY, https://maps.everytown.org/navigator/trends.html?dataset=permitting_process [https://perma.cc/JXA8-UWA4]; Richard S. Grossman & Stephen A. Lee, *May Issue Versus Shall Issue: Explaining the Pattern of Concealed-Carry Handgun Laws, 1960–2001*, 26 CONTEMP. ECON. POL'Y 198, 199–202 (2008).

In short, the long history of gun regulation, dating back to the 1328 Statute of Northampton, is overwhelmingly race-neutral, with each new model of regulation based on nonracially motivated predecessors. Racist laws certainly existed—primarily in the South—but they stood outside of the clear historical line of American gun regulation.

III. ORIGINALISM AND ODIOS HISTORICAL LAWS

Faced with the actual historical record of nonracist gun laws, gun rights advocates and scholars appear to cherry-pick historical racist gun laws primarily for rhetorical effect. They essentially argue that all current firearms regulations are illegitimate because some racist gun laws existed in the past.⁷² More charitably, they make a quasi-equal-protection claim that the racist intent of some historical laws carries forward to today's gun laws.⁷³ They technically get one thing right—expressly racist historical laws from the American South should not be used to justify modern gun regulation—but they fundamentally misconstrue why.

Gun rights advocates primarily focus on two types of laws in particular: antebellum Slave and Black Codes, and early Reconstruction Black Codes. Slave Codes prohibited enslaved persons from doing virtually anything without their owners' consent, including possessing firearms,⁷⁴ while antebellum Black Codes drastically limited the ability of free blacks to travel between cities and states, enforce contracts, vote and testify in trials, and possess and carry firearms.⁷⁵ Black Codes existed in many states, but weapon restrictions appear to have been mostly limited to the South.⁷⁶ After the Civil War, many former Confederate States readopted Black Codes regulating Freedmen, which severely limited Freedmen's ability to contract, own land, participate in civic society, and possess and carry firearms.⁷⁷

Modern originalism, including that applied by the Supreme Court in *Heller*, looks to the original public understanding of the scope of a constitutional provision.⁷⁸ In *Heller*, the Court looked to the historical scope of firearms

72. See Brief for Petitioners, *supra* note 3, at 2, 10–13; see also Amicus Brief for NAAGA, *supra* note 3, at 4–11; Nicholas Gallo, *Misfire: How the North Carolina Pistol Purchase Permit System Misses the Mark of Constitutional Muster and Effectiveness*, 99 N.C. L. REV. 529, 533–36 (2021) (haphazardly discussing racist gun laws in an attempt to stain gun regulation generally as racist).

73. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263–67 (1977).

74. CHARLES, *supra* note 6, at 3–4, 12–13.

75. *Id.* at 12–13; see also MASUR, *supra* note 18, at 16–18.

76. See generally, *Race and Slavery Based, Repository of Historical Gun Laws*, *supra* note 6; Notable exceptions include New Jersey, Indiana, and a town in Iowa. Act of 1752, ch. 112, § 4, 1752 N.J. Laws 443, 444 (New Jersey was a slave state at the time); A Law Entitled a Law Respecting Slaves, § 4, 1804 Ind. Acts 108, DUKE CTR. FOR FIREARMS L., <https://firearmslaw.duke.edu/laws/1804-ind-acts-108-a-law-entitled-a-law-respecting-slaves-%C2%A7-4/> [<https://perma.cc/C687-9XNM>]; VINCENNES, IOWA, AN ORDINANCE TO PREVENT NUISANCE, ETC. ch. 21, § 7 (1819).

77. CHARLES, *supra* note 6, at 10–12.

78. Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 23 (2011).

regulations to assess this historical understanding of the Second Amendment.⁷⁹ The expressly racist Southern laws should *not* be considered when assessing the original public understanding of the Second Amendment.⁸⁰ These discriminatory gun laws arose out of a view of Blacks and Black citizenship, most clearly embodied in the anticanonical Supreme Court decision in *Scott v. Sanford*, which rejected Black people as full citizens.⁸¹ This view was ultimately rejected by the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, which extended the rights of American citizenship to Black men.⁸² The Southern gun laws were enacted with an antiquated, and ultimately rejected, race-based view of citizenship and rights. In this view, Blacks fell outside of “the people” protected by the Second Amendment.⁸³ Regulations based on this rejected view of Black citizenship thus have no role to play in the originalist analysis.⁸⁴

For the same reasons, a law passed with facially neutral language but intended only to be enforced against a group wrongly considered outside of the people would provide little guidance about the scope of the Second Amendment right.⁸⁵ If these kinds of regulations were the sole historical support for New York’s challenged law, the originalist argument for upholding the law would be quite weak.⁸⁶

Fortunately, as this article has shown, gun laws stained by bias were not the rule in American history. There is a tradition of public carry regulations that were race neutral, enacted and enforced to protect Black people, or only regulated white people. This is the tradition that became New York’s law and

79. *District of Columbia v. Heller*, 554 U.S. 570, 626–28 (2008).

80. *See id.* at 614.

81. *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857).

82. U.S. CONST. amends. XIII, § 1, XIV, § 1, XV, § 1. *See generally* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 163–294 (1998) (discussing the passage, ratification, and meaning of the Reconstruction Amendments).

83. *See* U.S. CONST. amend. II.

84. Gun rights scholar Stephen Halbrook offers a more sophisticated claim, arguing that Black Code restrictions are key to interpreting the Fourteenth Amendment because they distinguished between “[f]ree citizens [who] had a right to carry arms [and] slaves [who] did not.” Stephen P. Halbrook., *Faux Histoire of the Right to Bear Arms: Young v. Hawaii* (9th Cir. 2021), INDEP. INST., at 34 (July 14, 2021), <https://www.independent.org/publications/article.asp?id=13662> [<https://perma.cc/K73U-QUDT>]. This argument is undermined by the historical record, which shows the repeal of the Black Codes followed by the enactment of general carry restrictions. *See infra* Part II.

85. Gun rights advocates often cite a Florida law requiring a license to possess certain firearms as an example of this type of law. *See* Amicus Brief for NAAGA, *supra* note 3, at 27–28 (discussing 1893 Fla. Laws 71–72). They cite to a concurring opinion in *Watson v. Stone*, in which one of the Justices said the law was “never intended to be applied to the white population.” *Id.* at 28 (quoting *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring)). The author is skeptical that Justice Buford paid close attention to the actions of the Florida state legislature as a fifteen-year-old in 1893, but not that there would have been discriminatory enforcement in the Jim Crow South. *See Justice Rivers Henderson Buford*, FLA. SUP. CT., <https://www.floridasupremecourt.org/Justices/Former-Justices/Justice-Rivers-Henderson-Buford> [<https://perma.cc/SVF7-8T2R>] (Dec. 4, 2020) (providing Justice Buford’s biography).

86. On the other hand, laws passed that were intended to apply to everyone, but had a disparate impact in how they were enforced, would still be relevant in assessing the historical understanding of the scope of the right because they were intended to apply to the people.

formed the basis for modern gun regulation. The Court should reject consideration of the racist laws of the antebellum and early Reconstruction South and look to this broader tradition as the basis for the scope of acceptable regulation under the Second Amendment.