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J. Baxter Stegall

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COMMENT

THE CURSE OF HAM: DISARMAMENT THROUGH DISCRIMINATION - THE NECESSITY OF APPLYING STRICT SCRUTINY TO SECOND AMENDMENT ISSUES IN ORDER TO PREVENT RACIAL DISCRIMINATION BY STATES AND LOCALITIES THROUGH GUN CONTROL LAWS

J. Baxter Stegall[†]

ABSTRACT

This Comment will demonstrate racial discrimination in gun control laws at the federal, state, and local level throughout our nation's history. It will then suggest a remedy to prevent discrimination through gun control laws by the application of strict scrutiny as the necessary standard of review. Most of the works suggesting that strict scrutiny be adopted for Second Amendment questions center on the due process and fundamental right aspects. This Comment will attempt to flank the question, arguing from an unconventional point of view in order to reach the same goal.

Sections I and II will introduce the reader to the topic and lay the background for how the courts arrived at the present question. The author recognizes that making the claim that gun control has been racially discriminatory in our nation's history is a tall order. Thus, significant effort has been taken to prove, through scholarly sources, the necessary underlying premise to this Comment.

Section III will lay out this history of discrimination in painstaking detail, focusing on the period from the colonization of the United States until the

[†] *Student Development Editor, LIBERTY UNIVERSITY LAW REVIEW, Volume 11. J.D. Candidate, Liberty University School of Law (2017); B.A., Hampden-Sydney College, 2004. I would like to thank Dan Peterson, Dr. Stephen Halbrook, Professor David Kopel, Dr. Warner Winborne, Hampden-Sydney College (1988), Angus McClellan, Hampden-Sydney College (2007), Professor Jeffrey Tuomala, Judge Paul Spinden, and Chris Collins, Liberty University School of Law (2016), for their support and insight and for helping me formulate the thesis of this Comment. Without their help, I would not have succeeded.*

"Molon Labe," translated as "come and take them," was King Leonidas' I response to Xerxes at the battle of Thermopylae when the Persian king demanded that the outnumbered Spartans surrender their weapons. It is my true hope that we may resolve the gun control debate peacefully through the courts. Because disarmed men fall victim to oppression, I would prefer the peaceful resolution over the violent alternative. This Comment suggests how to reach that resolution by utilizing the existing Equal Protection framework.

Civil Rights era of the 1960s. Readers most interested in the history of racism in gun control during American history may find this section the most informative. With the premise proven, the author will then illustrate how many of these same discriminatory practices are evident in current gun control schemes.

Section IV will describe many current schemes in use and illustrate how the same racially discriminatory practices are occurring, highlighting the danger of allowing these gun control methods to go unchecked by the proper standard of review. Readers interested in a legal analysis connecting current trends in gun control with past racially discriminatory schemes will find this section useful.

Section V will tie the methods together with the Equal Protection doctrine, demonstrating the need for strict scrutiny.

With the dark stain of racial discrimination still present by using the same methods that were used to disenfranchise blacks and other minorities in the exercise of the right to keep and bear arms in the past, the same schemes cannot be allowed to stand today. Through the application of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment, our nation can ensure that these schemes are not used to further discriminate against minorities.

I. INTRODUCTION

Gun control is racially discriminatory. Guns symbolize power, and the ability to defend oneself from a tyrannical state separates citizen from slave. For hundreds of years, states and localities have used gun control to oppress blacks and other minorities.

One of the very first statutes in the colonies expressly prevented blacks from owning firearms. This express racial discrimination continued through Reconstruction. After that time, states and localities invented facially neutral methods that were applied with a discriminatory purpose in order to continue the disarmament of blacks and thus keep the balance of power. After the Civil Rights era of the 1960s, many of the same schemes have been recycled and used again, and the same dark undercurrent of racial discrimination can be seen if one kicks over a few rocks and peers underneath.

By examining the back channel dealings of the passage of gun control laws, as well as comparing them to voting schemes that are known to be racially discriminatory, the reader will be able to conclude that there is a heavy shadow of racial discrimination still present in gun control laws. Because of this discrimination, the Equal Protection Clause of the

Fourteenth Amendment should require courts to use strict scrutiny in analyzing questions involving the fundamental right to keep and bear arms.

II. BACKGROUND

For two hundred and thirty-three years, the Supreme Court dodged a bullet: it refused to address whether the Second Amendment of the U.S. Constitution protected an individual right, or whether it protected the states' ability to call up and regulate fighting forces. There have been numerous Supreme Court cases dealing with the Second Amendment from an oblique stance,¹ but only a handful have addressed the Amendment head on.² The leading case for years was *U.S. v. Miller*,³ which held that the Second Amendment protected a person's right to possess a firearm for militia service,⁴ but failed to address whether this was an individual right or merely a collective right as part of a "well-regulated militia."⁵

In 2009, the Court finally addressed the issue, holding that the Second Amendment protected a pre-existing individual right.⁶ Shortly thereafter, in 2010,⁷ the Court again addressed an important Second Amendment question directly. The Court held that a person's right to possess a firearm was a fundamental right⁸ and that the Second Amendment was incorporated to the states through the Fourteenth Amendment.⁹ Other fundamental rights have been incorporated to the states as well, such as

1. See David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said about the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999).

2. See *Lewis v. U.S.*, 445 U.S. 55 (1980); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Miller*, 307 U.S. 174 (1939); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875).

3. *United States v. Miller*, 307 U.S. 174 (1939). Jack Miller and Frank Layton, Arkansas moonshiners, were arrested for violating the newly-enacted National Firearms Act of 1934 after being found in possession of a "sawed-off" shotgun with a barrel less than eighteen inches in length while participating in the interstate commerce of manufacturing moonshine. The Court held that the shotgun was not protected by the Second Amendment, because no evidence was presented that it was a weapon in common usage in military service at the time or had applicable military usage. The Court failed to note that no counsel for Miller submitted a brief or presented any argument. *Id.* at 175-78.

4. *Id.* at 178-79.

5. U.S. CONST. amend. II.

6. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

7. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

8. *Id.* at 778.

9. *Id.* at 791.

those outlined in the First,¹⁰ Third,¹¹ Fourth,¹² Fifth,¹³ Sixth,¹⁴ and Eighth¹⁵ Amendments. Laws that infringe upon these protections are weighed using strict scrutiny as the standard of review.¹⁶ Many scholars have suggested

10. See *Edwards v. South Carolina*, 372 U.S. 229 (1963) (incorporating the right to petition for redress of grievances); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating the guarantee against the establishment of religion); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the guarantee of free exercise of religion); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (incorporating the guarantee of freedom of assembly); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (incorporating the guarantee of freedom of the press); *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the guarantee of freedom of speech).

11. See *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982) (incorporating the Third Amendment prohibition against the quartering of troops to the states in the Second Circuit, including Connecticut, New York, and Vermont. Because there are not often violations of the Third Amendment, cases involving this particular right have not reached the Supreme Court on appeal).

12. See *Wolf v. Colorado*, 338 U.S. 25 (1949) (incorporating the Fourth Amendment's protection against unreasonable search and seizure to the states), *overruled in part by* *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that the Fourth Amendment was incorporated to the states, but that the states were free to fashion appropriate remedies in place of the exclusionary rule to protect against unlawful searches and seizures).

13. See *Benton v. Maryland*, 395 U.S. 784 (1969) (incorporating the protection against double jeopardy). See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Griffin v. California*, 380 U.S. 609 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating the right against self-incrimination to the states); see also *Chicago, Burlington, & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897) (incorporating the protection against taking of private property without just compensation).

14. See *Rabe v. Washington*, 405 U.S. 313 (1972); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Klopper v. North Carolina*, 386 U.S. 213 (1967) (incorporating the right to a speedy trial against the states); *Washington v. Texas*, 388 U.S. 14 (1967) (incorporating the right to compulsory process to obtain witness testimony); *Parker v. Gladden*, 385 U.S. 363 (1966) (incorporating the right to trial by impartial jury against the states); *Pointer v. Texas*, 380 U.S. 400 (1965) (incorporating the right to confront adverse witnesses against the states); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *In re Oliver*, 333 U.S. 257 (1948) (incorporating the right to a public trial and the right to notice of accusations against the states); *Powell v. Alabama*, 287 U.S. 45 (1932) (incorporating the right of assistance of counsel against the states).

15. See *Robinson v. California*, 370 U.S. 660 (1962) (incorporating the right against cruel and unusual punishments against the states); see also *Baze v. Rees*, 553 U.S. 35 (2008); *Schilb v. Kuebel*, 404 U.S. 357 (1971) (suggesting in dicta that the right against excessive bail has been incorporated against the states).

16. See *United States v. Carolene Products, Co.*, 304 U.S. 144, n.4 (1938); see also *Toiyosaburo Korematsu v. United States*, 323 U.S. 214 (1944).

that Second Amendment questions should be subject to strict scrutiny as well.¹⁷

One important reason that strict scrutiny should be applied to Second Amendment questions is the connection between racial discrimination and gun control. Throughout American history, gun control has been used to repress minorities.¹⁸ This discrimination continues to this day,¹⁹ albeit not as overtly. The purpose of the Fourteenth Amendment was to prevent states and localities from discriminating against minorities,²⁰ particularly blacks, by ensuring that fundamental rights would be protected. The Bill of Rights places restrictions on the Federal Government, not the states.²¹ However, following the Civil War, the nation realized that rights guaranteed on a national level were useless unless the states were prevented from infringing upon them as well. Discriminatory laws aimed at disenfranchising minorities, collectively referred to as the Black Codes, were passed in southern states.²² To paraphrase Martin Luther King, Jr., rights which could be abridged were in fact not rights at all.²³ With the passage of the Fourteenth Amendment,²⁴ the people now had the avenue to slowly reclaim these rights. The mid-twentieth century saw a flurry of incorporation of

17. See Dan M. Peterson & Stephen P. Halbrook, *A Revolution in Second Amendment Law*, 29-WTR DEL. L. 12 (2011); see also Alice Marie Beard, *Resistance by Inferior Courts to Supreme Court's Second Amendment Decisions*, 81 TENN. L. REV. 673 (2014); David G. Browne, *Treating the Pen and the Sword as Constitutional Equals: How and Why the Supreme Court Should Apply its First Amendment Expertise to the Great Second Amendment*, 44 WM. & MARY L. REV. 2287 (2003); Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?* 105 NW U. L. REV. 437 (2011). Section II of this comment advocates for strict scrutiny.

18. *McDonald v. City of Chicago*, 561 U.S. 742, 771-75 (2010); see also Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67, 68 (1991).

19. Tahmassebi, *supra* note 18, at 80-81.

20. *The Civil Rights Cases*, 109 U.S. 3 (1883).

21. *McDonald*, 561 U.S. at 743 (referencing *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. 243 (1833)).

22. Tahmassebi, *supra* note 18, at 67-71.

23. In his Letter from a Birmingham Jail (Apr. 16, 1963), https://www.africa.upenn.edu/Article_s_Gen/Letter_Birmingham.html, Dr. King quotes "one of our distinguished jurists" (presumably Chief Justice Earl Warren) when he says "justice too long delayed is justice denied." While justice is not the same as a right, the underlying premise for both ideas is the same: when government can arbitrarily deny justice or rights, then neither exist.

24. U.S. CONST. amend. XIV (ratified by the states in July 1868).

fundamental rights,²⁵ aptly in tune with the civil rights movement of the era.²⁶ However, arguably, the most important right was overlooked.

The Second Amendment provides the teeth which protect all other rights.²⁷ Without the ability to defend themselves, blacks were at the mercy of racist groups such as the Ku Klux Klan,²⁸ which terrorized, lynched, and disenfranchised minorities with impunity from Reconstruction²⁹ until the late 1960s.³⁰ When blacks had access to weapons, the situation often turned in their favor.³¹ However, this was historically not the case, as gun control laws were

25. See *supra* notes 10-15.

26. The Civil Rights Era in this context runs from 1954, with the Supreme Court's decision in *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), until the passage of the Civil Rights Act of 1968. This era also saw the majority of the Bill of Rights incorporated to the states via the Fourteenth Amendment. See *supra* notes 10-15.

27. William Haupt, III, *Haupt's Take: The Second Amendment Is Our Tool to Maintain the Rest*, WATCHDOG (May 27, 2015), <http://watchdog.org/221046/the-second-amendment/>.

28. The Southern Poverty Law Center designates the Ku Klux Klan as a "Hate Group." *Ku Klux Klan*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan> (last visited Oct. 12, 2015).

29. W.E.B. DUBOIS, *BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880* 671-75 (1935). The Ku Klux Klan used violence and intimidation to disenfranchise blacks. Arson, assault, and murder were common tactics used to scare blacks into submission. *Id.*

30. Many bombings, lynchings, and assaults occurred across the south, including the bombing of the home of local NAACP Chapter President Harry Moore and his wife Harriette of Mims, Florida. The Ku Klux Klan was suspected in the blast. Michael Browning, *Who was Harry Moore?*, THE PALM BEACH POST (Aug. 16, 1999), <http://www.hartford-hwp.com/archives/45a/454.html>.

31. ROBERT F. WILLIAMS, *NEGROS WITH GUNS* (reprint Wayne State University Press 1998) (1962). Robert F. Williams, president of the local chapter of the NAACP in Monroe, North Carolina, was among a group of blacks that successfully defended themselves with firearms during an incursion by local Ku Klux Klan members following violent race riots in town. Williams, in addition to starting the NAACP chapter, had started a local chapter of the National Rifle Association. Taking advantage of the ability to order firearms by mail, the NAACP chapter armed itself. *Id.* The Gun Control Act of 1968 would prohibit this later. See *infra* § IV.

A distant uncle of the author, Bruce Stegall, entered Williams's neighborhood on a reconnaissance mission. Once Stegall could discover the location of Williams's house and the approximate strength of his party, local Klan members could return and attack. However, their ruse was discovered by the local blacks, and their car was surrounded. Mr. and Mrs. Stegall were dragged out of their car at gunpoint by the angry mob. Williams intervened and was able to negotiate a tense truce between the factions to prevent certain violence. Williams rescued Mr. and Mrs. Stegall from the angry members of his own group. In that moment, the two sides came to understand each other much more clearly. Both sides could see that the others were actually human. However, without the ability to access firearms, the reconnaissance could have led to a mass lynching. Williams, *supra* note 31, at 10-12.

aimed at disarming and disenfranchising blacks.³²

Certainly, within the next few years, the Court will be faced with the need to decide which standard of review is applicable for laws infringing upon the Second Amendment rights of the people. In order to prevent states and localities from using gun control to continue to discriminate against and disenfranchise minorities, the Supreme Court should apply strict scrutiny, thus serving one of the main purposes of incorporating fundamental rights to the states through the Fourteenth Amendment.

III. HISTORICAL RACIAL BIAS IN GUN CONTROL

Periods in American history can be defined by race relations. The major shifts in the history of this nation often track alongside changes in relations between the races, especially black and white. As history is related more like a plate of spaghetti than a waffle, so too do its major tenets often intertwine. Gun control evolved along the same track as race relations, and laws concerning the right to keep and bear arms became more restrictive with each paradigm shift in race relations. For the purposes of this paper, American history as defined by race relations and gun control can be logically divided into four epochs: (a) from the colonial period until the Civil War; (b) the Civil War and Reconstruction; (c) from Reconstruction until the Civil Rights Era of the 1960s; and (d) the modern era. This Section will analyze each period chronologically for evidence of racial bias shown through gun control laws.

A. *Colonial Period to the Civil War*

Throughout American history, gun control laws have been aimed at disarming minority populations, including blacks, Indians, Italians, Irish, and other undesirable groups, either explicitly by statute or implicitly through targeted enforcement. “The history of gun control in America possesses an ugly component: discrimination and oppression of blacks, other racial and ethnic minorities, immigrants, and other ‘unwanted

This event was never spoken about in my household growing up. When I learned of it and asked about it, I was told in no uncertain terms to drop the subject and never speak of it again. My family wanted absolutely no connection to the shame brought on by Bruce Stegall’s participation with the local Klan outfit. However, we cannot overcome the mistakes of the past by ignoring them. By researching and speaking to this event, and recognizing the importance of access to firearms in self-defense and in preventing government-sponsored atrocities, I hope to close the gap and heal the wounds of the past.

32. *McDonald v. City of Chicago*, 561 U.S. 742, 771-75 (2010); *see also* Tahmassebi, *supra* note 18.

elements.”³³ The motive behind these gun control laws was sinister: to preserve and maintain the status quo with regard to the power structure of minority oppression. This power structure was especially visible in the relationship between whites and blacks in the early history of the United States. Blacks were held in bondage; whites were their masters. This relationship was codified in the Constitution and was prevalent since the United States’ inception.³⁴ Gun control ensured that this power balance could not be upset. “The first gun control laws were enacted in the antebellum South forbidding blacks, whether free or slave, to possess arms, in order to maintain blacks in their servile status.”³⁵

Gun control laws have been used to oppress minority groups, specifically blacks, since Colonial times.³⁶ It is not difficult to comprehend why masters would want to prevent slaves from owning arms, but early American laws often barred freedmen from possessing weapons as well. “The development

33. Tahmassebi, *supra* note 18, at 67.

34. U.S. CONST. art I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”) From the founding years on, the contrast in laws affecting blacks in servitude was apparent. The mere proposition that a slave was “worth” only three-fifths of a person for purposes of calculating representation is only partial evidence given in the Constitution of the racial disparity codified into law. Other clauses in the Constitution address slavery as well. See U.S. CONST. art. I, § 9, cl. 1 (referring to the regulation of the migration or importation of “such Persons”); U.S. CONST. art. IV, § 2, cl. 3 (referring to the capture and return of “Person[s] held to Service or Labour [sic] in one State, under the Laws thereof,” who escape and flee to other states). It cannot be disputed that the laws of the states and the Constitution saw clear delineation in rights based solely on race or servile status.

35. Tahmassebi, *supra* note 18, at 67.

36. *Id.* “That all such free Mulattoes, Negroes[,] and Indians . . . shall appear without arms.” *Id.* (quoting 7 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 95 (W.W. Henning ed., 1823)). Racially discriminatory gun control laws were among the first of all laws enacted in the New World in 1619 with the House of Burgesses meeting in Virginia as the first elected assembly of lawmakers in the Colonies. CHARLES E. HATCH, JR., AMERICA’S OLDEST LEGISLATIVE ASSEMBLY & ITS JAMESTOWN STATEHOUSES (1956). Among these laws was the statute specifically prohibiting blacks, Indians, and those of mixed race from owning or possessing arms. The earliest codification of American laws includes this statute, intended to ensure oppression people of color through disarmament. The disarmament and disenfranchisement continued through the Colonial period leading up to the Revolutionary War. “In 1640, . . . restrictive legislation [was] passed concerning blacks in Virginia[,] exclud[ing] them from owning a gun.” Tahmassebi, *supra* note 18, at 69 (quoting L. KENNETT & J.L. ANDERSON, THE GUN IN AMERICA; THE ORIGINS OF A NATIONAL DILEMMA 50 (1975)).

of racially based slavery in the seventeenth century American colonies was accompanied by the creation of laws meting out separate treatment and granting separate rights on the basis of race. [These included] laws denying free blacks the right to keep arms.”³⁷

Slave revolts were forefront in the reasoning behind gun control laws in the 17th Century.³⁸ “In 1712, . . . South Carolina passed ‘An act for the better ordering and governing of Negroes and Slaves’ which included two articles particularly relating to firearms ownership and blacks.”³⁹ Virginia continued its history of statutes designed to disarm blacks with an act entitled “An Act for Preventing Negroes Insurrections.”⁴⁰

The ability to prevent resistance, rebellion, and insurrection against sitting government by the use of gun control came naturally to the colonists, having been subjected to similar laws in England: “[T]he prevention of popular insurrections and resistance [sic] to government by disarming the bulk of the people, is a reason oftener meant than avowed by the makers of the forest and game laws.”⁴¹ These gun control laws in England, while couched as game control laws, were enacted in order to control the populace.

The colonists learned the lesson well and used similar tactics to ensure that blacks and other undesirable ethnic groups could be effectively oppressed. It becomes significantly harder to hold people in bondage if they are armed, for with weapons comes the ability to protest the decision. “The purpose of [the] right [to keep and bear arms] is to deter tyranny and allow popular revolution to unseat a tyrant.”⁴² It is hard to imagine a government more tyrannical than one which enslaves its subjects and puts them to hard labor in the fields. Joseph Story, one of the most hallowed jurists of American legal theory, agreed: “One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence [sic] to keep arms”⁴³ Without

37. Tahmassebi, *supra* note 18, at 69.

38. *Id.* at 70.

39. *Id.*

40. *Id.* (quoting 2 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 481 (W.W. Henning ed., 1823)).

41. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1374 (1998) (citation omitted).

42. *Id.* at 1390.

43. *Id.* at 1393 (quoting JOSEPH STORY, FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 747 (1842)). Other jurists held similar interpretations of English law, illustrating the heavy restrictions and strict qualifications placed on English subjects in order

weapons, blacks in the early history of our nation had no ability to resist, and their chains were much easier to maintain.

Racially discriminatory gun control laws continued after the Revolution and were aimed at free blacks⁴⁴ as well as slaves. One of the most common rationales given in prohibiting blacks from possessing arms was the proposition that they were not citizens. In 1844, the North Carolina

to exercise the right (or more accurately in this context, the privilege) to be armed. In his 1803 annotated treatise of Blackstone's interpretation of the law, often referred to as the *American Blackstone*, St. George Tucker quotes Blackstone's description of game laws in England, adding in his own commentary:

The [English] bill of rights . . . secures to the subjects of England the right of having arms for their defence [sic], *suitable to their condition and degree*. In the construction of these game laws it seems to be held, that no person who is not qualified according to law to kill game, hath any right to keep a gun in his house. Now, as no person, (except the game-keeper of a lord or lady of a manor) is admitted to be qualified to kill game, unless he has 100*l.* per annum . . . it follows that no others can keep a gun for their defence [sic]; so that the whole nation are completely disarmed, and left at the mercy of the government, under the pretext of preserving the breed of hares and partridges, for the exclusive use of the independent country gentleman. In America we may reasonably hope that the people [but excluding, of course, blacks] will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty.

Kopel, *supra* note 41, at 1374-75 (citation omitted). Blackstone, as well as early American jurists, recognized the necessity of the right to keep and bear arms in preventing tyranny and oppression. "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and it will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." *Id.* at 1393-94 (quoting JOSEPH STORY, FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264-65 (1842)).

Tucker's son, Henry St. George Tucker (a noted constitutional scholar in his own right, the younger Tucker served as president of the Virginia Supreme Court and as a professor of law at the University of Virginia), held similar views to those of his father: "The right of bearing arms—which with us is not limited and restrained by an arbitrary system of game laws, as in England; but is practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting, as a freeman ought, the inroads of usurpation." *Id.* at 1398 (quoting HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAW OF VIRGINIA: COMPRISING THE SUBSTANCE OF A COURSE OF LECTURES DELIVERED TO THE WINCHESTER LAW SCHOOL 42-43 (3d ed. 1846)).

Early American jurists seemed to agree that the right to keep and bear arms was instrumental in preventing oppression by a tyrannical government. Thus, it is a fair inference to suppose that had blacks been able to keep and bear arms, the institution of slavery may have fallen much earlier, not at the weight of political will, but through the sights of a Kentucky rifle in the hands of insurrecting blacks.

44. *Id.* at 1416.

Supreme Court refused to strike down a law that prohibited free blacks from carrying guns and justified its decision on the basis that blacks were not citizens.⁴⁵ The Georgia Supreme Court also refused to strike down a similar law, holding that “free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office.”⁴⁶ In Florida, there was a consensus that “the freedman was considered inferior and criminal, [and] it was assumed that special laws should be passed for his control so as to protect the rest of society. Furthermore, there had always been laws to govern Negroes, slave and free.”⁴⁷

As alien as the concept that blacks simply could not be citizens may seem today, it was not an idea that was restricted to the South. “It would be impossible to enumerate . . . the various laws, marking the condition of [the black] race, which were passed from time to time after the Revolution, and before and since the adoption of the Constitution of the United States.”⁴⁸ The U.S. Supreme Court shared this view as well. In the notorious opinion in *Dred Scott v. Sandford*, Chief Justice Taney came to the conclusion that “it [is] absolutely certain that the African race [was] not included under the name of citizens of a State, and [was] not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States.”⁴⁹ Taney declared that it was not likely that the Framers intended to include blacks “in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens[, or to] secure to them rights, and privileges, and rank, in the new political body throughout the Union.”⁵⁰

45. Tahmassebi, *supra* note 18, at 70 (citing *State v. Newsom*, 27 N.C. 250 (1844)).

46. *Id.* (citing *Cooper v. Mayor of Savannah*, 4 Ga. 68, 72 (1848)).

47. Joe M. Richardson, *Florida Black Codes*, 47 THE FLORIDA HISTORICAL QUARTERLY 365, 368 (1969), <http://www.jstor.org/stable/30140241> (citation omitted).

48. *Dred Scott v. Sandford*, 60 U.S. 393, 416 (1856).

49. *Id.* at 423. In this ethically abhorrent decision, which has never been retracted by the Court and was only invalidated by the passage and ratification of the Fourteenth Amendment, the Court performed Olympic-quality mental gymnastics to reach the holding that blacks were not citizens. The Court admitted that the “generality of the words ‘free inhabitants’ might give rise to the idea that blacks could be construed to be included in the people protected by the Privileges and Immunities Clause, but then immediately states, “[I]t is very clear that, according to their accepted meaning in that day, they did not include the African race, whether free or not . . .” *Id.* at 418. This thought process is reminiscent of final arguments used by frustrated parents when dealing with curious yet defiant toddlers who have discovered a logical fallacy from the parents: “Because I said so.”

50. *Id.* at 416.

Taney went on to describe the parade of horrors that would occur if the Court were to declare blacks qualified for citizenship.

For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went.*⁵¹ And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.⁵²

Both statutorily and judicially, blacks were disenfranchised and discriminated against in American law from colonial times until the Civil War.

51. *Id.* at 416-17. The Court recognized the danger to the established system that armed blacks posed. One could imagine this quote being whispered in hushed, astonished tones over tea in parlors across the South, incredulous and worried at the thought of armed blacks roaming “wherever they pleased.” This upset of the balance of racial power in the nation could not be tolerated, but if blacks were armed, it may well not have been stopped.

52. *Id.* (emphasis added).

B. *The Civil War⁵³ and Reconstruction*

In the early 1860s, war ravaged the United States. She was rended apart, and hundreds of thousands of her youth were wiped into eternity in bloody battles across her land. The theories of the purposes behind the Civil War are numerous and contentious, and this Comment is not the proper forum for tackling the nuances underlying those theories. It is, however, safe to say at the end of the war, slavery was no more. The Thirteenth Amendment was passed prior to the end of the war,⁵⁴ and it in no unclear terms abolished slavery for good.

But many states in the South were not so easily swayed.⁵⁵ Defiant even upon defeat, state legislatures passed notorious statutes intended to disenfranchise the newly-freed blacks in an attempt to perpetuate the structure of the antebellum system.⁵⁶ Responding to calls across the

53. There is nothing “civil” about war. The author served in the U.S. Army and deployed to Baghdad, Iraq. He agrees with Ernest Hemingway, who said, “Never think that war, no matter how necessary nor how justified, is not a crime. Ask the infantry and ask the dead.” Ernest Hemingway, *Introduction* to *TREASURY FOR THE FREE WORLD* xv (Ben Raeburn ed., 1946). The war between the states cost our nation over 600,000 young men, including William Stegall, the author’s great-great-great-grandfather (his son Samuel Stegall, the author’s great-great-grandfather, walked home to North Carolina from a Pennsylvania prisoner-of-war camp). See *Civil War Casualties*, CIVIL WAR TRUST, <http://www.civilwar.org/education/civil-war-casualties.html> (last visited Jan. 24, 2016); see also *The Civil War: Search for Soldiers*, NATIONAL PARK SERVICE, <https://www.nps.gov/civilwar/search-soldiers.htm?submitted=1&firstName=&lastName=Stegall&stateCode=NC&warSideCode=C&battleUnitName> (last visited July 28, 2016). Discussion on the cause of the war and the reasons why it was fought are best suited to another forum. But one redeeming quality of the war was the political gains that occurred afterwards in the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments.

54. U.S. CONST. amend. XIII. The Senate passed the Thirteenth Amendment on April 8, 1864, and the House of Representatives passed it on January 31, 1865. It did not require signature by the President. It was ratified by a sufficient number of states and took effect December 6, 1865. Like the causes of the war, the question surrounding the proper ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments is also best suited for another forum.

55. “The Thirteenth Amendment formally ended slavery, but the legacy of bondage proved stubbornly persistent. Seventy-five years after emancipation black forced labor remained common in many areas of the South.” William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. OF S. HIST. 31, 31 (1976), <http://www.jstor.org/stable/2205660>.

56. Tahmassebi, *supra* note 18, at 70.

After the conclusion of the American Civil War, several southern legislatures adopted comprehensive regulations, Black Codes, by which the new freed men were denied many of the rights that white citizens enjoyed. The Special Report of the Anti-Slavery Conference of 1867 noted with particular emphasis that

southern states to enact “stringent laws to control the negroes, [and] require them to fulfill their contracts of labour [sic] on the farms,”⁵⁷ these “Black Codes” were pervasive throughout the South. Often written in race-neutral terms, the people in the South knew that the laws “were intended to maintain white control of the labor system, and local enforcement authorities implemented them with this in mind.”⁵⁸ Most southern states enacted legislation intended to continue control over blacks, intending to replicate the level of control over blacks that existed prior to abolition. W.E.B. DuBois summarized the content of the various states’ slave codes in his treatise on the American slavery system and its fall, entitled *Black Reconstruction in America*:

Slaves were not considered men. They had no right of petition. They were ‘devisable like any other chattel.’ They could own nothing; they could make no contracts; they could hold no property, nor traffic in property; they could not hire out; they could not legally marry nor constitute families; they could not control their children; they could not appeal from their master; they could be punished at will. They could not testify in court; they could be imprisoned by their owners, and the criminal offense of assault and battery could not be committed on the person of a slave. The “willful, malicious and deliberate murder” of a slave was punishable by death, but such a crime was practically impossible of proof. The slave owed to his master and all his family a respect “without bounds, and an absolute obedience.” This authority could be transmitted to others. A slave could not sue his master’ had no right of redemption; no right to education or religion; a promise made to a slave by his master had no force nor validity. Children followed the condition of the slave mother. The slave could have no access to the judiciary. A slave might be condemned to death for striking any white person. Looking at these accounts, “it is safe to say that the law regards a Negro slave, so far as his civil status is

under these Black Codes blacks were “forbidden to own or bear firearms, and thus were rendered defenseless against assaults.”

Id. at 71.

57. Cohen, *supra* note 55, at 34 (citation omitted).

58. *Id.*

concerned, purely and absolutely property, to be bought and sold and pass and descend as a tract of land, a horse, or an ox.”⁵⁹

Mississippi enacted a statute which stated, in part, “Be it enacted . . . [t]hat no freedman, free negro or mulatto, not in the military . . . and not licensed to do so by the board of police or his or her county, shall keep or carry fire-arms of any kind, or any ammunition, . . . and all such arms or ammunition shall be forfeited to the informer”⁶⁰

Fearing revolts by recently emancipated slaves,⁶¹ North Carolina passed a similar statute entitled “[A]n [A]ct [C]oncerning Negroes, and [F]ree [P]ersons of [C]olor or [M]ixed [B]lood.”⁶² The fear of blacks acquiring arms (and thus, being able to use force to prevent their own oppression) was forefront in the minds of North Carolinians when passing the Black Code.⁶³ The code included provisions placing great restrictions on blacks regarding what are considered basic human rights today: the right to marry,⁶⁴ the right to contract,⁶⁵ and the right to testify in court.⁶⁶ Further, there were great disparities in punishments for certain crimes.⁶⁷

Florida’s Black Code was considered to be one of the strictest.⁶⁸ It contained specific provisions barring freedmen from having certain rights.

59. DuBois, *supra* note 29, at 10. W.E.B. DuBois (born February 23, 1868) was an American civil rights activist who was a child during Reconstruction. His penultimate essay, *Black Reconstruction*, is lauded as a masterpiece in capturing the history of slavery and the Reconstruction era, through the eyes of blacks. He obtained bachelor’s and master’s degrees, and ultimately a doctorate in history from Harvard. As a prominent activist for black rights, he was a founding member of the National Association for the Advancement of Colored People. NAACP History: W.E.B. DuBois, NAACP, <http://www.naacp.org/oldest-and-boldest/naacp-history-w-e-b-dubois/> (last visited Oct. 26, 2015).

60. Tahmassebi, *supra* note 18, at 71 (citing 1866 MISS. LAWS ch. 23, § 1, 165 (1865)).

61. James B. Browning, *The North Carolina Black Code*, 15 J. OF NEGRO HIST. 461, 463 (1930), <http://www.jstor.org/stable/2714207>.

62. *Id.* at 464.

63. *Id.* at 462 (“What made the situation apparently alarming was that in suppressing the war to dissolve the Union the whites were deprived of arms while many Negroes had easily obtained them. A general feeling of insecurity on the part of the whites, therefore, resulted.”); *see also id.* at 463 (citation omitted) (“The planters had always taken a great deals [sic] of pains to prevent slave uprisings. Consequently, at the close of the war, their fear of revolt, though hardly well grounded, naturally increased. To meet this problem, then, the former ruling class felt that immediate legislation was necessary.”).

64. *Id.* at 465.

65. *Id.*

66. *Id.*

67. *Id.* at 466.

68. Richardson, *supra* note 47, at 365.

“The freedmen were given no political rights whatsoever. They were permitted to testify only in cases involving other Negroes and even then, the jury was to be white. Freedmen were forbidden to carry firearms of any kind.”⁶⁹

DuBois summarized the firearms restrictions in some of the Black Codes well:

Very generally Negroes were prohibited or limited in their ownership of firearms. In Florida, for instance, it was “unlawful for any Negro, mulatto, or person of color to own, use, or keep in possession or under control any bowie-knife, dirk, sword, firearms, or ammunition of any kind, unless by license of the county judge of probate, under a penalty of forfeiting them to the informer, and of standing in the pillory one hour, or be whipped not exceeding thirty-nine stripes, or both, at the discretion of the jury.”

Alabama had a similar law making it illegal to sell, give or rent firearms or ammunition of any description “to any freedman, free Negro or mulatto.”

Mississippi refused arms to Negroes. “No freedman, free Negro, or mulatto, not in the military service of the United States Government, and not licensed to do so by the board of police of his or her county, shall keep or carry firearms of any kind, or any ammunition, dirk, or bowie-knife; and on conviction thereof, in the county court, shall be punished by fine, not exceeding ten dollars, and pay the costs of such proceedings, and all arms or ammunition shall be forfeited to the informer.”

A South Carolina Negro could only keep firearms on permission in writing from the District Judge. “Persons of color constitute no part of the militia of the State, and no one of them shall, without permission in writing from the district judge or magistrate, be allowed to keep a firearm, sword, or other military weapon, except that one of them, who is the owner of a farm, may keep a shot-gun [sic] or rifle, such as is ordinarily used in hunting, but not a pistol, mustket, or other firearm or weapon

69. *Id.* at 373. “The provision forbidding freedmen to possess firearms was apparently motivated by fear of insurrection. The legislature passed a resolution calling upon the governor to use ‘utmost endeavors’ to put Florida in a complete state of defense against any insurrectionary movement. There were repeated references in law to possible insurrections among ‘a certain portion of the population.’ The three-man committee had warned that the legislature had a duty to protect women and children from ‘threatened danger.’” *Id.* at 373 n.30.

appropriate for purposes of war . . . and in case of conviction, shall be punished by fine equal to twice the value of the weapon so unlawfully kept, and if that be not immediately paid, by corporal punishment.⁷⁰

Explicit racial discrimination was not limited to state governments; localities used gun laws to discriminate and disenfranchise blacks as well. An ordinance from Opelousas, Louisiana, specifically limited the right of blacks to keep or bear arms: “No freedman who is not in the military service shall be allowed to carry fire-arms [sic], or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer, in writing, and approved by the mayor or president of the board of police.”⁷¹ The city of Alexandria, Virginia, also enforced ordinances disenfranchising blacks, including forbidding them to carry firearms, punishable by whipping.⁷²

Congress recognized that states and localities were continuing to restrict the civil rights of blacks. The treatment of blacks was appalling, and many were prevented from exercising whatever new rights were gained at the end of the war. Abuse of state militias was rampant, and these were often used to strong-arm blacks to prevent them from exercising their civil rights. Officials from the various Freedmen’s Bureaus were called to testify before Congress. In a debate on how to resolve the problem, Senator Lyman Trumbull quoted from a letter sent to him by Colonel Samuel Thomas, who was stationed in Vicksburg, Mississippi: “[N]early all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of this militia, which typically would hang some freedman or search negro houses for arms.”⁷³ This behavior by states was not rare. Lieutenant Colonel H.S. Hall spoke to a congressional committee, relaying the actions of Texas Governor Jack Hamilton in suppressing insurrection by blacks using armed patrols:

Under pretense of the authority given them, they passed about through the settlements where negroes were living, disarmed them—took everything in the shape of arms from them—and frequently robbed them of money, household furniture, and anything that they could make of any use to themselves.

70. DuBois, *supra* note 29, at 172-73.

71. STEPHEN P. HALBROOK, *SECURING CIVIL RIGHTS: FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS* 12-13 (2010).

72. *Id.* at 14.

73. *Id.* at 25 (internal quotations omitted).

Complaints of this kind were very often brought to my notice by the negroes from counties too far away for me to reach.⁷⁴

Similar villainy occurred in South Carolina. General Rufus Saxton testified before a Senate committee: "I have had men come to my office and complain that the negroes had arms, and I also heard that bands of men called Regulators, consisting of those who were lately in the rebel service, were going around the country disarming negroes."⁷⁵ This oppressive conduct was not limited to southern states. Representative Anthony Thornton of Illinois, speaking on the House floor on March 3, 1866, claimed that "[i]n the North during the Civil War 'freedom of speech was denied; the freedom of the press was abridged; the right to bear arms was infringed.'"⁷⁶ Neither was the oppression of blacks at the hands of states and localities limited to civil rights or property rights. It was not uncommon for patrols or authorities to simply kill blacks. Clinton B. Fisk told Congress of the horrors that were unfolding in Kentucky.

The civil law prohibits the colored man from bearing arms: Their arms are taken from them by the civil authorities, and confiscated for benefit of the Commonwealth Thus, the right of the people to keep and bear arms as provided in the Constitution is infringed. [T]he town marshal takes all arms from returned colored soldiers, and is very prompt in shooting the blacks wherever an opportunity occurs. As a result, outlaws throughout Kentucky make brutal attacks and raids upon the freedmen, who are defenseless, for the civil law-officers disarm the colored man and hand him over to armed marauders.⁷⁷

Brevet Lieutenant Colonel W.H.H. Beadle, stationed in North Carolina, spoke before a joint congressional committee.

Some of the local police have been guilty of great abuses by pretending to have authority to disarm the colored people. They go in squads and search houses and seize arms Houses of colored men have been broken open, beds torn apart and thrown about the floor, and even trunks opened and money taken. A

74. *Id.* at 25-26.

75. *Id.* at 26.

76. *Id.* at 29.

77. *Id.* at 31 (internal quotations omitted) (emphasis omitted).

great variety of such offenses have been committed by the local police⁷⁸

And in Franklin County, Florida, a Freedman's Bureau official named Thomas Osborn received a letter from freedmen, claiming:

The civil authority in this county are taking away all the fire arms [sic] that is [sic] found in the hands of the Colored people. They do not only take our arms but they bring us before a Criminal Court and make us pay eight or ten dollars as cost of Court then we have to get two white men as Bail to appear in court in March. Sir we hope these are not the laws of the U.S. if they are then we are worst [sic] than Slaves, houses are searched Day and Night. Peaceful persons put in jail if a gun is found in their house.⁷⁹

These testimonial accounts of military officials stationed in southern states helped spur Congress to action. Despite a veto attempt by President Johnson, Congress passed the Civil Rights Act on April 9, 1866.⁸⁰ This legislation was a start, but stronger efforts would be needed.⁸¹

In an attempt to ensure that state and local laws could not be used to invalidate the civil rights of all American citizens, Congress debated the passage of the Fourteenth Amendment. Representative Thaddeus Stevens spoke on the floor of the House, "[I]ts provisions 'are all asserted, in some

78. *Id.* at 36.

79. *Id.* at 55 (citation omitted).

80. *Id.* at 37. Section 1 of the Act provided:

[C]itizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to *full and equal benefit of all laws and proceedings for the security of person and property*, as enjoyed by white citizens

Id. at 37-38 (emphasis in original).

81. Indiana Representative George W. Julian spoke about the failures of enforcement of the Civil Rights Act of 1866.

Although the civil rights bill is now the law, . . . [it] is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments; and a black man convicted of an offense who fails immediately to pay his fine is whipped Cunning legislative devices are being invented in most of the States to restore slavery in fact.

HALBROOK, *supra* note 71, at 45.

form or another, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This Amendment supplies that defect, and allows Congress to correct the unjust legislation of the States”⁸²

Senator Jacob Howard, in introducing the proposal on behalf of the Joint Committee assigned with the task of drafting the language, explained one of the underlying goals of the Fourteenth Amendment: “The great object of the first section of this amendment is . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees,” which include “the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; . . . [and] the right to keep and bear arms.”⁸³ Senator Luke Poland of Vermont spoke on the issue, “[N]o doubt should be left existing as to the power of Congress to enforce principles lying at the foundation of all republican government if they be denied or violated by the States.”⁸⁴ After significant congressional squabble, as well as some military coercion against the South,⁸⁵ the Fourteenth Amendment was ratified and became law in January 1867.⁸⁶

Civil rights abuses against blacks and other minorities did not stop with the passage of the Fourteenth Amendment. Now that express discrimination against blacks was unconstitutional, state legislatures adapted to the new legal landscape and in sinister design, discovered methods to continue to disenfranchise blacks, while passing constitutional muster. These schemes included what now are often considered to be “common-sense” gun regulations, such as bans on the carrying of concealed weapons, bans on certain classes of firearms, the levying of exorbitant taxes and fees on firearms ownership, and the registration of firearms and ammunition.⁸⁷

82. *Id.* at 40.

83. *Id.* at 41 (emphasis omitted).

84. *Id.* at 43.

85. The history surrounding the passage, rejection, coercion, and eventual ratification of the Fourteenth Amendment by the states is lengthy and worthy of its own attention. The level of detail necessary to explain the events leading up to the ratification of the amendment goes beyond the scope of this Comment. For an excellent treatise on the history and legal issues leading up to the Fourteenth Amendment as related to the right to bear arms, see STEPHEN P. HALBROOK, *SECURING CIVIL RIGHTS: FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS* (2010).

86. HALBROOK, *supra* note 71, at 67.

87. Tahmassebi, *supra* note 18, at 73-74.

C. *Post-Reconstruction to the Civil Rights Era*

1. Jim Crow Era, 1870-1934

In Tennessee, the post-Reconstruction years held a dim view for the future of blacks' rights, in particular the right to keep and bear arms. White supremacists in control of the state legislature set the stage for the continued discrimination against blacks while hiding behind facially neutral gun control laws. One of these laws passed in 1870 prohibited the "carrying, 'publicly or privately,' of, among other things, the 'belt or pocket pistol or revolver.'"⁸⁸ Laws like this were rarely enforced against whites, but were rather a means to harass and arrest blacks and prevent them from being armed.⁸⁹

88. *Id.* at 74.

89. In 1941, a black man named Mose Watson was arrested for carrying a concealed handgun following a traffic stop in Volusia County, Florida. In granting his writ of habeas corpus, the Florida Supreme Court held that a pistol located in the glovebox of Watson's automobile was not "in [Watson's] manual possession." The Court also suggested in dicta that carrying a weapon for personal protection would be a protected right, not subject to governmental permission slips. Justice Rivers Buford, a prolific opinion writer who had in the past used his powers of verbal persuasion to stop an imminent lynching on the steps of the Jackson County, Florida, courthouse wrote a special concurrence to the opinion. See Supreme Court Portrait Gallery, *Justice Rivers H. Buford*, FLORIDA SUPREME COURT, <http://www.floridasupremecourt.org/about/gallery/buford.shtml> (last accessed Jan. 23, 2016). He related the racially disparate history of the pistol permit process in Florida:

I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. *The statute was never intended to be applied to the white population and in practice has never been so applied.* We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. It is also a safe guess to say that not more than 5% of the men in Florida who own pistols and repeating r[i]flles have ever applied to the Board of County Commissioners for a permit to have the same in their possession and *there had never been, within my knowledge, any effort to enforce the provisions of this statute as to white people,* because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.

Watson v. Stone, 148 Fla. 516, 524 (1941) (en banc) (Buford, J., specially concurring) (emphasis added). The racially discriminatory undercurrent of firearms law in the South was also noted by a justice of the Ohio Supreme Court. A Mexican railroad worker was roused from his sleep in a railyard caboose by police and arrested for carrying a concealed weapon.

Some states banned particular classes of weapons. In 1902, South Carolina banned the sale of pistols “except to sheriffs and their special deputies.”⁹⁰ Certainly, no blacks were deputized in the deep South at the turn of the 20th Century, while whites were often deputized as political favor.⁹¹ Other states used targeted gun bans with the intent to price impoverished blacks out of the arms market. By banning affordable handguns (a tactic reiterated one hundred years later when they were referred to as “Saturday Night Specials”), legislatures could strip blacks of the *ability* to be armed, if not the right.

Another Tennessee law that was passed in 1879 banned the sale of handguns except “army or navy model revolvers.”⁹² “This law effectively limited handgun ownership to whites, many of whom already possessed these Civil War service revolvers These military firearms were among the best made and most expensive on the market, and were beyond the monetary means of most blacks and laboring white people.”⁹³ Even without expressly mentioning race in the laws, state legislatures had successfully figured out ways to restrict blacks from owning guns.

Small pistols selling for as little as 50 or 60 cents became available in the 1870’s and ‘80’s, and since they could be afforded by recently emancipated blacks and poor whites (whom agrarian agitators of the time were encouraging to ally for economic and political purposes), these guns constituted a significant threat to

The case went before the Ohio Supreme Court on the issue of constitutionality. In his scathing dissent, Justice Wanamaker discarded southern jurisprudence which he considered to be tainted by the stench of racial discrimination:

The Southern States have very largely furnished the precedents. It is only necessary to observe that *the race issue there has extremely intensified a decisive purpose to entirely disarm the negro*, and this policy is evident upon reading the opinions. What may have seemed sufficient reason for a holding concerning the carrying of concealed weapons in one's own home in those states does not oblige the Supreme Court of Ohio to make a similar holding in this state.

State v. Nieto, 101 Ohio St. 409, 430 (1920) (Wanamaker, J., dissenting) (emphasis added).

90. Tahmassebi, *supra* note 18, at 76.

91. This abuse of discretion by sheriffs continues today. In states with restrictive gun control, the political elite often are able to be sworn in as special deputies, with no law enforcement training, but then exempt from many of the gun control laws that the common folk must abide.

92. Tahmassebi, *supra* note 18, at 74 (internal quotations omitted).

93. *Id.*

a southern establishment interested in maintaining the traditional class structure.⁹⁴

These laws were effective at keeping newly freed blacks from being armed, because while as freedmen they were paid, they were rarely, if ever, paid sufficient wages to afford a quality handgun for defense. These backdoor techniques were not limited to Tennessee. Arkansas also passed a similar law, aimed at keeping cheap (i.e., affordable) handguns out of the hands of blacks.⁹⁵

Other states employed different schemes with the same goal in mind: preventing blacks from owning or possessing firearms and thus exercising the right to defend themselves and upset the balance of power. Alabama, Texas, and Virginia all employed taxation schemes aimed at raising the price of handguns to the point that blacks could not afford to buy them.⁹⁶ Alabama enacted their tax scheme in 1893,⁹⁷ and Texas followed in 1907.⁹⁸ Virginia went so far as to call for:

[A] prohibitive tax . . . on the privilege of selling handguns as a way of disarming the son of Ham,⁹⁹ whose cowardly practice of toting guns has been one of the most fruitful sources of crime Let a Negro board a railroad train with a quart of mean whiskey and a pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights.¹⁰⁰

Some states used innocent-sounding registration schemes but with nefarious intent. As is feared in modern-day registration schemes, the lists were used to round up black gun owners, arrest them, and confiscate their

94. *Id.* (citation omitted).

95. *Id.* at 74.

96. *Id.* at 74-75.

97. Tahmassebi, *supra* note 18, at 76.

98. *Id.*

99. The Son of Ham is a thinly-veiled reference to slaves. Canaan, son of Ham, was a biblical figure whose descendants came to inhabit the area of modern Israel, Jordan, Lebanon, and Syria. Noah was Canaan's grandfather, and in the book of Genesis, Noah got drunk and cursed Canaan for transgressions of his father, Ham. In the curse, Noah proclaimed, "Cursed be Canaan! The lowest of slaves will he be to his brothers." *Genesis* 9:25 (New International Version). This reference to slaves is clear enough that the intent of the legislature can be drawn: to prevent blacks from owning guns. While it appears obscure today, at the turn of the 20th century the biblical reference would have been much more quickly recognized by the general public, as well as by legal scholars of the day.

100. Tahmassebi, *supra* note 18, at 75 (quoting Comment, *Carrying Concealed Weapons*, 15 VA. L. REG. 391, 391-92 (1909)).

means of defense.¹⁰¹ The guns taken were often given to local chapters of the Ku Klux Klan or to other white militias who would use the guns against the very blacks they were taken from.¹⁰² Mississippi became the first state to formally enact a firearms registration law in 1906, “requiring retailers to maintain records of all pistol and pistol ammunition sales, and to make such available for inspection on demand.”¹⁰³

The ability of local sheriff and police departments, many heavily infiltrated by Klan members, to be able to determine which blacks had arms upon simple request to area retailers was a dangerous precedent. It left blacks in a potentially deadly legal predicament: buy guns on the black market and be subject to arrest for failure to obey the registration laws, or follow the law and let the authorities know they possessed weapons and then be subject to pretextual arrests intended to disarm them. Either way, the risk of disarmament could be deadly when faced with the threat of the Ku Klux Klan.

Abusing law for the purpose of targeting particular racial groups for disarmament and political powerlessness was not limited to the South. In other areas of the country, the groups targeted for disarmament were recent European immigrants. Because of stereotypes associating immigrants with crime, laziness, and conspiratorial connection with anarchists and labor organizers, gun control laws were passed which were then used to target racial minorities, including immigrants. By disarming them, those in power could strip the minorities of any ability to defend themselves, a true symbol of freedom. New York enacted gun control laws targeting immigrants, beginning in 1911 with the passage of the Sullivan law.¹⁰⁴

“Of proven success in dealing with political dissidents in Central European countries, this system made handgun ownership illegal for anyone without a police permit.”¹⁰⁵ The New York Police Department was given total power to regulate handgun ownership and capriciously exercised this power to disarm the city’s Italian population. This law extended prior attempts to disarm immigrants, including when city officials cancelled permits issued to Italians.¹⁰⁶ State officials had also previously passed laws banning immigrants from possessing firearms in public.¹⁰⁷

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 77.

105. Tahmassebi, *supra* note 18, at 77.

106. *Id.* at 77.

107. *Id.*

As those in power noted the success of these abusive laws, they began to spread. “Most of the American handgun ownership restrictions adopted between 1901 and 1934 followed on the heels of highly publicized incidents involving the incipient black civil rights movement, foreign-born radicals or labor agitators.”¹⁰⁸ Michigan passed a law similar in scope to the Sullivan law after the trial of Dr. Ossian Sweet. Sweet, a black civil rights leader, moved into a neighborhood where he was the only non-white. A lynch mob showed up at his house one night. When the Detroit police on scene refused to lift a finger, Sweet shot one of the attackers and was indicted for murder.¹⁰⁹ Missouri also enacted race-based reactionary gun control in response to riots in St. Louis.¹¹⁰ These acts were merely precursors of much greater governmental intervention yet to come.

Following World War I, many recently-discharged black servicemen returned home. Trained and experienced in the use of weapons, they began to stand up for their civil rights.¹¹¹ The ability to be armed was a dramatic force multiplier, as oppressing an unarmed populace is always easier than an armed one. However, this grasp for civil rights by blacks led to a resurgence in Klan violence. During the decade following the Great War, Klansmen committed heinous crimes against blacks, including beatings and lynchings, often in public.¹¹²

In order to ensure that their victims were unarmed, many states passed gun control legislation.¹¹³ These laws typically banned the possession of handguns or other forms of ready self-defense without permits, which were issued at the discretion of the local and state governments.¹¹⁴ These discretionary systems allowed governmental officials to pick and choose who could be armed in their jurisdictions. In a debate over a comprehensive gun control legislation package in California in 1923, it was noted that the laws would potentially “have a salutary effect in checking [T]ong wars among the Chinese and vendettas among our people who are of latin

108. *Id.* at 78.

109. *Id.*

110. Tahmassebi, *supra* note 18, at 78.

111. *Id.*

112. *Id.*

113. *Id.* These states included the southern states where Klan activity was expected, such as Alabama, Arkansas, Mississippi, Missouri, Tennessee, and Texas; however, the Klan was present in northern and Midwest states as well, including New Jersey, Illinois, Indiana, Michigan, and Oregon. *Id.* Each of these states enacted restrictive handgun permitting laws or strict bans between 1910 and 1934. *Id.*

114. *Id.* at 77-78.

descent.”¹¹⁵ These laws were enforced against blacks, but never against the Klansmen or the special deputies tasked with putting what were seen as the “uppity negroes” in their place.¹¹⁶ “The Klan targeted not only blacks, but also Catholics, Jews, labor radicals, and the foreign-born; and these people also ran the risk of falling victim to lynch mobs or other more clandestine attacks, often after the victims had been disarmed by state or local authorities.”¹¹⁷

2. The National Firearms Act of 1934

The publicizing and exploitation of a small number of crimes by criminal street gangs led to the passage of the National Firearms Act of 1934 (NFA ‘34).¹¹⁸ This legislation outlawed the possession of certain types of weapons

115. *Assembly Bill 263*, LEGISLATIVE INTENT SERVICE, INC. (1923), <http://www.hoffmang.com/firearms/AB263-Hawes-1923.pdf>.

116. “Often public authorities stood by while murders, beatings and lynchings were openly perpetrated upon helpless black citizens. And once again, firearms legislation . . . made sure that the victims of the Klan’s violence were unarmed and did not possess the ability to defend themselves, while at the same time cloaking the specially deputized Klansmen in the safety of their monopoly of arms.” Tahmassebi, *supra* note 18, at 78.

117. *Id.* at 78-79.

118. Three major news events led to the enactment of the National Firearms Act of 1934. During the St. Valentine’s Day Massacre in Chicago, which occurred February 14, 1929, Al Capone sent a death squad to a warehouse where his rival Bugs Moran was holed up. LUCIANO IORIZZO, *AL CAPONE, A BIOGRAPHY* 48 (2003). Dressed as policemen, Capone’s men threw Moran and his crew up against a wall. *Id.* Instead of frisking and arresting the gangsters, the “police” instead cut them down with machine guns. LUCIANO IORIZZO, *AL CAPONE, A BIOGRAPHY* 48 (2003). *Id.*

A second event was the violent crime spree wreaked upon the nation by Bonnie Parker and Clyde Barrow from 1932 to 1934. Bonnie and Clyde, as they have become colloquially known, terrorized the nation with a series of audacious and flagrant robberies and murders, using machine guns, sawed-off shotguns, and handguns. An excellent history of their criminal exploits can be found in this book: WINSTON G. RAMSEY, ED., *ON THE TRAIL OF BONNIE AND CLYDE: THEN AND NOW* (2003).

The third event was the crime spree by John Dillinger, infamously labeled Public Enemy No. 1. Dillinger committed a string of bank robberies during the early 1930s, most of which ended in violent clashes with law enforcement. See BRYAN BURROUGH, *PUBLIC ENEMIES* 186-88 (2004). Dillinger used machine guns, sawed-off shotguns, and handguns. *Id.* A well-researched tome on Dillinger was written by Bryan Burrough. *Id.*

Despite laws already outlawing moonshine distribution, robbery, and murder, Congress pushed for gun control as a method of stopping these violent clashes with police. Oddly, these sorts of crimes continue today. In 1986, FBI agents closed in on two suspected bank robbers in Miami, Florida. Upon confronting them, a firefought raged, leaving two agents dead. See *Grogan v. Platt*, 835 F.2d 844 (11th Cir. 1988). In 1997, two heavily armed men robbed a Bank of America in North Hollywood, California. A fierce gun battle ensued.

without governmental permission through the issuance of a tax stamp.¹¹⁹ Many of the restrictions included in the NFA '34 directly attacked rights

See Botched L.A. Heist Turns into Bloody Shootout, CNN (Feb. 28 1997), <http://www.cnn.com/US/9702/28/shootout.update/>. In 2015, following a massacre of 14 people in San Bernardino, California, a married couple suspected of committing the heinous crime were killed in a violent shoot-out with police. *See Adam Nagourney et al., San Bernadino Shooting Kills at Least 14; Two Suspects Are Dead*, N.Y. TIMES (Dec. 2, 2015), http://www.nytimes.com/2015/12/03/us/san-bernardino-shooting.html?_r=0.

119. In response to these violent clashes between gangsters and law enforcement, Congress acted. *Wickard v. Filburn*, 317 U.S. 111 (1942) had not yet been decided, and Congress's power to regulate through the Commerce Clause, U.S. CONST, art. I, § 2, cl. 3, was severely limited compared to today. However, Congress's power to tax was not in question, so the legislature used the National Firearms Act to restrict certain types of weapons by placing draconian taxes on them, thus skirting the sticky question of regulation under the Commerce Clause.

Karl Frederick, president of the NRA, appeared before Congress during debate on H.R. 9066, which eventually became the National Firearms Act of 1934, and suggested that the federal government had no authority to pass the legislation. He criticized Congress, admonishing it for disguising crime control (within the distinct purview of the states) as a revenue raising measure (a federal power).

This bill, as I see it, is intended to be a bill for the suppression of crime and is proposed to the United States Congress which ordinarily has no power in such matters, under the guise of a revenue raising bill . . . [M]y view has been that the United States has no jurisdiction to attack this problem directly. I think that under the Constitution the United States has no jurisdiction to legislate in a police sense with respect to firearms. I think that is exclusively a matter for State regulation, and I think that the only possible way in which the United States can legislate is through its taxing power, which is an indirect method of approach, through its control over interstate commerce, which was perfectly proper, and through control over importations.

National Firearms Act, Hearings on H.R. 9066 Before the Committee on Ways and Means, 73rd Cong. 43, 53 (1934). U.S. Representative James Frear (R-Wis. 63) fired back at Frederick, telling him it was not his place to question the motives of Congress. *Id.* at 43. Speaking to why the onerous \$200 tax on firearms, including handguns, would be so crippling to the common man, Frederick said,

I think that the result of this provision here will be to deprive the rural inhabitant, the inhabitant of the small town, the inhabitant of the farm, of any opportunity to secure a weapon which he perhaps more than anyone else needs for his self-defense and protection. I think that it would be distinctly harmful to destroy the opportunity for self-defense of the ordinary man in the small community, where police forces are not adequate.

Id. Enacted on June 26, 1934, as Chapter 757, 48 Stat. 1236, the act was commonly known as the National Firearms Act of 1934 (NFA). The modern version of the law is now codified as 26 U.S.C. § 5849.

The NFA restricts many types of weapons, including machine guns, suppressors (also called silencers), short-barreled rifles (SBR's) and short-barreled shotguns (SBS's), destructive devices (DD's), and a catch-all category known as Any Other Weapon (AOW's).

protected by the Second Amendment. The *Miller* Court even implied that if any valid militia use for these weapons could be shown by the appellee, then the Second Amendment would protect his right to possess them.¹²⁰

The NFA requires a \$200 tax be paid to the Treasury Department prior to transfer of any of these weapons.

120. *United States v. Miller*, 307 U.S. 174, 178 (1939). “In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” *Id.* The implication is simple: if a weapon has some reasonable relationship to the preservation or efficiency of a well-regulated militia, the Second Amendment “guarantees the right to keep and bear such an instrument.” *Id.* The Court suggests, though does not define, two simple tests to determine if a weapon has such a reasonable relationship: if “a weapon is part of ordinary military equipment” or if “its use *could* contribute to the common defense.” *Id.* (dicta) (emphasis added).

The original intent of the Second Amendment can be described rather simply. In order to repel invasion by foreign governments, and in order to prevent tyrannical encroachment by domestic government, the militia must have access to arms. Justice Scalia explained in his dicta covering the historical evolution of the right to keep and bear arms in *District of Columbia v. Heller*, 554 U.S. 570 (2008), how the militia includes all able-bodied people. This view is supported by one of the authors of the Constitution, George Mason, who said, “I ask, Who are the militia? They consist now of the whole people, except a few public officers.” *Debate in Virginia Ratifying Convention*, 4 THE FOUNDERS CONSTITUTION, Art. 4, § 4, doc. 9 (1778), http://press-pubs.uchicago.edu/founders/documents/a4_4s9.html.

The mindset was that upon invasion, or upon tyrannical encroachment, volunteer militia companies, or bands of irregulars, would form in the town square, church, or other convenient place. Men would show up with their own arms, provisions, and equipment for fighting. In 1776, this would include a Kentucky rifle, a flintlock pistol, or whatever weapons the man had which were suitable for use in warfare. In 2016, the modern equivalent would be the M-16 rifle, Glock pistol, or whatever weapons the fighter had that would be equivalent to the modern infantryman.

If the government, whether federal, state, or local, has the ability to restrict which arms the fighter brings to the town square, it can exercise significant advantage over the populace in the dreaded day that tyranny arrives. Allowing a tyrannical government the ability to referee which weapons a militia will use to depose it forfeits one of the very purposes of the Second Amendment: to keep tyrannical government in check.

In *District of Columbia v. Heller*, 554 U.S. 570, 624-25, 627 (2008), the Court seized on a test laid out in *Miller* which protected weapons “in common use at the time.” *Id.* at 624 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). Ignoring the suggestion in *Miller* that weapons should be protected if they have a reasonable relationship to militia service, the *Heller* Court firmly established the “common use” standard. *Id.* The danger with this standard is noted by the history surrounding firearms ownership since *Miller*. In the late 1920s, one could purchase a machine gun like the Thompson submachine gun at a hardware store, a fact that spurred the passage of the NFA ‘34 in the first place. Thompsons were used

Originally, the NFA '34 was intended to heavily restrict the possession of handguns,¹²¹ as well as the other weapons. This ability to wield taxation as a weapon to price minorities out of defending themselves with common, accessible, and bearable handguns provided those in power with the perfect vehicle to oppress minorities. A \$200 tax on a handgun that only cost \$5¹²²

in World War II less than a decade later. This common availability of weapons with clear reasonable relationships to militia service evaporated due to gun control legislation. Now, a Thompson is particularly rare and certainly not “in common use.” Under the *Heller* test, this weapon would receive no Second Amendment protection. The logical fallacy that gun control efforts that hamper the availability of a weapon in turn create the situation where the weapon receives no Second Amendment protection defies the very purpose of the amendment. The Seventh Circuit recognizes this circular reasoning, although the court does not find it to be persuasive.

[R]elying on how common a weapon is at the time of litigation would be circular to boot. Machine guns aren't commonly owned for lawful purposes today because they are illegal; semi-automatic weapons with large-capacity magazines are owned more commonly because, until recently (in some jurisdictions), they have been legal. Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned. A law's existence can't be the source of its own constitutional validity.

Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015). Because of the underlying purpose of the Second Amendment, the “in common use” test taken from *Miller* and adopted in *Heller* is not nearly as appropriate as the “reasonable relationship to militia service” suggested in dicta in *Miller*.

121. *National Firearms Act, Hearings on H.R. 9066 Before the Committee on Ways and Means*, 73rd Cong. 43 (1934).

122. A commercial advertisement for Iver-Johnson handguns from 1905 listed a break-action revolver for \$5 for a model with a hammer and \$6 for a hammerless version. *Gun Advertisements*, VINTAGE AD BROWSER, <http://www.vintageadbrowser.com/guns-ads> (last visited Jan. 23, 2016).

The Sears and Roebuck Catalog from 1912 showed Iver-Johnson revolvers to be mid-range revolvers from a price standpoint. Revolvers ranged from just \$1.29 for the cheapest models up to \$16 for a top of the line Colt or Smith and Wesson. “Automatic” pistols retailed for \$22 (actually a semi-automatic pistol but listed in the advertising parlance of the time) such as the timeless Colt Automatic Pistol (chambered in .45ACP and colloquially called the “Colt 45.” This pistol was later referred to as the Colt Model 1911, which saw fame in military service from World War I through the Global War on Terrorism and still is a popular and reliable model over a century later). SEARS, ROEBUCK, AND CO., 124 Catalog 906-09 (1912), <https://archive.org/stream/catalogno12400sear#page/n0/mode/2up>.

As noted above, the least expensive handgun in the Sears Catalog of 1912 listed at just \$1.29. Even considering that the price may have doubled by 1934, a \$200 tax levied on a weapon which cost just over \$2 would be unfathomable and could not have any purpose other than to eradicate the market for the weapons. This would have effectively eliminated the ability for minorities and other poverty-stricken populations to arm themselves effectively with reliable handguns. The Act also levied a leviathan \$5,000 tax on dealers. NRA

would price minorities (along with probably everyone else except the wealthiest people) out of the market to acquire arms suitable for personal defense. A tax of 8,000 percent on any commodity could not be seen as anything but prohibitory. Further, it was packaged neatly to sell to the American public as an anti-crime measure in response to the recent surge in Prohibition-era gang violence.¹²³ Under heavy pressure by the National Rifle Association, Congress yielded and did not include pistols or revolvers as firearms to be regulated under the NFA.¹²⁴

3. The Gun Control Act of 1968

In response to the assassinations of President John F. Kennedy,¹²⁵ civil rights leader Dr. Martin Luther King, Jr.,¹²⁶ and U.S. Attorney General

President Frederick speaks to these issues in his testimony before Congress. He explained how the Act would strip the average citizen of the ability to defend himself:

In the first place, it requires Federal documents to be filled out, procured from Federal officials, before a pistol can be purchased. It requires that pistol to be purchased from a licensed dealer. Now, if the largest and most important and wealthiest dealers, those in the larger cities, are the only dealers to exist who can handle firearms, and if it is required to go to a Federal official who is not to be found readily in rural communities, in the country, in any except the larger communities—if they only are allowed to handle firearms, it seems to me that *the practical result will be that the countryman absolutely will be unable, in a practical sense, to obtain any firearm. There are so many impediments put in his way. He will be unable to secure a weapon that he needs for his own defense and the defense of his home and family.*

National Firearms Act, Hearings on H.R. 9066 Before the Committee on Ways and Means, 73rd Cong. 43, 43-44 (1934) (emphasis added).

123. See Tahmassebi, *supra* note 18, at 77-78.

124. The final draft of the NFA, which passed as Public Law 474 on June 26, 1934, included the following definition: “The term ‘firearm’ means a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, *except a pistol or revolver*, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person . . .” See National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (emphasis added).

125. Lee Harvey Oswald shot President John F. Kennedy in Dallas, Texas, on November 22, 1963. He used a Mannlicher-Carcano 6.5mm surplus Italian military rifle. Federal Bureau of Investigation Special Agent Robert A. Frazier described the rifle in detail before the Warren Commission. See *Hearings Before the President’s Commission on the Assassination of President Kennedy*, Vol. III, 390-95 (1964).

126. James Earl Ray shot Dr. Martin Luther King, Jr., with a Remington Game Master slide-action rifle, chambered in .30-06, in Memphis, Tennessee, on April 4, 1968. He had legally purchased the rifle at a hardware store the week prior to the killing. FINAL REPORT OF THE SELECT COMMITTEE ON ASSASSINATIONS, 95th Cong., 2d Sess. 293 (1979).

Robert Kennedy,¹²⁷ Congress passed the Gun Control Act of 1968 (GCA '68).¹²⁸ But a much more sinister undercurrent fed the passage of the Act. After the passage of the Civil Rights Act of 1964¹²⁹ and the Voting Rights Act of 1965,¹³⁰ there was much consternation across the country over desegregation. Race riots erupted in many U.S. cities, including Los Angeles,¹³¹ New York,¹³² and Chicago.¹³³ Following Dr. King's murder, cities in 36 states and the District of Columbia exploded in racially-charged violence, resulting in 43 deaths, 3,500 injuries, and over 27,000 arrests.¹³⁴

President Lyndon B. Johnson initially tried to ignore the riots as being perpetrated by fringe elements of militant black power movements.¹³⁵ FBI Director J. Edgar Hoover eagerly tried to convince the President that

127. Sirhan Sirhan used an Iver-Johnson .22 caliber revolver when he assassinated Attorney General Robert Kennedy, in Los Angeles, California, on June 6, 1969. See JULES WITCOVER, *85 DAYS; THE LAST CAMPAIGN OF ROBERT KENNEDY* 286 (1969).

128. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968).

129. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

130. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

131. On August 11, 1965 (only 5 days after the passage of the Voting Rights Act of 1965, *supra* note 130), a racially charged riot exploded onto the streets of the Watts neighborhood of Los Angeles, California, following a forceful arrest of a black man suspected of driving under the influence. "The ensuing struggle during his arrest sparked off 6 days of rioting, resulting in 34 deaths, over 1,000 injuries, nearly 4,000 arrests, and the destruction of property valued at \$40 million." See *Martin Luther King, Jr., and the Global Freedom Struggle*, KING ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_watts_rebellion_los_angeles_1965/index.html (last visited Feb. 23, 2016).

132. On July 16, 1964, a racially charged riot occurred in the Harlem neighborhood of New York City, New York, following the police shooting of a young, black man. A racial confrontation occurred between an apartment supervisor and three black youths, and when it escalated into a fight, James Powell participated. New York Police Department Lieutenant Thomas Gilligan fired three times into the group, killing Powell. The riots that ensued lasted for six days, with 465 arrested and 118 injured, and one rioter killed in addition to Powell. See FRED C. SHAPIRO & JAMES W. SULLIVAN, *RACE RIOTS, NEW YORK, 1964* 1-2 (1964).

133. On August 16, 1964, a racially charged riot occurred in the Dixmoor neighborhood of Chicago, Illinois, following a forceful arrest of a black woman accused of shoplifting a bottle of gin. Property was damaged, many were arrested, and 37 were reported injured. Ron Grossman, *The Gin Bottle Race Riot*, CHICAGO TRIBUNE (Nov. 25, 2014), <http://www.chicagotribune.com/news/opinion/commentary/ct-ferguson-gin-bottle-race-riot-dixmoor-flashback-tbd-jm-20141125-story.html>.

134. See Peter B. Levy, *The Dream Deferred: The Assassination of Martin Luther King, Jr., and the Holy Week Uprisings of 1968* in BALTIMORE '68: RIOTS AND REBIRTH IN AN AMERICAN CITY 5-6 (Jessica L. Elfenbein et al. eds., 2011).

135. Kenneth O'Reilly, *The FBI and the Politics of the Riots, 1964-1968*, 75 J. OF AM. HIST. 91, 91, 95, 99, 103, 112 (1988), <http://www.jstor.org/stable/1889656>.

investigation and crackdown of the instigators was necessary.¹³⁶ The hope that many civil rights leaders also had ties to subversive, leftist movements only fed into Hoover's anti-communist witch hunt.¹³⁷

Eventually, Johnson realized that there was more to the movement than just a few irate Communist sympathizers and recognized that he needed to get ahead of the wave of racial animosity before it broke and destroyed the nation.¹³⁸ He began to work more closely with Hoover, despite the two having significant political differences. Johnson was motivated by political desires to ensure that the Democratic Party did not lose the Presidency over Republican manipulation of the riots, illustrating that his Great Society programs had failed.¹³⁹ Hoover was motivated by the desire to expand his domestic surveillance program and the ability to monitor and catalog the various undesirable characters operating in and around the Civil Rights movement.¹⁴⁰

The FBI began to formulate reports that the subversive elements in the Civil Rights movement were the cause of the recent violence across the nation and were fueling the continued disruption in civil obedience, violent

136. *Id.* at 96, 103-04.

137. *Id.* at 105.

138. *Id.* at 103-04.

139. O'Reilly, *supra* note 135, at 93.

Johnson was "toying with many possibilities," DeLoach told Hoover on this occasion, "which will give him favorable publicity inasmuch as he considers the various riots to have lost him many votes." The most ambitious plan involved an FBI report on the riots that was intended to defuse Goldwater's law-and-order politicking and to recapture those lost votes.

Id. at 94 (citation omitted). By ensuring that the FBI reports contained the correct political slant on the riots across the nation, President Johnson could manipulate the press and the public, restoring confidence in his administration and his policies. This required selecting, identifying, and marginalizing the more distasteful leaders of the movement, while ensuring that the civil rights leaders who were amenable to working with the Johnson administration did not appear to be radical.

In the case of the New York riots, the director stressed the activities of a former Communist party organizer, the involvement of the Progressive Labor movement, and the rhetoric of Malcolm X. A typical memo from Hoover, delivered to Dewey with a copy to Jenkins at the White House, read: "By agitating through inflammatory propaganda and rallies, and stepping into explosive situations to fan the flames of disorder, these culprits [Communists, Maoists, Black Muslims] play an important role in racial violence."

Id. at 96-97 (quoting Hoover to Dewey, Sept. 10, 1964, no.9, and accompanying "blind" memo, Thomas E. Dewey folder, Louis B. Nichols *Official and Confidential FBI Files*; Hoover to Tolson, Belmont, Rosen, William Sullivan, and DeLoach, Sept. 15, 1964, no. 54); *see also id.* at 96 n.15.

140. *Id.* at 92.

as well as non-violent.¹⁴¹ Typical for the Hoover era, the FBI was willing to scratch the backs of those who would scratch its own. Reports of militant Black Panther members walking in public with mail-order military surplus rifles slung on their backs fueled the need for action.¹⁴² Offered in exchange for these reports were not-so-subtle hints of increased funding for the agency.¹⁴³ Justice Taney's predictions in *Dred Scott* had come true: Blacks were travelling from state to state, holding political rallies, voting, carrying arms wherever they went (including in the state capitol buildings), and "endangering the peace and safety of the State."¹⁴⁴

As racial tension gripped the nation, many were paralyzed out of fear, but others were fomented to the brink of revolution. The real action took place in political back channels. While President Johnson appeared on the

141. *Id.* at 96. "[Former New York Governor, progressive Republican, and LBJ advisor Thomas] Dewey and Hoover also agreed on the culpability of 'the responsible Negro organizations.' The 'more violent' actions (as Dewey designated the nonviolent 'sit-ins, et cetera') of the past three years, they agreed, had led to the current break-down of law and order." *Id.* (emphasis omitted).

142. "The Gun Control Act of 1968 was passed at a time when the Black Panthers were making headlines by openly and legally carry weapons during their demonstrations . . . Black Panthers were often times carrying mail order military surplus rifles that were targeted in the 1968 Act." David Babat, *The Discriminatory History of Gun Control*, University of Rhode Island, Senior Honors Projects, Paper 140, 12 (2009), http://digitalcommons.uri.edu/srhonorsprog/140/?utm_source=digitalcommons.uri.edu%2Fsrhonorsprog%2F140&utm_medium=PDF&utm_campaign=PDF_CoverPages; see also Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17 (1994).

The California Legislature adopted a major new arms law in 1967, for the first time prohibiting the open carrying of firearms in cities. This law easily passed after the Black Panthers demonstrated against it by walking into the assembly chamber carrying "pistols, rifles, [and] at least one sawed-off shotgun." This demonstration of course pushed the law through, in spite of significant opposition from conservative Republicans such as State Senator John G. Schmitz.

Cramer, *supra* at 21 (citation omitted).

143. The FBI was asked to recommend language for the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified at 42 U.S.C. § 3711). [Senator John McClellan (D-Ark.)] gave [FBI Deputy Director Cartha Dekle "Deke"] DeLoach a copy of his omnibus crime control bill and "asked that the FBI study this bill very carefully and actually prepare language which could be inserted into the bill." "This would be done," DeLoach said, "on a confidential basis." When Calloway finished work on a new version of the bill, he handed a copy of another bill, the law enforcement assistance bill (which would be added to the omnibus bill) to Bishop and requested, "on an informal basis," the FBI's "views with regard to it."

O'Reilly, *supra* note 135, at 112.

144. *Dred Scott v. Sandford*, 60 U.S. 393, 416-17 (1856); see also *supra* notes 51-52.

national stage to extend a hand to blacks in their time of struggle,¹⁴⁵ he was secretly working with politicians of influence to ensure that the rapidly disintegrating racial situation could be controlled. Johnson spoke regularly with Mayor Richard J. Daley, the consummate leader of the Chicago Machine.¹⁴⁶ Violence was exploding uncontrollably across the nation, and Chicago felt the sharp sting of violent racial animosity more than many cities. Daley expressed his alarm at blacks obtaining weapons and demanded the President take action in pushing Congress to enact gun control legislation at the national level.

Outside the suburbs in the city, we have control, but what the hell, in the suburbs, there are—you go out to all around our suburbs and you’ve got people out there, *especially the non-white, are buying guns right and left*. Shotguns and rifles and pistols and everything else. There’s no registration . . . There’s no, and you know, they’ve had trouble with this national gun law, but after the president’s assassination, *someone ought to do something*.¹⁴⁷

145. “We have talked long enough in this country about equal rights. We have talked for one hundred years or more. It is time now to write the next chapter, and to write it in the books of law.” Lyndon B. Johnson, President of the United States, Speech before a Joint Session of Congress (Nov. 27, 1963); Ted Gittinger & Allen Fisher, *LBJ Champions the Civil Rights Act of 1964*, 36 PROLOGUE MAGAZINE 2 (2004), <http://www.archives.gov/publications/prologue/2004/summer/civil-rights-act-1.html>; *see also* Transcript of Telephone Call from President Lyndon B. Johnson to Dr. Martin Luther King, Jr. (Nov. 25, 1963), <http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/a-conversation-between-lbj-and-martin-luther-king-jr>; Record of Telephone Call from President Lyndon B. Johnson to Dr. Martin Luther King, Jr., Tape No. K6311.02, Lyndon B. Johnson Presidential Library, Univ. of Tex. (Nov. 25, 1963), http://www.lbjlib.utexas.edu/johnson/archives.hom/Dictabelt.hom/lbj_recordings/6311K/63110222.pdf (“Well, I’m going to support [President Kennedy’s progressive policies], and you can count on that. And I’m going to do my best to get other men to do likewise, and I’ll have to have y’all’s help.”); Audio Recording of Telephone Call from President Lyndon B. Johnson to Dr. Martin Luther King, Jr., Tape No. K6311.02, Lyndon B. Johnson Presidential Library, Univ. of Tex., archived at The Miller Center, Univ. of Va. (Nov. 25, 1963), <http://millercenter.org/presidentialrecordings/lbj-k6311.02-22>.

146. A quick survey of the Telephone Conversation Descriptions archived at the LBJ Presidential Library shows over one hundred entries between Johnson and Daley, or involving the two. The conversation topic headnotes range from personal matters, recommendations on political appointments, to policy considerations, to Democratic Party concerns, to advice both sought from and given to the President. It is clear based simply on the content and number of these conversations that Daley served as a trusted advisor to the President. *See* Lyndon B. Johnson Presidential Library, Univ. of Tex., <http://www.lbjlib.utexas.edu/johnson/archives.hom/Dictabelt.hom/content.asp> (last visited Jan. 24, 2016).

147. Record of Telephone Call from President Lyndon B. Johnson to Chicago Mayor Richard J. Daley, Citation No. 10414, Lyndon B. Johnson Presidential Library, Univ. of Tex.

“Pay no attention to the man behind the curtain,”¹⁴⁸ some might say. But the fact that Johnson held deep-seated racial prejudices, and one of his most

(July 19, 1966), http://www.lbjlib.utexas.edu/johnson/archives.hom/Dictabelt.hom/lbj_recordings/6607/wh10414.pdf; see also Audio Recording of Telephone Call from President Lyndon B. Johnson to Chicago Mayor Richard J. Daley, Citation No. 10414, Lyndon B. Johnson Presidential Library, Univ. of Tex., archived at The Miller Center, Univ. of Va. (July 19, 1966), <http://millercenter.org/presidentialrecordings/lbj-wh6607.02-10414> (last visited Feb. 14, 2016) (transcribed from .mp3 audio file by author) (emphasis added).

148. The Wizard, *THE WIZARD OF OZ* (Metro-Goldwin-Mayer Studios 1939). Just as the Wizard admonishes Dorothy and her friends not to peek behind the curtain for fear that the true motives behind his operation will come to light, so too would Johnson wish to put on one face in public, while showing another reality behind closed doors. Johnson regularly called blacks “nigger” and referred to the Civil Rights Act of 1964 as “the nigger bill.” Adam Serwer, *Lyndon Johnson was a Civil Rights Hero. But Also a Racist.*, MSNBC (Apr. 11, 2014), <http://www.msnbc.com/msnbc/lyndon-johnson-civil-rights-racism>.

With a long legislative history as a member of the Southern voting bloc, Johnson stymied earlier attempts at civil rights reform. During debate over the Civil Rights Act of 1957, Johnson said to Sen. Richard Russell (D-Ga.),

These Negroes, they’re getting pretty uppity these days and that’s a problem for us since they’ve got something now they never had before, the political pull to back up their uppityness [sic]. Now we’ve got to do something about this, we’ve got to give them a little something, just enough to quiet them down, not enough to make a difference.

DORIS KEARNS GOODWIN, *LYNDON JOHNSON AND THE AMERICAN DREAM* 148 (1976).

In deciding to appoint Thurgood Marshall to the U.S. Supreme Court, rather than a lesser-known black jurist, Johnson responded, “[W]hen I appoint a nigger to the bench, I want everybody to know he’s a nigger.” Adam Serwer, *Lyndon Johnson was a Civil Rights Hero. But Also a Racist.*, MSNBC (Apr. 11, 2014), <http://www.msnbc.com/msnbc/lyndon-johnson-civil-rights-racism>; see also ROBERT DALLEK, *LONE STAR RISING: LYNDON JOHNSON AND HIS TIMES 1908-1960* 519 (1991).

Using the term was not just parlance of the day; Johnson once screamed in outrage at one of his drivers who asked to be called by his given name, rather than “boy,” “nigger,” or “chief.” Venomously comparing the black driver to mere chattel, Johnson replied,

As long as you are black, and you’re gonna be black till the day you die, no one’s gonna call you by your goddamn name. So no matter what you are called, nigger, you just let it roll off your back like water, and you’ll make it. Just pretend you’re a goddamn piece of furniture.

Adam Serwer, *Lyndon Johnson was a Civil Rights Hero. But Also a Racist.*, MSNBC (Apr. 11, 2014), <http://www.msnbc.com/msnbc/lyndon-johnson-civil-rights-racism>; see also ROBERT PARKER & RICHARD L. RASHKE, *CAPITOL HILL IN BLACK AND WHITE* v (1989).

Johnson’s racist agenda may be best summed up in one word: *control*. Just like the authors of the Slave Codes, the Black Codes, and the Jim Crow laws, Johnson intended to keep blacks in America subjugated. This is best evidenced by an infamous quote made in the presence of an Air Force One steward, where Johnson laid out his plan to two governors to use welfare legislation as bait to secure power for his party: “I’ll have them niggers voting Democratic for the next two hundred years.” RONALD KESSLER, *INSIDE THE WHITE HOUSE:*

trusted advisors pushed for gun control as a response to racial violence, leads one to question Johnson's true motivations when advocating for and signing the Gun Control Act of 1968.

Congress, reacting partially from heavy pressure by President Johnson,¹⁴⁹ passed the Gun Control Act of 1968 on October 22, 1968.¹⁵⁰ That same day, the President held a press conference in the White House Cabinet Room and signed the Act.¹⁵¹ In his announcement, he praised the ban of "cheap foreign \$10 specials."¹⁵² He also lamented his inability to include two other provisions in the Act: national licensing of "those who carry . . . guns"¹⁵³ and national registration of all guns.¹⁵⁴ The hallmarks of earlier racially discriminatory gun control¹⁵⁵ were back, now wielded at the federal level by men who intended to keep "uppity"¹⁵⁶ blacks in their place. It is hard to come to a conclusion other than "[t]he Gun Control Act of 1968 was passed not to control guns but to control blacks"¹⁵⁷

THE HIDDEN LIVES OF THE MODERN PRESIDENTS AND THE SECRETS OF THE WORLD'S MOST POWERFUL INSTITUTION 33 (1996).

149. Lyndon B. Johnson, President of the United States, Remarks Upon Signing the Gun Control Act of 1968, Given at the Cabinet Room of the White House (Oct. 22, 1968), <http://www.presidency.ucsb.edu/ws/?pid=29197>.

150. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968). The Gun Control Act of 1968 was codified as 18 U.S.C. §§ 921-928. The Act also amended the National Firearms Act of 1934.

151. Johnson, *supra* note 149.

152. *Id.* (internal quotations omitted).

153. *Id.*

154. *Id.*

155. See HALBROOK, *supra* note 71, at 67-69.

156. GOODWIN, *supra* note 148, at 148.

157. ROBERT SHERRILL, THE SATURDAY NIGHT SPECIAL AND OTHER GUNS WITH WHICH AMERICANS WON THE WEST, PROTECTED BOOTLEG FRANCHISES, SLEW WILDLIFE, ROBBED COUNTLESS BANKS, SHOT HUSBANDS PURPOSELY AND BY MISTAKE AND KILLED PRESIDENTS-TOGETHER WITH THE DEBATE OVER CONTINUING SAME 280 (1973).

IV. HIDDEN RACIAL BIAS IN MODERN GUN CONTROL SCHEMES

*“Ninety-five percent of murders fall into a specific category: male, minority and between the ages of fifteen and twenty-five. Cities need to get guns out of this group’s hands and keep them alive.”*¹⁵⁸
 – Michael Bloomberg, President, Everytown for Gun Safety

Taken alone, the following evidence would not be enough to convince the reader that each gun control scheme was racially discriminatory. These laws are not facially discriminatory, and it is not always evident whether they are passed with a discriminatory purpose. However, when viewed in light of over 350 years of racial discrimination in gun control (both express and implied), it is much more difficult to sever the notion that gun control today still reeks of racism. While individual laws infringing on the right to keep and bear arms might seem innocuous (or even “common sense”¹⁵⁹),

158. Michael Bloomberg, President, Everytown for Gun Safety, Panel Interview at Aspen Institute (Feb. 6, 2015); see Karl Herchenroeder, *Michael Bloomberg Calls Colorado’s Decision on Legal Pot Stupid*, ASPEN TIMES (Feb. 6, 2015), <http://www.aspentimes.com/news/14957190-113/michael-bloomberg-calls-colorados-decision-on-legal-pot-stupid>.

Apparently, Bloomberg realized he had exposed a more sinister intention behind his push for gun control, and pressured the Aspen Institute not to release video footage of his remarks. See Karl Herchenroeder, *Michael Bloomberg Blocks Footage of Aspen Institute Appearance*, ASPEN TIMES (Feb. 13, 2015), <http://www.aspentimes.com/news/15037917-113/michael-bloomberg-blocks-footage-of-aspen-institute-appearance>. This attempt to cover up a possible Freudian slip highlights the nefarious motives behind Bloomberg’s push for gun control in the modern era.

159. The idea of “common-sense gun reform” is a modern rallying cry for gun control proponents. The idea that the average American will vote away his inalienable right to self-defense in the name of common-sense is appealing to politicians and activist groups who are willing to disguise the underlying motivation of gun-control: total disarmament. Gun control is not about controlling guns, but rather controlling people. And history has shown that disarmed populations are always easier to control. See *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1856).

“[O]nce Congress gets on board with common-sense gun safety measures we can reduce gun violence a whole lot more.” Barack H. Obama, President of the United States, Remarks by the President on Common Sense Gun Safety Reform, Given at the East Room of the White House (Jan. 5, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/05/remarks-president-common-sense-gun-safety-reform>.

Former mayor of New York City and unabashed gun control financier Michael Bloomberg started an activist group called Everytown for Gun Safety, which replaced the failed group Mayors Against Illegal Guns. Everytown’s website shows the following: “Everytown for Gun Safety researches a range of vital issues surrounding gun violence, develops data-driven solutions, and works with lawmakers and people like you to pass common-sense laws and policies that save lives.” *Learn What It Takes to Keep America Safe*, EVERYTOWN FOR GUN SAFETY, <http://everytown.org/learn/> (last visited Jan. 24, 2016); see also

these laws cannot escape the dark stain of racial bias upon which they are founded.

Evidence of implicit discrimination and discriminatory effect can be seen in three areas: A. The economic impact of certain gun control laws; B. The similarities between certain gun control laws and discriminatory tools of the past such as poll taxes and literacy tests; and C. Racial discrimination in gun control laws as shown through disparate impact on minorities.

A. *Economic Impact of Modern Gun Control Schemes*

1. Saturday Night Specials

One of the crown jewels of the Gun Control Act of 1968 was limiting the importation of affordable handguns.¹⁶⁰ This was achieved by prohibiting the importation of any firearms other than those “generally recognized as particularly suitable for or readily adaptable to sporting purposes.”¹⁶¹ The

We Are Everytown for Gun Safety, EVERYTOWN FOR GUN SAFETY, <http://everytown.org/who-we-are/> (last visited Jan. 24, 2016).

“Former New York City Mayor Michael Bloomberg’s gun control group is set to spend heavily in at least one key legislative election in Virginia. Everytown for Gun Safety Action Fund said Wednesday that it plans to spend \$700,000 helping the Democratic candidate in a closely contested Richmond-area state Senate race that could determine which party controls the upper chamber.” See Alan Suderman, *Michael Bloomberg’s Gun Control Group to Spend in Virginia*, WASH. TIMES (Oct. 21, 2015), <http://www.washingtontimes.com/news/2015/oct/21/michael-bloombergs-gun-control-group-to-spend-in-v/>.

160. “It puts up a big ‘off-limits’ sign, to stop gunrunners from dumping cheap foreign ‘\$10 specials’ on the shores of our country.” Johnson, *supra* note 149.

The Act would likely make cheap, affordable handguns almost impossible to obtain in the new retail market in the United States. Although the law itself only banned the importation of these types of guns, there was only one known domestic manufacturer of handguns in the low-price category.

William Mooney, a firearms control specialist for the Senate Subcommittee on Juvenile Delinquency said today that the only known United States company that manufactured comparable guns was Imperial Metal Products, Inc., 1860 Broadway. Edward Kane, treasurer of the company, said in a telephone interview that he knew of no competitor in this country that made a small-caliber pistol in the \$12-14 range.

Fred Graham, *Handgun Imports Held Up by U.S.*, N.Y. TIMES, Aug. 17, 1968, at 14.

161. The original wording of the Gun Control Act of 1968 which addressed Saturday Night Specials is rather cryptic and leaves significant discretion to the Executive Branch to interpret and pervert to its purposes:

Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or

official justification for banning this particular type of weapon was to reduce crime.¹⁶² It claimed that criminals were more likely to use cheap,

brought into the United States or any possession thereof in violation of the provisions of this chapter.

Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1217 (codified as 18 U.S.C. § 922(l)) (quotations in original). 18 U.S.C. § 925(d) lays out the exceptions with § 925(d)(3) giving authority to the Secretary of the Treasury (the Secretariat under which the Bureau of Alcohol, Tobacco, and Firearms fell) to determine which firearms met the definition of sporting purpose:

(d) The Secretary may authorize a firearm or ammunition to be imported or brought into the United States or any possession thereof if the person importing or bringing in the firearm or ammunition establishes to the satisfaction of the Secretary that the firearm or ammunition— . . . (3) is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 [firearms such as machine guns, short barreled rifles, and others which fall under the purview of the National Firearms Act of 1934] and is generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military firearms . . .

Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1225 (codified as 18 U.S.C. § 925(d)) (quotations in original).

162. Johnson, *supra* note 149; *see also* Gun Control Act of 1968 purpose statement: The Congress hereby declares that the purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence, and *it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.*

Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1213-14 (emphasis added).

Interestingly, Congress appears to recognize an individual right to possess and own firearms, but omits the defense of the nation from foreign invasion or tyranny through militia service as one of the express “lawful activit[ies].” Also, Congress appears to heavily shift the purpose of the right to keep and bear arms towards hunting and sportsmanship, activities which were ancillary to the original purpose of the right.

Further, in an ironic twist, Congress expresses its intent not to “restrict[] or burden . . . citizens with respect to . . . personal protection.” *Id.* Yet the interpretation by the Johnson administration which prevents the importation of affordable handguns appears to do exactly that. Strikingly, it only appears to burden the poor and economically challenged, who have traditionally and still remain minorities. The rich can afford expensive handguns for personal protection. They can also afford to live in suburbs or gated communities. It is the poor and downtrodden, who live in crime-ridden communities with low tax base and limited police protection, who desperately need access to cheap, affordable handguns.

widely available, and easily accessible handguns more often when committing crimes.¹⁶³ However, this assertion has been repeatedly questioned.¹⁶⁴ If the purpose of the provision in the Act was based on faulty

Many might be willing to sacrifice quality and durability simply to have a gun that would fire when they got mugged or their house was burglarized. For a family on a limited income, minimum wage, or public assistance, a \$50 revolver may be all it could afford. The Saturday Night Special provision of the Gun Control Act of 1968 may actually have increased crime, by exposing and leaving unarmed those most vulnerable to armed criminals who used stolen high-quality guns to ply their trade. *See infra* note 161 and *supra* note 163.

163. GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 83-84 (2d ed. 2005). “[I]t is asserted that [Saturday Night Specials] are more likely to be involved in crime than other types of handguns.” *Id.* at 84.

164. *See id.*

“Although expensive handguns are sometimes used in crime, the real enemy in the American Handgun War remains the small, cheap, easily concealable handgun.” This was a curious claim in light of the conclusions of a report sponsored by the Police Foundation and published 4 years earlier. This generally pro-[gun-]control report’s most widely cited conclusion was also the one most prominently summarized by the Foundation’s President, Patrick Murphy, in the report’s preface: “This evidence clearly indicates that the belief that so-called Saturday Night Specials (inexpensive handguns) are used to commit the great majority of these felonies is misleading and counterproductive.”

Id. at 84 (quotations in original); *see also* Marianne W. Zawitz, *Guns Used in Crime*, U.S. DEP’T OF JUSTICE, 2 (July 1995), <http://www.bjs.gov/content/pub/pdf/GUIC.PDF>.

Research by Wright and Rossi in the 1980’s found that most criminals prefer guns that are easily concealable, large caliber, and well made. Their studies also found that the handguns used by the felons interviewed were similar to the handguns available to the general public except that the criminals preferred larger caliber guns.

KLECK, *supra* at 163; *see also* Greg Ellifritz, *Criminals and the Guns They Carry*, CONCEALED CARRY MAGAZINE (Aug. 17, 2012), <https://www.usconcealedcarry.com/criminals-and-the-guns-they-carry>.

Of the 67 handguns carried by criminals in this study, only 17 of them (25 percent) were below .35 caliber. The vast majority were medium to larger caliber weapons. The guns were not all cheaply made either. The three most commonly represented handgun manufacturers in this study (Ruger, Smith and Wesson, and Glock) are generally known to make quality, reliable handguns. Only about 23 percent of the guns we took from criminals could be considered “Saturday Night Specials.”

KLECK, *supra* at 163; *see also* *Crime Study Shoots Holes in Gun Theory*, Milwaukee Sentinel reprinted. of Asso. Press Wire Service, February 28, 1977.

“Analysis of types of firearms confiscated suggests that price is not a significant factor in the handguns used for the commission of crimes,” the report said. “The data indicate that expensive handguns are used as often as inexpensive ones. [T]his finding bears directly on the potential of legislative proposals to

logic, it may be possible that there were other ulterior motives for including it.¹⁶⁵ One major indicator of these motives is the name itself given to these

ban certain types of handguns based on their quality,” it added. The analysis was contained in a report released Sunday by the Police Foundation, which conducted a two year research project to learn more about the kinds of guns used in crimes. The foundation is a private non-profit organization that promotes research on police issues Only 15.9% of the confiscated weapons were produced by companies primarily engaged in making cheap pistols known as Saturday night specials, the report said The study was based on data furnished by the FBI, the Bureau of Alcohol, Tobacco[,] and Firearms, and police departments in Atlanta, Baltimore, Boston, Chicago, Detroit, Houston, New York, Philadelphia, San Francisco[,] and Washington, D.C.

KLECK, *supra* at 163. Criminologist Markus T. Funk takes the analysis of the failed Saturday Night Special theory a step further and suggests that laws banning guns based on quality-control standards such as melt points may have been enacted for racially discriminatory purposes, and the laws inhibit the poor from obtaining affordable handguns for defense.

Some legislators, apparently due to either misinformation or personal biases (both racial and socioeconomic), have enacted melting-point laws that remove many of the lower-cost guns from the market as a method of crime prevention. Melting point laws, however, merely bar those of lesser economic means from having a way to protect themselves against the criminals that prey on them, and such an outcome is neither fair, nor is it criminologically sound.

Markus T. Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. OF CRIM. L. & CRIMINOLOGY 806 (1995), <http://www.jstor.org/stable/pdf/1144049.pdf>.

165. There is limited direct evidence that laws banning cheap, affordable handguns had a veiled discriminatory purpose. But certainly they affected the poor and minorities at disparate rates, when compared to whites.

A law that banned gun ownership by all persons with an annual gross family income under a given dollar amount would obviously be unfair and probably unconstitutional. Banning low-priced variants of a given product is functionally equivalent to such a law, as it has the same consequences. Drafters of existing [Saturday Night Special] legislation did not define the [Saturday Night Special] by retail price but rather by various criteria closely related to price. In some state laws the prohibited guns are defined by the temperature at which they melt, cheap guns being made of metal that melts at a relatively low temperature. In the [F]ederal [Gun Control Act of 1968] the guns banned from importation were defined as those “not suitable for sporting use”. . . . The definition was administratively applied through the use of a list of “factoring criteria” that gave points for each gun feature that supposedly made the gun more suitable for “sporting uses”—a longer barrel, adjustable sights, or a better quality metal. However, almost all of the features that earned points toward the minimum “qualifying score” were features that would also raise the price of the gun. Regardless of what definition of [Saturday Night Special] is used, the handguns that fall within its purview are mostly the low-priced guns that poor people are most able to afford.

KLECK, *supra* note 163, at 86.

cheap, low-quality handguns. The term “Saturday Night Special” first appeared in the weeks just prior to the passage of the Gun Control Act of 1968.¹⁶⁶ It is one dripping with racist history, as it is a fusion of two phrases—“Suicide Special” and “Nigger-town Saturday Night.”¹⁶⁷

The idea of banning the sale and possession of cheap handguns is not new. Laws aimed at stripping blacks of the ability to buy affordable guns date back to Reconstruction.¹⁶⁸ Nor are the ideas anachronisms. Cheap handguns have been the target of federal legislation in the 1960s, state legislation on many occasions, and are still a target today.¹⁶⁹ Whether these laws are intended to discriminate against minorities or simply price the

166. “Title IV of [the Gun Control Act of 1968] bans the importation of the cheap, small-caliber ‘Saturday-night specials’ that are a favorite of holdup men.” Graham, *supra* note 160, at 1.

167. DON B. KATES, JR., RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT, 11, 25 (1979).

168. See *supra* § III(B)(i). Courts have gone further in defining exactly what is meant by a Saturday Night Special. The Court of Appeals of Maryland defined them as follows: “Saturday Night Specials are generally characterized by short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability.” Kelley v. R.G. Indus., Inc. 497 A.2d 1143, 1153-54 (Md. App. Ct. 1985).

The court then went on to espouse that there were no lawful uses for these types of handguns. *Id.* at 1154. The court even considered an explanation from a salesman of the R.G. Industries (an importer of low-quality, cheap German revolvers): “[A] salesman for R.G. Industries, describing what he termed to be a ‘special attribute’ of a Rohm handgun, was said to have told a putative handgun marketer, ‘If your store is anywhere near a ghetto area, these ought to sell real well. This is most assuredly a ghetto gun.’” *Id.* at 1158.

However, the Maryland Appeals Court failed to recognize that these types of guns may be all that a poor minority could afford, and while these weapons may not be the most reliable or the most accurate, the economical use of affordable materials results in a low cost to the end user. The fact that the court even heard that they were likely to be strong sellers in the ghetto strengthens the notion that these sorts of guns were popular with poor minorities who could afford nothing better.

169. In 2013, U.S. Rep. Luis Gutierrez (D-Ill. 4) introduced legislation to restrict the domestic manufacture of non-sporting handguns, aimed at eradicating the market for affordable guns. He continues the myth of the Saturday Night Special and appears to ignore the need for poor minorities in Chicago to purchase affordable firearms to defend themselves.

“In spite of being widely considered unsuitable for self-defense or sporting, they are very popular crime guns,” Gutierrez said. Gutierrez’s bill would expand the ATF’s safety requirements for imported handguns to those manufactured domestically. It would also make it a federal crime to possess so-called “junk” handguns or transfer them to others.

Mike Lillis, *Democrat’s Bill Targets ‘Junk’ Handguns*, THE HILL (Mar. 4, 2013), <http://thehill.com/homenews/house/286029-dem-bill-targets-junk-handguns> (quotations in original).

poor out of the market for affordable handguns, the effect is the same: poor minorities are left unable to afford handguns for self-protection in the crime-ridden neighborhoods where they are most needed. This theory has been recognized by jurists as well as politicians¹⁷⁰ and should be given

170. In sharp contrast to the opinion about Saturday Night Specials held by the Maryland Court of Appeals in *Kelley v. R.G. Industries, Inc.* 497 A.2d 1143, 1153-54 (Md. App. Ct. 1985), the U.S. District Court for the District of Columbia recognized the impact that banning cheap handguns would have on the poor minorities in inner city slums.

The definition of "Saturday Night Special" is uncertain and may change depending upon the circumstances and facts of a given case. The definition clearly excludes the more expensive handguns on the market, but it is just as obvious that such weapons, being more accurate and more reliable are more dangerous and more likely to cause greater injury and harm

The effect of such a ruling would be to limit the supply of cheap handguns in the marketplace. While this Court understands that the effort of the Maryland court may be to reduce the number of cheap guns available to criminals, the result is that it may reduce the number of cheap guns available to law abiding citizens as well. The court in quoting comments relating to the "ghetto" and the assertion that such cheap weapons are "ghetto guns" does not define "ghetto". Is a "ghetto" a low income area, or an area made up of persons of a particular race or nationality, or an area where there is an abnormally high crime rate, or all or some of the above. Although the Maryland court does not attempt any definition of "ghetto", it does appear that the salesman who was quoted had very definite ideas as to what he meant by the reference to "ghetto", although he did not define the word. Other sources have defined "ghetto" as "a quarter of a city in which members of a minority, racial or cultural group live especially because of social, legal, or economic pressure." The salesman who was quoted seems to assume that anyone residing in a "ghetto" is criminal or suspect. The fact is, of course, that while blighted areas may be some of the breeding places of crime, *not all residents of are so engaged, and indeed, most persons who live there are lawabiding but have no other choice of location. But they, like their counterparts in other areas of the city, may seek to protect themselves, their families and their property against crime, and indeed, may feel an even greater need to do so since the crime rate in their community may be higher than in other areas of the city.* Since one of the reasons they are likely to be living in the "ghetto" may be due to low income or unemployment, *it is highly unlikely that they would have the resources or worth to buy an expensive handgun for self defense. To remove cheap weapons from the community may very well remove a form of protection assuming that all citizens are entitled to possess guns for defense.* This may be one explanation why the Saturday Night Special has a high rate of sale in the low income community. It also raises a question concerning the validity of legislation or court decisions which seek to remove cheaper guns from the market place without taking similar action against higher priced weapons.

Delahanty v. Hinckley, 686 F. Supp. 920, 928-29 (D.D.C. 1986) (internal citations omitted) (emphasis added). Interestingly, this case arose from the assassination attempt on President

strong consideration when evaluating the motives behind and the effects of gun control legislation aimed at banning affordable handguns. This sort of legislation reeks of the past attempts to disarm blacks through economic manipulation of the handgun market. It has a discriminatory effect which primarily affects blacks and other poor minorities, and the term itself used to describe the guns is plainly racist.

2. Using Gun Control Laws to Eliminate the Ability to Purchase a Firearm

There are other ways in which laws can be used to stifle gun ownership. In some states and localities, the process to legally purchase a firearm is extensive.¹⁷¹ Federal law prevents citizens from purchasing handguns in any state except their state of residence. The same law prevents citizens from transferring firearms purchased from dealers in other states, except through a dealer in the citizens' home state. Heavy federal, state, and local regulation on dealers can make it difficult to open and maintain a gun store.¹⁷² These

Ronald Reagan on March 30, 1981. John Hinckley, Jr., shot President Reagan with an RG-14, a .22 caliber revolver of the type banned from importation by the Gun Control Act of 1968. Also severely wounded in the shooting was Secretary of State James Brady. His death in 2014, over thirty years after the shooting, was ruled a homicide as it was attributed to the injuries he sustained in 1981. Peter Hermann & Michael Reane, *Medical Examiner Rules James Brady's Death a Homicide*, WASH. POST (Aug. 8, 2014), https://www.washingtonpost.com/local/crime/james-bradys-death-ruled-homicide-by-dc-medical-examiner/2014/08/08/686de224-1f41-11e4-82f9-2cd6fa8da5c4_story.html.

His wife, Sarah Brady, would align with Handgun Control Inc. (HCI), the preeminent gun control activist group for the 1980's and 1990's. She would become its president in 1989. In 2001, HCI was renamed the Brady Campaign to Prevent Gun Violence, in honor of the Bradys' work in the gun control field. The group's preeminent legislative success was the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993), commonly referred to as the Brady Bill. This law instituted the process of background checks for retail purchasers of handguns from Federal Firearms Licensees. The Brady Campaign continues today in its push for further gun control legislation at the national, state, and local level. *Jim and Sarah Brady*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/jim-and-sarah-brady> (last visited Oct. 27, 2016).

171. See *Firearms Licenses*, NEW YORK POLICE DEPT, http://www.nyc.gov/html/nypd/html/firearms_licensing/handgun_licensing_information.shtml; *Frequently Asked Questions*, ILLINOIS STATE POLICE, <https://www.ispsfb.com/Public/Faq.aspx>; Brian MacQuarrie, *Want a Gun License in Massachusetts? Much Depends on Where You Live*, BOSTON GLOBE (Mar. 11, 2013), <http://archive.boston.com/news/local/massachusetts/2013/03/10/want-gun-license-massachusetts-much-depends-where-you-live/04SFwTtEpGdtEHm5mTQuSO/story.html>; *Metropolitan Police Department*, DC.GOV, <http://mpdc.dc.gov/service/firearm-registration-district-columbia>; see also EMILY MILLER, EMILY GETS HER GUN ... BUT OBAMA WANTS TO TAKE YOURS 1-4 (2013).

172. See *Licensing*, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, <https://www.atf.gov/qa-category/licensing>; see also Lizzie Johnson, *San Francisco's Last Gun Shop Gives Up the*

factors, combined with a political climate that is vehemently anti-gun,¹⁷³ make it virtually impossible for a person to purchase a handgun. When this perfect storm hits inner city environments full of poor minorities,¹⁷⁴ the effect is a complete inability for the poorest and most downtrodden to legally defend themselves.

The most glaring example is the United States' capital. The District of Columbia has some of the most stringent gun control laws in the nation.¹⁷⁵ Despite the government's insistence that there are six licensed gun dealers in the District,¹⁷⁶ only one sells guns to individual citizens.¹⁷⁷ "You can't just go out and legally buy a gun in the nation's capital. If you purchase a pistol from another state, whether in person or over the Internet, you can't ship it to your residence in the District, nor can you drive it back over the Potomac

Fight, S.F. CHRONICLE (Oct. 30, 2015), <http://www.sfchronicle.com/bayarea/article/San-Francisco-s-last-gun-shop-gives-up-the-fight-6601929.php>.

173. See *Supreme Court Shoots Down D.C. Gun Ban*, CBS NEWS (June 26, 2008), <http://www.cbsnews.com/news/supreme-court-shoots-down-dc-gun-ban/>; see also Emily Miller, MILLER: D.C.'s Only Gun Source, WASH. TIMES (Oct. 11, 2011), <http://www.washingtontimes.com/blog/guns/2011/oct/11/miller-dcs-only-gun-source/>. When asked about his support regarding a citizen's right to keep and bear arms, D.C. Council Chairman Kwame Brown (D) stated, "I don't support having more guns in the District of Columbia." He also replied, "I don't think we need more guns in our streets." *Id.* Soon after, Brown resigned from the Council in 2012 following his indictment on federal bank fraud charges. See Del Quentin Wilber & Tim Craig, *Kwame R. Brown, D.C. Council Chairman, Resigns After Being Charged with Bank Fraud*, WASH. POST (June 6, 2012), https://www.washingtonpost.com/local/crime/2012/06/06/gJQAUxJqIV_story.html.

174. Demographic makeup of the District of Columbia includes 48.3% blacks. See *QuickFacts: District of Columbia*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/11001.00>. It also includes a citywide 18.4% poverty rate. *Id.*

175. Abby D. Phillip, *D.C. Gun Laws Some of the Strictest in the U.S.*, ABC NEWS (Sept. 17, 2013), <http://abcnews.go.com/blogs/politics/2013/09/d-c-gun-laws-some-of-the-strictest-in-the-u-s/>.

176. There are officially 28 Federal Firearms Licensees in the District of Columbia. However, only 6 of these are Type 01 Dealers, which the ATF describes as "Dealer[s] in Firearms Other Than Destructive Devices (Includes Gunsmiths)." There are no Type 02 Dealers in the District, which the ATF describes as "Pawnbroker[s] in Firearms Other Than Destructive Devices." The rest (21 Licensees) are Type 03, "Collector[s] of Curios and Relics," who cannot sell guns to the public. There is also one Type 08 licensee, an "Importer of Firearms Other Than Destructive Devices." Importers also cannot sell guns to the public. See *Listing of Federal Firearms Licensees (FFLs)—2015*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, <https://www.atf.gov/firearms/listing-federal-firearms-licensees-ffls-2015> (last visited Jan. 25, 2016) (select XLS under "Complete Listing" and then review the downloaded file); see also *Report of Active Firearms Licenses—License Type by State Statistic*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES (Jan. 11, 2016), <https://www.atf.gov/file/101746/download>.

177. Miller, *supra* note 173.

river.”¹⁷⁸ The only way to get the firearm legally into the District is to transfer it through a Federal Firearms Licensee, or FFL, commonly referred to as a Dealer. Charles Sykes, the only FFL who sells firearms to District residents, does not even keep normal business hours.¹⁷⁹ In fact, he does not even have inventory. Instead, he merely transfers firearms purchased elsewhere to residents of the District.¹⁸⁰

Sykes saw firsthand the way that the red tape found in stringent and cumbersome gun control laws and zoning ordinances can be used to strangle gun shops. The city wielded these laws against him in 2010, almost running him out of business.¹⁸¹ With the threat of the only gun shop closing, the possibility of poor minorities in the crime-ridden District being unable to legally acquire a handgun for self-defense became clear. Further adding to the frustrations for the poor trying to purchase an affordable handgun are the fees involved. Sykes charges \$125 just to transfer a handgun and process the paperwork.¹⁸² That sum does not include the cost

178. *Id.*

179. *Id.*

180. “Currently, there is only one licensed gun dealer in the city, and even he doesn’t sell guns. He just acts as a middleman for residents who own guns outside the district or purchase them in surrounding areas and have them shipped in.” Josh Fatzick, *DC Police Chief Welcomes Gun Stores to District*, DAILY CALLER (Apr. 6, 2015), <http://dailycaller.com/2015/04/06/dc-police-chief-welcomes-gun-stores-to-district/>.

181. In an interview with Washington Post reporter Emily Miller, Sykes described the frustration he faced from governmental red tape when he lost the lease for his retail establishment and needed to move his shop. Miller reported:

Last May, Mr. Sykes lost his lease when his office building was sold. The city then took advantage of a stray word in the law to classify his business as a “firearms retail sales establishment,” which made it almost impossible for him to relocate. The designation meant he couldn’t be within a football field’s distance from a school, church, apartment, house or library. In this tightly packed city, that left no reasonably priced options. The city gave him a small-scale map of where he could set up shop, but the map didn’t even have street names on it.

Miller, *supra* note 173. Oddly, the ATF still lists Sykes as an FFL Type 01 Dealer. *Listing of Federal Firearms Licenses (FFLs)—2016*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, <https://www.atf.gov/firearms/listing-federal-firearms-licensees-ffls-2016> (select XLS under “Complete Listing” and then review the downloaded file). But the Washington Metropolitan Police Department claims there are currently no dealers available in the District. DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, DISTRICT OF COLUMBIA FIREARMS REGISTRATION GENERAL REQUIREMENTS GUIDE 5 (2013), http://otr.cfo.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/firearms_reg_req.pdf (last visited Jan. 25, 2016). “At the time of this publication, no FFLs in the District are providing retail sales to the public.” *Id.*

182. Miller, *supra* note 173.

of the gun, sales tax,¹⁸³ the licensing fees charged by the District of Columbia,¹⁸⁴ or shipping.¹⁸⁵ For poor minorities who may barely be able to afford a \$50 handgun for self-defense, the total cost to acquire a handgun in the District is over \$250,¹⁸⁶ with another \$48 due every three years.¹⁸⁷

B. Voting Disenfranchisement Compared to Modern Gun Control Schemes

In order to explore the racially discriminatory policies in place in gun control today, it is helpful to examine similar policies used to disenfranchise minorities with regard to voting in years past. The Supreme Court has “referred to the political franchise of voting as a fundamental political

183. The current tax rate for tangible personal property in the District is 5.7%. *Tax Rates and Revenues, Sales and Use Taxes*, OFFICE OF THE CHIEF FINANCIAL OFFICER, <http://cfo.dc.gov/node/232962> (last visited Jan. 25, 2016).

184. The current published licensing fee is \$48, consisting of \$13 application fee and \$35 fingerprinting and background check fee. DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, DISTRICT OF COLUMBIA FIREARMS REGISTRATION GENERAL REQUIREMENTS GUIDE 7 (2013) (quoting D.C. Code § 7-2502.07(a) (2012)), http://otr.cfo.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/firearms_reg_req.pdf. This fee is due every three years. *Id.* at 4.

185. Individuals cannot ship handguns via U.S. Postal Service. The Gun Control Act of 1968 requires individuals to ship handguns via common carrier, such as UPS or FedEx (though these companies are under no obligation to do so). *See* 18 U.S.C. § 1715. Both of these companies have internal policies requiring that firearms be shipped at expedited rates, adding significantly to the cost. *See* UNITED PARCEL SERVICE, 2016 UPS RATES AND SERVICES GUIDE, UPS Tariff/Terms and Conditions of Service—United States § 3.6.1 (2016), https://www.ups.com/media/en/daily_rates.pdf (“UPS, in its sole and unlimited discretion, may require the Shipper to select a UPS Next Day Air® delivery service for any Package containing a firearm. Handguns (as defined by 18 U.S.C. § 921) will be accepted for transportation only via a UPS Next Day Air delivery service.”); *see also* FEDERAL EXPRESS, FEDEX EXPRESS TERMS AND CONDITIONS, U.S. SHIPMENTS, 7 (2016), http://images.fedex.com/us/services/pdf/SG_TermsCond_US_2016.pdf (“Firearms must be shipped via FedEx Priority Overnight service. FedEx Express cannot ship or deliver firearms C.O.D. Firearms shipments cannot be placed in a FedEx Express Drop Box.”). The buyer may have no ability to manipulate which carrier a dealer uses to ship a firearm.

186. The following calculations were used: \$50 retail cost for a cheap handgun similar to the type described above, *see supra* § IV(A)(1); \$2.87 sales tax, *see* OFFICE OF THE CHIEF FINANCIAL OFFICER, *supra* note 183; \$48 license fee, *see* DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, *supra* note 184, at 8; \$28.72 shipping, United Parcel Service Next Day Air from Manassas, Virginia to Washington, D.C., using a Priority Small Box weighing 1.0lb, *see Create a Shipment*, UNITED PARCEL SERVICE, https://www.ups.com/uis/ctcCreate?ActionOriginPair=SeamlessExperience___StartSession&doc=en_US (last visited Jan. 25, 2016); and \$125 FFL Transfer Fee, *see* Miller, *supra* note 173.

187. *See* DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, *supra* note 184, at 4.

right”¹⁸⁸ and stated that “the right of suffrage is a fundamental matter in a free and democratic society.”¹⁸⁹ In modern times, voting rights are doggedly guarded by civil rights advocates and civil libertarians. However, during the hundred years between the Civil War and the passage of the Civil Rights Act of 1964, many dirty tricks were used to prevent blacks from participating in the political process and gaining power. Two of the most sinister non-violent techniques used to prevent blacks from exerting their newfound political power in the post-Reconstruction era were the poll tax¹⁹⁰ and the literacy test.¹⁹¹

Poll taxes surprisingly lasted longer than one would imagine, given their clear intention to skirt the Reconstruction Amendments. Initially, poll taxes were even upheld by the Supreme Court.¹⁹² However, the states ratified the Twenty-Fourth Amendment in 1964, thereby overriding all preceding Supreme Court decisions and holding that all poll taxes for federal elections were unconstitutional.¹⁹³ Two years later, with the 1966 decision in *Harper*

188. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

189. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

190. Poll taxes were used in many southern states, including Virginia. Virginia instituted a poll tax during the Constitutional Convention of 1901-1902, intended specifically to disenfranchise blacks. VIRGINIUS DABNEY, *VIRGINIA: THE NEW DOMINION* 435-37 (1971). Carter Glass, a newspaper man who at the time of the convention was the Virginia state senator from Lynchburg and who later would be a U.S. Congressman and Senator, made clear the intent of the poll tax: “Negro enfranchisement [is] a crime to begin with and a wretched failure to the end, [and] the unlawful but necessary expedients employed to preserve us from the evil effects of the thing were debauching the morals and warping the intellect of our own race.” *Id.* at 436 (internal quotations omitted). At \$1.50, the tax appears miniscule today. *Id.* at 437. But it would be equivalent to \$40.34 today, based on the Bureau of Labor Statistics Consumer Price Index, and historical inflation data compiled by Professor Robert Sahr, of Oregon State University. See INFLATION CALCULATOR, <http://www.in2013dollars.com/1901-dollars-in-2016?amount=1.50> (last visited Feb. 29, 2016).

191. See *infra* note 221.

192. *Breedlove v. Suttles*, 302 U.S. 277 (1937).

To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the state and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the state may condition suffrage as it deems appropriate.

Id. at 283.

193. U.S. CONST. amend. XXIV. “The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the

v. Virginia State Board of Elections, the Court proscribed poll taxes in all state and local elections, in addition to federal elections.¹⁹⁴ Finding poll taxes to be “disfavored”, “capricious”, “irrelevant”, and “invidious”,¹⁹⁵ the Court reversed *Breedlove*.¹⁹⁶

There are strong parallels between poll taxes, literacy tests, and certain gun control schemes. As these parallels are explored, one should consider the policies behind the voting disenfranchisement tools and compare them with the policies used for hundreds of years to prevent blacks and other minorities from owning guns. In that light, the seemingly innocent schemes seem much more disquieting.

1. Permits, Licenses, and Fees

One common gun control scheme is the permitting process. The process differs from one jurisdiction to another, but the basic premise requires an application be submitted, a fee to be paid, and often an interview be conducted.¹⁹⁷ The handgun licensing process for New York City is

United States or any State by reason of failure to pay any poll tax or other tax.” Id. (emphasis added).

In a per curiam decision analyzing the Twenty-Fourth Amendment, the U.S. District Court for the Southern District of Mississippi held:

It was the clear intention and purpose of the Twenty-Fourth Amendment to the Federal Constitution that neither the United States, nor any state should impair the vested right of duly registered voter to vote by reason of his failure to pay a poll tax. No state is thus permitted to circumscribe or burden or impair or impede the right of a voter to free and effective exercise and enjoyment of his franchise in any election for a Federal official “by reason of failure to pay any poll tax”, as the amendment expressly provides.

Gray v. Johnson, 234 F. Supp. 743, 746 (S.D. Miss. 1964).

194. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.

Id. at 666.

195. *Id.* at 668.

196. “*Breedlove v. Suttles* sanctioned [the] use [of poll taxes] as ‘a prerequisite of voting.’ To that extent the *Breedlove* case is overruled.” *Id.* at 669 (quoting *Breedlove v. Suttles*, 302 U.S. 277 (1937)).

197. The requirement for an in-person appearance or an interview should immediately trigger memories of the in-person license applications used in the South to prevent blacks from owning firearms. See *supra* note 89. The NYPD includes some incredibly dangerous and suspect language which is representative of many license applications across the nation:

extensive. Managed by the New York Police Department (NYPD), separate licenses are required to possess (keep) and to carry (bear) a firearm.¹⁹⁸ A license is required merely to possess a handgun in the home.¹⁹⁹ The licensing procedure requires that applicants complete an application, submit to fingerprinting, supply substantial amounts of documentation, and show that owning a handgun is necessary by completing a “Letter of Necessity.”²⁰⁰

Most alarming in the NYPD’s process is the draconian fee. Combined fees of almost five hundred dollars²⁰¹ are required to obtain a license merely to possess a handgun in the home for self-defense, a right held by the Court to be fundamental.²⁰² Illinois uses a similar scheme, requiring a ten-dollar fee for each Firearms Owners’ Identification Card.²⁰³

This financial imposition on a fundamental right directly correlates with a poll tax. As the Court stated in *Harper*, “To introduce wealth or payment

“If your investigation results in a determination that you lack character and fitness for a license or permit, your application will be denied.” See *Firearms Licenses—Gun Licensing FAQ*, NEW YORK POLICE DEP’T, http://www.nyc.gov/html/nypd/html/firearms_licensing/gun_licensing_faqs.html (last visited Feb. 29, 2016).

198. See *Firearms Licenses—Handgun License Information, Types of Licenses*, NEW YORK POLICE DEP’T, http://www.nyc.gov/html/nypd/html/firearms_licensing/handgun_licensing_information.shtml (last visited Feb. 29, 2016).

199. “PREMISES LICENSE: IS A RESTRICTED TYPE OF LICENSE. It is issued for your RESIDENCE or BUSINESS. The Licensee may possess a handgun ONLY on the premises of the address indicated on the front of the license. Licensees may also transport their handguns and ammunition in SEPARATE LOCKED CONTAINERS, DIRECTLY to and from an authorized range, or hunting location. HANDGUNS MUST BE UNLOADED while being transported.” *Id.* (emphasis in original).

200. “If you decide to apply for a license you must APPEAR IN PERSON at the License Division with the completed application, the documents specified in the application instructions, the application fee, and the fingerprint fee After you file your application you will be contacted for an interview and may be required to submit additional documentation.” *Id.* (emphasis in original).

201. The application fee is \$340, with an additional \$89.75 required for fingerprint processing. *Id.*

202. See *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

203. See *Checklist Prior to Applying, Firearms Owners Identification* (FOID), ILLINOIS STATE POLICE (Oct. 9 2014), <https://www.ispfsb.com/Public/FOID.aspx> (click “Checklist prior to applying”). The Illinois FOID application also requires a head-and-shoulders photograph of the applicant. While proponents may argue that this is to ensure the card bearer is who he says he is, the possibility for abuse in the racial discrimination context cannot be ignored. It harkens to the days when the southern Sheriff would call an applicant in, look at him, and immediately deny the application based on his observations of the applicant’s race. See *supra* note 89.

of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an invidious discrimination.”²⁰⁴ In the context of keeping a handgun in the home, and when viewed with the memory of the hundreds of years of racial discrimination in gun control laws, the requirement of paying a fee should trigger suspicion in even the most seemingly-benign examples.

In *Harper*, the Court concluded, “The principle that denies the State the right to dilute the citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.”²⁰⁵ The same analogy extends to the fundamental right of keeping and bearing arms, and the same obstruction of this right by the state imposing a fee should be equally barred.

The similarities between disenfranchisement and disarmament of blacks throughout American history are striking. They have followed hand in hand, often using similar techniques for the same discriminatory purpose. Early in the United States' history, these techniques were express; later, they were implied. Still, the same undercurrent has been present: prevent the empowerment of blacks. Even today, the imposition of a paltry fee to obtain an identification card to vote is attacked venomously as racist in nature,²⁰⁶ yet almost five hundred dollars in fees to exercise another fundamental right is not questioned. As the Court noted in *Harper*, “[t]he degree of the discrimination is irrelevant.”²⁰⁷ When viewed in the light of the Equal Protection Clause, a ten-dollar fee to possess and keep a handgun in the home is just as evil as five hundred dollars. Neither should be allowed in

204. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (internal citations omitted) (quoting *Skinner v. State of Oklahoma*, 316 U.S. 535).

205. *Id.*

206. Politico magazine reported on Attorney General Eric Holder's denouncement of laws requiring identification cards to vote during a speech in South Carolina in 2012:

Citing the “drumbeat of concern” he has encountered from Americans across the country about discrimination in the election systems, the attorney general vowed that the Justice Department was more committed than ever before to enforcing the Voting Rights Act. Holder promised to continue reviewing recently proposed changes to the election system, including those that govern third-party voter registration organizations, early voting and photo identification requirements, with the goal of ensuring that there is “no discriminatory purpose or effect.”

MJ Lee, *Holder: Same Voting Issues as MLK*, POLITICO (Jan. 16, 2012), <http://www.politico.com/story/2012/01/holder-same-voting-issues-as-mlk-071476>.

207. *Harper*, 383 U.S. at 668.

order to prevent the possibility of states and localities from continuing to use gun control laws to discriminate against minorities.

2. Taxation as a Bar to Ownership

One gun control technique that harkens to the days of poll taxes is a specific sales or ownership tax on firearms or ammunition. The city of Seattle recently passed a unique sales tax aimed at retail sales of firearms.²⁰⁸ This taxation scheme is purported to “promote public safety, prevent gun violence, and address in part the cost of gun violence in the City [of Seattle].”²⁰⁹ However, by levying a \$25 tax on every firearm sold by retailers within the City of Seattle,²¹⁰ poor minorities are deterred even further from obtaining affordable arms for their defense.

As noted in Section IV(A)(iii), the poor already face significant financial hurdles in arming themselves, and a tax, appearing to be very minor for a pistol that retails for close to \$600,²¹¹ can be prohibitory on a \$50 revolver. By requiring the tax for all firearms sold new by retailers, the city of Seattle has put significant barriers on the indigent from exercising their fundamental right to own a handgun and keep it in their home.²¹²

More egregious is the \$1,000-per-handgun excise tax recently passed by the U.S. Territory of North Marianas (also known as the Commonwealth of

208. Seattle Municipal Code § 5.50.030, *amended* August 3, 2015 (This ordinance has been passed but has not yet been codified.); *see* City of Seattle Ordinance 124833, https://www.municode.com/library/wa/seattle/codes/municipal_code (last visited Feb. 28, 2016).

209. City of Seattle Ordinance 124833, Resolution § 1, https://www.municode.com/library/wa/seattle/codes/municipal_code (last visited Feb. 28, 2016).

The City finds and declares that gun violence directly affects the City and its residents. Therefore, the City intends to exercise its taxing authority, as granted by the Washington State Constitution and as authorized by the Washington State Legislature, to raise general revenue for the City and to use that revenue to provide broad-based public benefits for residents of Seattle related to gun violence by funding programs that promote public safety, prevent gun violence[,] and address in part the cost of gun violence in the City.

Id.

210. Seattle Municipal Code § 5.50.030, *amended* August 3, 2015. *See* City of Seattle Ordinance 124833, https://www.municode.com/library/wa/seattle/codes/municipal_code (last visited Feb. 28, 2016).

211. The popular Smith and Wesson M&P semi-automatic pistol, chambered in 9mm Parabellum, has a manufacturer’s suggested retail price of \$569. *See* SMITH & WESSON, http://www.smith-wesson.com/webapp/wcs/stores/servlet/Product4_750001_750051_769001_1_757954_757781_757781_ProductDisplayErrorView_Y (last visited Feb. 28, 2016).

212. *See* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010); District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

the North Marianas Islands, or CNMI).²¹³ The CNMI admits (at great pain)²¹⁴ that the Second Amendment applies to the island territory, and therefore, it cannot continue its previous total ban on handguns.²¹⁵ Clearly aimed at pricing handguns out of reach of most people,²¹⁶ this law taxes

213. 4 N. MAR. I. CODE § 1402(h). “*Pistols*. \$1,000 per pistol. Pistol shall have the same meaning as set forth in Title 6, Division 10 of the Commonwealth Code. The exemption for Nonbusiness Use, 4 CMC § 1402(d) shall not apply to the excise tax imposed on pistols. This provision shall automatically expire one year after the effective date of the Special Act for Firearms Enforcement.” *Id.* (emphasis in original).

214. “*Unfortunately*, on March 28, 2016, the United States District Court for the District of Northern Mariana Islands held that the Second Amendment applies to the Commonwealth.” Special Act for Firearms Enforcement, 6 N. MAR. I CODE § 10101, Comm’n Comment § 2 “Findings and Purpose” (emphasis added). “The Second Amendment, through the Due Process Clause of the Fourteenth Amendment, applies against the states. Accordingly, the Second Amendment applies with full force in the Commonwealth as if it were a state.” *Radich v. Guerrero*, 2016 WL 1212437 at *3 (Dist. N. Mar. 2016), *appeal docketed*, No. 16-16065 (9th Cir., June 15, 2016).

215. *Id.*

The Commonwealth, like the District of Columbia in *Heller*, categorically bans handguns. 6 CMC §§ 2222(e) (“No person shall . . . [i]mport, sell, transfer, give away, purchase, possess or use any handgun, automatic weapon, or ammunition other than” .22 or .223 caliber rifles or .410 gauge shotguns). 2301(a)(3) (stating that it is unlawful to import contraband, including firearms other than .22 or .223 caliber rifles or .410 gauge shotguns). Because the Commonwealth’s ban on handguns cannot be squared with the Second Amendment right described in *Heller* and *McDonald* and applied in the CNMI pursuant to the Covenant, it is invalid and must be enjoined.

Id.

216. Special Act for Firearms Enforcement, 6 N. MAR. I. CODE § 10101, Comm’n Comment § 2 “Findings and Purpose.”

Section 2. Findings and Purpose. The Legislature finds that human life is the most precious thing in the entire world. The Legislature finds that providing safety and the protection of human life to be the highest duty of government. The Legislature finds that *the current firearms laws, which ban handguns*, rifles in calibers larger than .223, and shotguns with a bore diameter [larger than] .410, *protect human life and ensure public safety by outlawing firearms whose primary purpose is offense against human beings . . . the Legislature finds that the vast majority of the inhabitants of the Commonwealth strongly oppose the legalization of handguns* because they rightly fear that the largescale introduction of handguns will undermine our peaceful communities.

Unfortunately, the current firearms laws of the Commonwealth, and the People’s desire to prevent the introduction of handguns into our communities, are at odds with the Second Amendment to the United States Constitution. The Legislature recognizes its solemn duty to uphold and protect the United States and Commonwealth Constitutions. Therefore, *the Legislature reluctantly*

every handgun purchased from a dealer at the obscene rate of \$1,000 per firearm.

Since handguns could not be owned or imported into the CNMI prior to *Radich*,²¹⁷ the passage of the SAFE Act ensures that all handguns imported for sale will be subject to the \$1,000 excise tax,²¹⁸ it is safe to say that all handguns available for private ownership in the Northern Marianas will be subject to the \$1,000 excise tax. This will likely affect the market, skewing it drastically and further adversely affecting poor minorities. Worse still, this taxation scheme has been suggested to be a “role model” for other states and localities to follow in order to effectively ban handgun possession.²¹⁹

This same \$1,000 tax, when added to the price of the \$50 handgun, would prevent most any impoverished person from being able to afford to purchase a handgun for self-defense. While not expressly directed at any particular race, the CNMI handgun tax cannot be interpreted different than a poll tax: a direct tax placed on the exercise of a constitutional right and one which will effectively prevent poor minorities from enjoying the right.

It is clear that any poll tax, however small or insignificant, is absolutely unconstitutional.²²⁰ This is because of the long-standing stain of racial discrimination associated with poll taxes and voter disenfranchisement. Considering that voting is not even a constitutional right but merely a political one, it would follow that if the same stain exists as applied to the right to keep and bear arms (a *fundamental* right), then the same taxation (in whatever form it appears, be it a tax, fee, or license) should meet the same fate as the poll tax.

accepts that it must legalize the ownership and possession of firearms to the extent required by the Second Amendment.

Id. (emphasis added).

217. See 6 N. MAR. I. CODE § 10101, Comm’n Comment § 2 “Findings and Purpose”; see also *Radich*, 2016 WL 1212437 at *3.

218. See 4 N. MAR. I. CODE § 1402(h). Just prior to publication of this Comment, this code section was struck down as unconstitutional on multiple grounds. See *Murphy v. Guerrero*, 2016 WL 5508998 (Dist. N. Mar. 2016).

219. “The administration of Gov. Ralph DLG Torres defended the CNMI’s new gun control laws on Friday as a law that could be ‘a role model’ for other U.S. states and jurisdictions facing seemingly uncontrolled and continued gun violence.” Dennis B. Chan, *Administration Defends New Gun Law*, SAIPAN TRIBUNE (Apr. 18, 2016), <http://www.saipantribune.com/index.php/administration-defends-new-gun-law/#>.

220. See generally *supra* § IV(B).

3. Literacy Tests Compared to Written Applications, Safety Tests, and Essay Requirements

One of the most diabolical and racially discriminatory schemes in the history of the fight against minority disenfranchisement was the literacy test.²²¹ Knowing that former slaves (who were mostly blacks) and many

221. The cultural and legal history surrounding literacy tests is expansive. A proper analysis of the tests and their usage is beyond the scope of this Comment. I will attempt to summarize the highlights of the history surrounding their use and prohibition. The general rule to take away is that literacy tests have not been ruled unconstitutional per se, but the stain of racial discrimination associated with them is so strong as to render them repulsive to the workings of good government.

The contention of this comment is that the same stain exists when tests relying on the literacy of a person attempting to exercise his rights under the Second Amendment, and the same repulsiveness should be found.

Following the ratification of the Reconstruction Amendments (U.S. CONST. amend. XIII, XIV, and XV), the former Confederate states attempted to find ways to legally circumvent the anti-discrimination provisions that the amendments provided. One of the most effective (given the high rates of black illiteracy), yet facially-nondiscriminatory, was the literacy test. Various suffrage requirements that citizens wishing to vote must be able to read, write, or read and write various documents (often, ironically, the Constitution itself) were enacted in all of the former confederate states to some degree.

Virginia was one of these states that employed poll taxes and literacy tests as a barrier to suffrage. The Commonwealth held a convention to update the state constitution, meeting in Richmond from June 1901 until June 1902.

[T]he [state constitutional convention] delegates settled on provisions that eventually would disfranchise most black Virginians and about half of the white electorate as well through the imposition of a poll tax and other constitutional restrictions, including literacy and understanding clauses. Recent U.S. Supreme Court decisions had encouraged Southern states to use such subterfuges to circumvent the Fifteenth Amendment that prevented discrimination by race in voting.

RONALD HEINEMANN, *OLD DOMINION, NEW COMMONWEALTH: A HISTORY OF VIRGINIA, 1607-2007* 277 (2007). Special thanks to Professor Heinemann, who suffered patiently through my hard-headed attempts to learn history from him during my time at Hampden-Sydney College.

Virginia's literacy test required a "reasonable explanation" of any portion of the state constitution. *Voting Rights*, VIRGINIA HISTORICAL SOCIETY, <http://www.vahistorical.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/voting-rights> (last visited July 28, 2016).

In a travesty of justice, the U.S. Supreme Court refused to strike down an Alabama literacy test as violating the Fifteenth Amendment. The statute required that "after January 1, 1903, only the following persons are entitled to register: First. Those who can read and write any article of the Constitution of the United States in the English language . . ." *Giles v. Harris*, 189 U.S. 475, 483 (1903). Giles, an otherwise-qualified black man who demanded to be registered to vote, appealed to the Court for relief. Justice Oliver Wendell Holmes trapped

poor whites (who often served as a political threat to those in power) could not read, many states introduced literacy tests as a prerequisite to vote. Often, these laws included grandfather provisions,²²² intended to exclude whites from having to satisfy the requirements.

Giles in a Catch-22 of strained logic: either the entire provision was invalid, and thus Giles could not be registered to vote and therefore could not be granted relief by the Court, or the provision was valid, and Giles was properly exempted. Justice Holmes refused to consider the constitutionality of the provision against the Fifteenth Amendment. *Id.* at 486-88.

The use of literacy tests in the South continued undaunted until Congress acted. The Voting Rights Act of 1965 (VRA '65) forbade, with limited exception, the use of "any literacy test as a qualification for voting in any election." Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); see 52 U.S.C. § 10101. The constitutional validity of this congressional solution was upheld by the Supreme Court in *Katzenbach v. Morgan*, 384 U.S. 641, 657-58 (1966).

However, originally the VRA '65 only applied to states in which less than 50% of voting-age residents were registered as of November 1, 1964, or who had voted in the 1964 election. This was a targeted congressional attempt to eliminate the discriminatory practices used by southern states. In 1970, Congress amended the VRA '65 and expanded the ban on literacy tests to the entire country. The Supreme Court upheld this ban on literacy tests as constitutional in *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970).

222. A "grandfather provision" is a colloquial term for which the original meaning was quite literal. It has since lost its literal connotation through regular use, but the underlying meaning is still clear: an exemption will be made for some people from certain standards or laws in order to allow those people to continue the proscribed conduct unimpaired by the new law.

However, in the past, it meant most literally that the exemption applied based on one's grandfather (or ancestral lineage). An Oklahoma constitutional amendment was a source of litigation in the U.S. Supreme Court. See *Guinn v. U.S.*, 238 U.S. 347 (1915). The original Oklahoma Constitutional provision declared:

The qualified electors of the state shall be male citizens of the United States, male citizens of the state, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the state one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote.

Id. at 357 (quoting OKLA. CONST. § 4(a), art. 3). An amendment had been passed, which was the subject of the litigation. The United States government alleged that the amendment violated the recently-passed Fifteenth Amendment of the federal Constitution. The amendment stated:

No person shall be registered as an elector of this state or be allowed to vote in any election held therein, unless he be able to read and write any section of the Constitution of the state of Oklahoma; but no person who was, on January 1st, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution.

After a hundred years of legislation and litigation, the nation now recognizes literacy tests as a basic infringement on the right to vote. Literacy tests hold an especially hideous connotation based on their specific employment to disenfranchise blacks and prevent them from gaining legitimate representative power. When the same techniques are used as a barrier to a fundamental right based in racism, the same conclusion should follow. Many common gun control schemes incorporate provisions that reek of the literacy test. Many states and localities require safety training prior to the issuance of firearms permits. Often, this training includes testing, which requires the applicant be able to read in order to successfully complete the test.

One such test is employed in the small community of Lowell, Massachusetts, and is exemplary of the literacy barrier placed in front of those wishing to exercise their rights under the Second Amendment. Administered at the sole discretion of Police Superintendent William Taylor,²²³ the

policy requires anyone seeking a license-to-carry to take a gun-safety course. Anyone applying for an unrestricted gun license must state in writing why they should receive such a license, and to provide additional documentation, such as prior military or law-enforcement service, a prior license-to-carry permit, or signed letters of recommendation.²²⁴

This policy reeks of the implicitly discriminatory practices utilized by states in the hundred years between the Civil War and the Civil Rights era of the 1960s, including the ability for the local police chief to scrutinize the individual²²⁵ and ensure he is of good character by requiring letters of reference.

Id. at 357 (quoting the 1910 amendment to OKLA. CONST. § 4(a), art. 3) (emphasis added). The clause expressly exempted sons, grandsons, and other descendants from the state's literacy test requirements, based simply on the fact that their ancestors had been qualified to vote prior to the enactment of the Fifteenth Amendment. The Court saw through the state's obvious ploy and struck down the provision as unconstitutional. *Id.* at 367-68.

223. Grant Welker, *City Gun Policy in Place, Despite Protests*, LOWELL SUN (Jan. 19, 2016), http://www.lowellsun.com/breakingnews/ci_29406406/city-gun-policy-place-despite-protests. "Taylor, as head of the Police Department, may unilaterally set the firearms policy." *Id.*

224. *Id.*

225. "Lowell's policy is less strict than those in many of the state's largest cities . . . and allows the police to look closer at each applicant individually." *Id.* (quoting Lowell, Massachusetts, City Manager Kevin Murphy) (emphasis added).

The essay requirement is the most onerous and appears to be a Xerox copy of discriminatory voting practices of the Jim Crow era now applied to gun rights. The similarities have not gone unnoticed. Lowell resident Dan Gannon stated to a reporter, “I will never write an essay to get my rights as an American citizen.”²²⁶

Even today, these same schemes, when applied to voting, trigger immediate howls of racial discrimination.²²⁷ Regardless of whether the

Further, Lowell Police Superintendent Taylor requires an in-person interview as part of the application process. See *Lowell, Massachusetts, LTC Application Requirements*, LOWELL POLICE DEP’T, <http://www.lowellma.gov/police/Lists/Department%20Services/DispForm.aspx?ID=4&RootFolder=%2Fpolice%2FLists%2FDepartment%20Services&Source=http%3A%2F%2Ftestwww%2Elowellma%2Egov%2Fpolice%2FPages%2FDepartmentServices%2Easpx> (last visited July 28, 2016).

The Superintendent requires a written essay in order to be considered for the license to carry:

Applicants for an unrestricted LTC must further submit a written supplement providing specific reasons that the applicant believes support granting the unrestricted access. The written supplement should identify the applicant’s proper purpose in seeking an unrestricted LTC.

Id. This licensing-to-carry scheme is not merely for permission to carry a concealed weapon, but also to bear a weapon openly. “According to Taylor, Lowell has about 6,000 licenses-to-carry issued. The ‘vast majority,’ he said, are restricted, *which do not allow residents to openly carry guns.*” Welker, *supra* note 223. The Department warns applicants that an unrestricted permit (necessary to bear a weapon openly) are rarely granted. “*Applications for an unrestricted LTC will only be granted in limited circumstances.*” *Lowell, Massachusetts, LTC Application Requirements*, LOWELL POLICE DEP’T, <http://www.lowellma.gov/police/Lists/DepartmentServices/DispForm.aspx?ID=4&RootFolder=%2Fpolice%2FLists%2FDepartment%20Services&Source=http%3A%2F%2Ftestwww%2Elowellma%2Egov%2Fpolice%2FPages%2FDepartmentServices%2Easpx> (last visited July 28, 2016).

Further illustrating the discriminatory impact which the essay requirement will have on minorities with limited education is the statement in the application requirements that warns that a less-complete essay will require more backing documentation, while a more-complete essay will require less documentation. “A particularly strong application with regard to [the essay requirement] will result in a lesser need to provide documentation with regard to [the documentation requirement], and vice versa.” *Id.*

Thus, applicants with less mastery of the English language, who are unable to fully support the reasons why they should be allowed to exercise their fundamental rights, will face a steeper burden in providing supporting documentation than those with the gift of a silver tongue and a mastery of the language.

226. Welker, *supra* note 223.

227. Kent Willis, *A New Literacy Test in Virginia?*, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA (Apr. 13, 2010), <https://www.aclu.org/blog/new-literacy-test-virginia>. In the opinion article, Willis takes former Virginia Governor Bob McDonnell to task for a provision in the requirements for felons to request restoration of their voting rights. The provision required the felon to submit a “Details of Offense” letter, described as:

intent is shown in Lowell to specifically deny blacks or other minorities of the right to exercise rights under the Second Amendment through the essay requirement, the long history of racially motivated gun control in this nation should trigger alarms when citizens are faced with the same schemes used previously to discriminate against minorities. These alarms are well founded, and courts should use the same sharp-look scrutiny to prevent racial discrimination in gun control laws.

V. EQUAL PROTECTION REQUIRES THAT STRICT SCRUTINY IS THE NECESSARY STANDARD OF REVIEW TO PREVENT RACIAL DISCRIMINATION THROUGH GUN CONTROL LAWS

Gun control has been used to hold down blacks and other minorities for hundreds of years. From the initial founding of the Virginia colonies at Jamestown through the Civil War, statutes expressly forbid possession of arms by blacks. In the Reconstruction era and into the Jim Crow time period, states and localities successfully continued to use gun control to prevent blacks from exercising any newfound political power. Those in charge invented clever methods of using facially neutral laws, applied in a discriminatory manner, in order to keep blacks in their place. In the Civil Rights Era of the 1960s, some of the most pervasive federal gun control legislation was passed, steeped in the shadows of racism. Even today, the same tired schemes are recycled, with those in power pinky-swearing that the laws are to prevent crime.

The long history of racial discrimination in gun control, however, cannot be ignored. It stains the present laws with the discrimination of the past. When compared to disenfranchising voting laws, the strong correlations

A personal letter addressed to the Governor explaining the circumstances of your arrest and conviction. When and where did these offenses occur? How were you involved? Give a brief description of current employment or a "good faith" effort to obtain employment. If you have made strides in education or are involved in church activities please let us know as well. Please also include any and all service to the community since being released by the court and the reasons why you believe the restoration of your civil rights is justified.

Id. Willis goes on to say that "this new burden seems disturbingly close to the reinstatement of a literacy test in Virginia. For persons with a limited education, the governor's requirement that they write an essay explaining their past and present actions and the rationale for why their rights should be restored is a nearly insurmountable obstacle." *Id.*

If the requirement to submit reasons in writing why a person should be permitted to exercise the right to vote is seen as "a nearly insurmountable obstacle," which is "disturbingly close to the reinstatement of a literacy test," then why would the same requirement be acceptable when applied to the fundamental right of bearing arms under the Second Amendment?

only compound the danger that gun control could be used to discriminate against minorities. “Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”²²⁸

Minorities, especially blacks, are a suspect class in the eyes of the law.²²⁹ Blacks have been subjected to blatant discrimination in the eyes of the law for hundreds of years in the United States. Therefore, courts must be mindful of ensuring that continued discrimination does not occur. Gun control laws have been purposefully used to discriminate against blacks.²³⁰ This discriminatory intent in gun control laws continued, absent express purpose, for over one hundred years following the Civil War.²³¹ The same schemes invented to skirt the prohibitions against racial discrimination are

228. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)).

229. *See U.S. v. Carolene Prods., Co.*, 304 U.S. 144 (1938). “[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” *Id.* at 152 n.4. “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.” *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944).

The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, or an exemption in Ohio’s ad valorem tax for merchandise owned by a non-resident in a storage warehouse. In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

Loving v. Virginia, 388 U.S. 1, 8-9 (1967) (citation omitted). Blacks meet the traditional factors used to determine a suspect class. They have been subject to past racial discrimination, they exhibit obvious, immutable, and distinguishable characteristics that define them as a discrete group, and they have traditionally and historically been politically powerless. *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986). Further, gun control laws often “directly and substantially burden a fundamental right.” *Id.*

230. *See supra* § III(A); III(B) (showing express discrimination).

231. *See supra* § III(C) (showing implied discrimination).

still in use today.²³² The right of an individual to keep and bear arms in the United States is fundamental.²³³ While neither mere disparate impact nor mere discriminatory purpose is enough, when past discriminatory purposes meet current disparate impacts in the exercise of a fundamental right, strict scrutiny should be triggered.²³⁴

In order to overcome the past history of express and implied racial discrimination in gun control laws, to prevent concealed racial discrimination in current gun control laws, to prevent disparate impact of gun control laws against minorities, all while exercising a fundamental right, strict scrutiny should be triggered. The Equal Protection Clause requires that strict scrutiny be the minimal standard of review when a court considers a question that touches on the fundamental right to keep and bear arms.

VI. CONCLUSION

The Fourteenth Amendment was passed to ensure that states and localities cannot use laws to discriminate against blacks and other minorities based on race or nationality.²³⁵ The same amendment also incorporates against the states those prohibitions found in the Constitution on infringement against fundamental rights.

The Equal Protection Clause is one of the most useful parts of the Fourteenth Amendment in ensuring that these rights are protected. It has been invoked regularly to protect the rights of minorities in this nation. The Court should yet again employ it to prevent states and localities from using gun control laws to discriminate against minorities. There is an extensive and well-documented history of express and implied racial discrimination in gun control laws spanning 350 years. Many of the same schemes are still in play, spearheaded by men like Richard Daley and Michael Bloomberg, who have let their underlying motivations slip.

When there is a long and brutal history of racial discrimination in certain aspects of the law, and those same techniques continue today, still adversely

232. See *supra* § IV (showing comparisons of modern techniques).

233. See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

234. While a discussion of disparate impact could fill up an entire Comment itself, it does create some interesting questions when applied to Second Amendment issues. Intent can be proven by showing historical discriminatory action and can trigger strict scrutiny. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

235. “The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.” *Washington v. Davis*, 426 U.S. 229, 239 (1976).

affecting the same suspect class, the courts should use strict scrutiny in order to assure “equal and impartial justice under the law.”²³⁶ The Court should adopt strict scrutiny as the minimum standard in order to prevent states and localities from using gun control laws to discriminate against minorities.

236. *Caldwell v. State of Texas*, 137 U.S. 692, 697 (1891). Justice Fuller, writing for the Court, first described the application of the Equal Protection Clause of the Fourteenth Amendment in this way. The phrase has come to have such great importance in our jurisprudence that it is inscribed on the front of the United States Supreme Court Building.