

# THE YALE LAW JOURNAL

DANNY Y. LI

## Antisubordinating the Second Amendment

**ABSTRACT.** After over a decade of silence, and fourteen years since its landmark decision in *District of Columbia v. Heller*, the Supreme Court has fundamentally expanded and reshaped Second Amendment protection once again in *New York State Rifle & Pistol Ass'n v. Bruen*. In light of the Court's decision in *Bruen*—and the role of race-based arguments in its development—this Note tells a new story about the racialized development of the contemporary Second Amendment. It unearths the enduring role of racial-justice claims for gun rights in the social-movement and jurisprudential history of the modern Second Amendment. At each stage of the Second Amendment's modern development, the same racial-justice claims have been raised again and again to justify an increasingly expansive account of the constitutional right to keep and bear arms. Now, in *Bruen*, the Court has endorsed these claims under the guise of reasoning from history and tradition.

The Note then argues that the *Bruen* Court's Second Amendment, far from a source of liberation for the marginalized, reinforces relations of social inequality. The Court's turn towards a purely historical Second Amendment erases the value of antisubordination from judicial decision-making and practically disempowers communities from securing equal public safety today. In response, the Note concludes, proponents of gun-violence prevention measures must develop a race-conscious constitutional politics for gun regulation that centers communities' right to equal public safety while grappling with the reality of discriminatory policing.

**AUTHOR.** J.D. 2022, Yale Law School; M.A., University College London; B.A. Columbia University. My deepest thanks to Joseph Blocher and Reva B. Siegel for their encouragement and guidance of this Note from start to finish. For invaluable comments and discussion, deep gratitude to Jake Charles, Liam Gennari, Pratheepan Gulasekaram, Grace Judge, Daniel Ki, Gregory Magarian, Darrell Miller, Eric Ruben, and participants of the Duke Firearms Law Workshop and Criminal Justice Symposium at UCLA. Finally, special thanks to Gabrielle Jackson and Varshini Parthasarathy for their patience and invaluable feedback throughout the editorial process. All errors are my own.



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## INTRODUCTION

[I]t cannot be believed that the large slaveholding States regarded [“persons of the negro race”] as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, . . . it would give them the full liberty . . . to keep and carry arms wherever they went.<sup>1</sup>

— Chief Justice Taney in *Dred Scott v. Sanford*, 1857

“[E]ven Chief Justice Taney recognized (albeit unenthusiastically in the case of blacks) that public carry was a component of the right to keep and bear arms—a right free blacks were often denied in antebellum America.”<sup>2</sup>

— Justice Thomas in *New York State Rifle & Pistol Ass’n v. Bruen*, 2022

“There’s no Second Amendment on the South Side of Chicago.”<sup>3</sup>

— Chief Public Defender, Cook County, Illinois, 2021

After over a decade of silence and fourteen years since its landmark decision in *District of Columbia v. Heller*,<sup>4</sup> the Supreme Court has once again reshaped Second Amendment protection in *New York State Rifle & Pistol Ass’n v. Bruen*.<sup>5</sup> In *Bruen*, the Court invalidated a New York law that required “proper cause” to obtain a license to carry concealed firearms. Whereas *Heller* granted individuals the right to possess a gun at home for self-defense, *Bruen* now grants individuals the right to carry firearms in public.

The questions presented in *Bruen* have been festering among lower courts since *Heller*. And the briefing in *Bruen* largely reflected the popularity of the kinds of esoteric historical arguments that have become standard in disputes about the proper scope of Second Amendment protection. Noteworthy, however, was the number of briefs that urged the Court to invalidate New York’s licensing law on grounds that these gun regulations subjugate marginalized

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1. 60 U.S. (19 How.) 393, 416-17 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

2. 142 S. Ct. 2111, 2151 (2022).

3. Sharone Mitchell, Jr., *There’s No Second Amendment on the South Side of Chicago*, NATION (Nov. 12, 2021), <https://www.thenation.com/article/politics/gun-control-supreme-court> [<https://perma.cc/5C2K-UL9R>].

4. 554 U.S. 570 (2008).

5. 142 S. Ct. 2111 (2022).

communities. More than one of every five briefs filed to invalidate New York’s law raised arguments about the disparate impact of gun-control laws on marginalized groups.<sup>6</sup>

The filers of these race-conscious briefs made for strange bedfellows.<sup>7</sup> Twenty-three Republican state attorneys general filed a brief recounting the pre-Civil War enactment of laws restricting the carrying of firearms by free Black citizens.<sup>8</sup> One hundred seventy-six Republican members of the House filed a brief arguing that gun-regulation laws like New York’s were “designed to exclude non-elite immigrants and disfavored minorities from gun ownership.”<sup>9</sup> The libertarian Rutherford Institute compared New York’s licensing law to poll taxes and literacy tests.<sup>10</sup> And then there was the public defenders’ brief.<sup>11</sup> Filed by prominent New York public-defender organizations like the Bronx Defenders and Black criminal-defense lawyers, the public defenders’ brief argued that enforcement of criminal gun regulations like the New York licensing law had a disparate impact on communities of color by exacerbating punitive and discriminatory policing. Conservative gun-rights activists were ecstatic.<sup>12</sup>

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6. See Alexys Ogorek, *Breaking Down the Initial Amicus Briefs in Bruen*, DUKE CTR. FIREARMS L. (Aug. 11, 2021), <https://firearmslaw.duke.edu/2021/08/breaking-down-the-initial-amicus-briefs-in-bruen> [<https://perma.cc/9QRN-9JMD>].
  7. See Darrell A.H. Miller, *Conservatives Sound like Anti-Racists – When the Cause Is Gun Rights*, WASH. POST (Oct. 27, 2021, 6:00 AM EDT), <https://www.washingtonpost.com/outlook/2021/10/27/gun-rights-anti-racism-bruen-conservative-hypocrisy> [<https://perma.cc/XZ6P-HWMU>].
  8. Brief of the States of Arizona, Missouri, and 21 Other States as Amici Curiae Supporting Petitioners at 15-16, *Bruen*, 142 S. Ct. 2111 (No. 20-843).
  9. Brief of Representative Claudia Tenney and 175 Additional Members of the U.S. House of Representatives as Amici Curiae Supporting Petitioners at 6, *Bruen*, 142 S. Ct. 2111 (No. 20-843).
  10. Brief of the Rutherford Institute as Amicus Curiae Supporting Petitioners at 21, *Bruen*, 142 S. Ct. 2111 (No. 20-843).
  11. Brief of the Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae Supporting Petitioners, *Bruen*, 142 S. Ct. 2111 (No. 20-843).
  12. See, e.g., AWR Hawkins, *The Nation: Depressing to See Black and White Americans Unite Against Gun Control*, BREITBART (July 28, 2021), <https://www.breitbart.com/2nd-amendment/2021/07/28/nation-depressing-see-black-white-americans-unite-against-gun-control> [<https://perma.cc/D8PM-QJPU>]; Nicholas Johnson, *Is the Left’s Gun-Control Faction Breaking Up?*, NRA AM.’S 1ST FREEDOM (Oct. 31, 2021), <https://www.americas1stfreedom.org/articles/2021/10/31/is-the-left-s-gun-control-faction-breaking-up> [<https://perma.cc/53C9-KS3L>] (“Whatever the roots of the previous alignment between Blacks and the anti-gun movement, the boundaries are manifestly shifting. Alliances of the political class notwithstanding, Blacks are acquiring guns at a record pace.”); Cody J. Wisniewski, *The Supreme Court Briefs that Dismantle New York’s Public Carry Ban*, TRUTH ABOUT GUNS (July 30, 2021), <https://www.thetruthaboutguns.com/the-supreme-court-briefs-that-dismantle-new-yorks-public-carry->

In the end, the *Bruen* Court opted for a purportedly more “value-neutral” approach. In reaching its decision, the Court confined its method of Second Amendment interpretation to text, history, and tradition.<sup>13</sup> That is, to determine whether a particular gun regulation passes muster under the Second Amendment, courts consider first whether the law regulates conduct that is covered by the plain text of the Second Amendment. If so, then courts are limited to the question of whether the regulation comports with history and tradition.<sup>14</sup> In this case, the Court found that New York’s regulation was inconsistent with history and tradition – and thus constitutionally invalid.

Still, under the guise of “neutral” reasoning from text, history, and tradition, the *Bruen* Court vindicated race-conscious claims throughout its decision. Justice Thomas’s majority opinion recounted the history of Black disarmament and the necessity of Black arms bearing to defend against white terror.<sup>15</sup> It also referenced Chief Justice Taney’s oft-quoted passage in *Dred Scott*, cited above, ridiculing the idea of extending the right to bear arms – a privilege of citizenship – to Black people. This was proof in Thomas’s eyes that the Second Amendment has long been understood to protect carrying in public.<sup>16</sup> And in a concurring opinion, Justice Alito directly cited the public defenders’ brief to suggest that Second Amendment protection serves the public-safety interests of communities of color.<sup>17</sup>

These racial-justice claims are not some odd blips in the history of the modern Second Amendment’s development – indeed, as this Note argues, they are central to it. Nor are these claims inventions of the Roberts Court. Rather, race-conscious arguments for gun rights have been present from the very beginning of the modern Second Amendment’s social-movement and jurisprudential evolution. As early as the late 1960s, conservative gun-rights advocates began to link

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ban [<https://perma.cc/35F5-Z8GE>]; Editorial, *Progressive Gun Control Crackup*, WALL ST. J. (July 23, 2021, 6:43 PM ET), <https://www.wsj.com/articles/progressives-gun-control-black-attorneys-of-legal-aid-supreme-court-amicus-brief-11627078928> [<https://perma.cc/7JQ8-JXHY>].

13. *Bruen*, 142 S. Ct. at 2126.

14. The Court described the new text, history, and tradition approach in the following terms:

To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”

*Id.*

15. *Id.* at 2151.

16. *Id.*

17. *Id.* at 2159 (Alito, J., concurring).

gun control with racial subordination. These arguments became a consistent theme among gun-rights organizers and grew in sophistication over time as legal academics – and then federal judges – took notice.

As gun-rights advocates turned to courts to enforce new, more expansive readings of the Second Amendment, they brought these racial-justice claims with them. Indeed, at each stage of the Second Amendment's modern development, the *same* racial-justice claims have been raised again and again to justify an increasingly expansive account of the constitutional right to keep and bear arms. The race-conscious arguments asserted by gun-rights activists in public fora in the late twentieth century were transformed and made legible in formal jurisprudential settings in the twenty-first century – first, to justify the individual-rights theory of the Second Amendment; then, Second Amendment incorporation; and now, Second Amendment protection outside the home.

The invocation of race in the modern Second Amendment debate has been asymmetric. Whereas pro-gun conservative legal academics have amassed a war chest of scholarship advancing variations of the claim that gun regulation has racist origins and effects,<sup>18</sup> progressive legal scholars have – with rare exceptions<sup>19</sup> – largely remained silent. With the recent and unexpected boon from the public defenders' brief, conservative gun-rights activists have successfully popularized the claim that gun control is racist after half a century of social-movement mobilization without comparable resistance from progressive gun-regulation advocates.

Proponents of gun regulation cannot afford to cede this ground any longer. In that spirit, this Note has two goals. The Note's first contribution is in unearthing

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18. For only a small sample of this body of work, see, for example, Justin Aimonetti & Christian Talley, *Race, Ramos, and the Second Amendment Standard of Review*, 107 VA. L. REV. ONLINE 193, 193 (2021); J. Baxter Stegall, 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*, 11 LIBERTY U. L. REV. 271, 272-73 (2016); Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491, 1495-96 (2013); DAVID B. KOPEL, *THE TRUTH ABOUT GUN CONTROL* 11-15 (2013); David B. Kopel, *The Great Gun Control War of the Twentieth Century – and Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527, 1529 (2013); and STEPHEN P. HALBROOK, *THE RIGHT TO BEAR ARMS: A CONSTITUTIONAL RIGHT OF THE PEOPLE OR A PRIVILEGE OF THE RULING CLASS?* 288-309 (2021).
19. Most prominently, Carl T. Bogus and Carol Anderson have argued that the Second Amendment was part of the constitutional bargain between northern and southern delegates to preserve American slavery before the Civil War. See Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 321 (1998); CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* 5-6 (2021). Bogus and Anderson provide largely descriptive and historical arguments that do not offer comprehensive normative arguments in defense of gun control.

ing the enduring role of racial-justice claims in the social-movement and jurisprudential history of the modern Second Amendment. In bringing this history to light, this Note follows the example set by recent works that recover the ways in which histories of slavery and racial domination are essential to understanding the evolution of American law in an effort to complicate prevailing legal canons.<sup>20</sup> In the Second Amendment context, uncovering these histories in parallel highlights an important case of conservative “demosprudence.” Coined by Professors Lani Guinier and Gerald Torres, demosprudence describes “the process of making and interpreting law from an external—not just internal—perspective,” which “emphasizes the role of informal democratic mobilizations and wide-ranging social movements that serve to make formal institutions,” such as courts, more responsive to popular accounts of legal meaning.<sup>21</sup> The social-movement and jurisprudential histories this Note uncovers demonstrate that when it comes to race-conscious understandings of the Second Amendment, movement actors and courts have always been in conversation with one another. In *Bruen*, the Court expressly aligned itself with a social movement that has, over decades, mobilized to change Second Amendment understandings on race-based reasonings.

The Note’s second contribution is in offering a counterdemosprudence in the form of a competing normative framework that defends gun regulation as essential to addressing forms of racial subordination—a project I call “antibusordinating” the Second Amendment.<sup>22</sup> This framework views an absolutist and historical account of the right to bear arms—exemplified by the *Bruen* decision—as incompatible with the demands of racial antibusordination. Antibusordinating the Second Amendment, I argue, requires making room for communities’ interest in enacting gun regulation to attain conditions of equal public safety. Such a vision of the Second Amendment has historical roots in the civil-rights mobilization against gun violence that spanned the 1990s. As Black communities faced devastating rates of gun homicide, civil-rights organizations made combating gun violence a national priority on racial-equality grounds. They recognized that

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20. See, e.g., K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1062 (2022); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1789-90 (2019); Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 79 (2020); Matthew L.M. Fletcher, *Contract and (Tribal) Jurisdiction*, 126 YALE L.J.F. 1, 1-5 (2016); Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2027-28 (2022).

21. Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 127 HARV. L. REV. 437, 442 (2013).

22. The terminology and conceptual moves here draw inspiration from Genevieve Lakier, *Imagining an Antibusordinating First Amendment*, 118 COLUM. L. REV. 2117 (2018).



just as guns can be tools of self-defense, they can also serve as means of domination and sources of communal subordination. They viewed conditions of equal public safety as a civil right – necessary for communities of color to flourish and self-govern as free and equal members of the polity.

Under this framework, the *Bruen* decision is subordinating. Its new methodological reliance on history and tradition calls into question virtually everything about our current gun-regulation schemes. That, coupled with its extension of Second Amendment protection outside the home, renders Black communities less safe. The result is a Second Amendment jurisprudence that further deprives Black communities of the capacity to secure for themselves the conditions of equal public safety – all in the name of Founding Era history and tradition.

The Note proceeds in three Parts. Part I begins by tracing the evolution of racial-justice claims in the social-movement history of gun-rights activism. In tracing this history, we see that race-conscious arguments for gun rights have been present from the very beginning of contemporary Second Amendment organizing in the late twentieth century. Part I shows how these claims were embraced and invoked strategically by gun-rights organizers at a time when gun-regulation legislation was becoming increasingly common. Over time, these claims were articulated at higher levels of sophistication in a constitutional register.

To show how these claims informed constitutional understandings, Part II of this Note documents how these arguments became a central component of gun-rights advocates' legal strategy for reinventing and expanding the meaning of the Second Amendment. At every stage of the development of the modern Second Amendment, advocates marshaled race-conscious arguments to justify more and more expansive accounts of the constitutional right to keep and bear arms. Part II ends with an account of *Bruen*. A high watermark in the expression and deployment of racial-justice claims in the Second Amendment debate, *Bruen* shows just how much these claims have forever altered the terms of the gun debate inside and outside the courts. I argue that the Court's decision in *Bruen*, more than any previous Second Amendment decision, lends support to the "gun control is racist" narrative developed and marshaled for decades by gun-rights activists – under the guise of reasoning from history and tradition.

With these histories in tow, Part III offers a rejoinder by presenting the Note's normative framework for antisubordinating the Second Amendment. It begins with a competing history of the forceful efforts of civil-rights organizations in the 1990s to combat gun violence ravaging Black communities. These organizations viewed gun violence as a matter of civil rights, and they justified gun regulation through the lens of antisubordination. Drawing on this history, Part III articulates a theory of public safety as a social condition for democratic

equality: when Black communities are denied access to equal and adequate conditions of public safety, they are deprived of the opportunity to participate in the polity as equal citizens. In other words, the disparate harm that gun violence inflicts on Black communities is a form of racial subordination – and gun regulation is a necessary antisubordination strategy.

Nevertheless, using *Bruen* as an exemplar, Part III also takes seriously and confronts the central premise of the public defenders' brief – that methods of gun control relying on punitive policing can themselves have subordinating consequences. It responds that Second Amendment expansionism is not an antisubordinating doctrinal solution. Part III offers two challenges to *Bruen* from a racial-justice perspective. Substantively, it argues that – as civil-rights groups have long understood – expansive Second Amendment protection hampers communities' capacities to combat gun violence that exacerbates forms of social inequality. And methodologically, it argues that by embracing a purely historical interpretative method, the Court's doctrinal reasoning in *Bruen* is totally untethered to the value of antisubordination. Indeed, traditionalist methodologies reinforce the exact social hierarchies rooted in tradition that antisubordination seeks to abolish. They are an impoverished form of justification that disrespects Black Americans' status as equal members of the polity.

Part III concludes with a turn toward constitutional politics. Unencumbered by formal constitutional law, it suggests that advocates can build an antisubordinating Second Amendment in public fora – asserting the value of gun regulation to racial justice in the hope that future lawyers and courts are listening.

Before proceeding, it is worth foreshadowing the Note's methodology. This Note toggles back and forth between what courts say about the Second Amendment and what the “people” say about the Second Amendment (and gun rights more broadly). At times, particularly when the Note discusses debates surrounding gun-regulation policy, the reader may rightfully ask, what does this have to do with the Second Amendment? As a practice in demosprudence, this Note takes both an internal and external perspective on the law to understand the interplay between popular mobilizations and formal legal meanings. In other words, to understand what courts say about the meaning of the Second Amendment today, we must also understand how ordinary people have asserted and justified their right to bear arms in the past. I preview this methodological point because the antisubordinating framework presented in Part III largely lies outside the courts – after all, the framework is not reflected in today's prevailing Second Amendment jurisprudence. Instead, it must be built over time through popular mobilization over the proper role of guns in an egalitarian democracy.

## I. SOCIAL-MOVEMENT HISTORY

Since the Supreme Court's 2008 decision in *District of Columbia v. Heller*, legal scholars have authored extensive accounts of the modern Second Amendment's social-movement history.<sup>23</sup> These accounts describe the ways in which gun-rights advocates in the late twentieth century mobilized around expansive conceptions of the Second Amendment that protected an *individual's right* to bear arms – consistent, on their account, with the Constitution's original meaning. As Professor Reva B. Siegel has shown, these contemporary Second Amendment understandings were forged “through popular constitutionalism.”<sup>24</sup> Exploring the social-movement conflict that gave rise to the *Heller* decision, Siegel and others have documented how conservative coalitions, organized under the banner of an emergent New Right movement, embraced an originalist-constitutional politics to justify an increasingly libertarian account of the Second Amendment. These historical accounts tell us the story of how the Second Amendment as we know it today came to be.

The goal of this Part is not to retell the story of the contemporary Second Amendment's social-movement history in its entirety, but rather to fill in important omissions. Public commentators have expressed surprise at the expression of racial-justice claims in briefs filed in the *Bruen* case.<sup>25</sup> And most recently, Professor Khiara M. Bridges's *Harvard Law Review* foreword calls attention to invocations of race in *Bruen* as illustrative of what she calls the “Roberts Court's racial common sense.”<sup>26</sup> But the advent of these racial-justice claims far predates the Roberts Court. From the very beginning, in addition to asserting arguments in libertarian, law-and-order, and originalist frames, gun-rights advocates have asserted arguments that sound in racial justice. And these arguments have played a central role in the modern development of Second Amendment jurisprudence – a role that has so far been underappreciated.<sup>27</sup>

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23. See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008); ROBERT J. SPITZER, GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS (2015); ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (2011).

24. See Siegel, *supra* note 23, at 192.

25. See, e.g., Chauncey Alcorn, *The Fight Against Gun Control Has Some Surprising New Allies*, CNN (May 18, 2021, 6:43 AM ET), <https://www.cnn.com/2021/05/18/business/gun-control-debate-women-minorities/index.html> [<https://perma.cc/E55N-WPKH>].

26. Khiara M. Bridges, *The Supreme Court, 2021 Term – Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 25 (2022).

27. The most detailed existing account of the jurisprudential evolution of these claims is provided in Timothy Zick's recent article, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229 (2020).

Recent scholarship has already begun taking important steps to fill these gaps in the historical record. Military historian Patrick J. Charles, focusing on the racialized history of gun rights in the pre-Civil War and Reconstruction eras, has pointed to the appearance of the “gun control is racist” narrative by gun-rights advocates in the late twentieth century and legal academics in the early 1990s.<sup>28</sup> Professor Timothy Zick has explored the use of “civil rights and civil liberties frames or narratives” in Second Amendment discourse and interpretation.<sup>29</sup> Zick surveys and disaggregates different forms of racialized argument employed by gun-rights activists in their advocacy efforts, noting that “[a]n effective gun control counter-movement has yet to materialize.”<sup>30</sup>

This Part picks up where they left off, uncovering new social-movement history to recover the story of how gun-rights advocates marshaled racial-justice arguments in support of an expansive account of Second Amendment rights. In that way, it shows how, in addition to liberty claims, *equality claims* have always been present in the popular constitutionalism that gave rise to our contemporary Second Amendment. Like Charles and Zick, this Part catalogues different kinds of racial-justice claims leveraged by actors of the gun-rights movement. But it also aims to tell a story with historical continuity, demonstrating how these claims developed and matured in form and in substance over time. It is more interested in telling the story as a form of social-movement history. Who were the primary actors? When, where, and how did they assert racial-justice claims in pursuit of more expansive gun rights? And how did these claims eventually transform into constitutional argument?

Telling this story offers a more complete social-movement history of the modern Second Amendment and provides valuable context for the burgeoning racial-justice claims that we see today asserted in gun-control debates. It also offers an important historical backdrop for Part II, which considers the evolution of these racial-justice claims into formal legal arguments asserted in court, and Part III, which proposes normative foundations for the much-needed “gun control counter-movement.”<sup>31</sup>

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28. See Patrick J. Charles, *Racist History and the Second Amendment: A Critical Commentary*, 43 CARDOZO L. REV. 1343, 1345-68 (2022). Patrick J. Charles offers a brief historiography of the “gun control is racist” narrative that emerges in the later twentieth century. This Note aims to provide a more detailed account of that historiography, place it in historical context, and use it to describe a conservative demoscience of race—that is, to show how these activist arguments about guns and race were adapted into *legal* arguments about the Second Amendment marshaled in courts.

29. Zick, *supra* note 27, at 232.

30. *Id.* at 236.

31. *Id.*

A. *The Early Days of Gun Rights and Racial Justice*

Second Amendment scholars have documented the ways in which the modern fight for gun rights emerged in the late twentieth century “in the shadow of civil rights struggle.”<sup>32</sup> This fight took shape in the 1960s as civil-rights conflict, urban riots, higher crime rates, and the assassinations of President Kennedy, Senator Robert Kennedy, and Dr. Martin Luther King, Jr., led to growing calls for gun-control legislation.<sup>33</sup> Those involved in the nascent gun-control movement situated themselves within the civil-rights tradition. As Professor Kristin A. Goss explained:

Many early gun control leaders were inspired by the citizen movements for civil rights, women’s rights, and consumer protection that unfolded in the 1950s, 1960s, and 1970s. They thought that a national victory for gun control could be next. Yet the gun control campaign was beginning to institutionalize nationally at a time when the power and moral authority of the federal government were waning.<sup>34</sup>

By the 1970s, opposition to gun-control legislation grew after years of continually rising crime rates and social unrest.<sup>35</sup> Popular support for gun-control measures fell, and gun-rights activists intensified their resistance to even moderate forms of gun regulation.<sup>36</sup> Professor Siegel notes that advocacy groups like the National Rifle Association (NRA) began to express their opposition to gun-control measures in law-and-order frames, calling for “individual accountability” that sounded in “a libertarian spirit that was increasingly hostile to the government in any guise.”<sup>37</sup> A conservative insurgency within the NRA pushed the organization and its leadership towards a new constitutional politics that embraced the “individual”-right interpretation of the Second Amendment.<sup>38</sup> These politics would be folded into the coalition politics of an emergent New Right movement, which sought restoration of the Constitution in matters concerning

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32. Siegel, *supra* note 23, at 235; *see also id.* at 203 (acknowledging that civil-rights conflict and riots in cities across the country “imbued guns with a variety of racial meanings”).

33. *See id.* at 202-03.

34. KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* 166-67 (2006).

35. Siegel, *supra* note 23, at 207-08.

36. *See id.* at 208.

37. *Id.* at 209.

38. *See id.* at 211-12.

criminal defendants' rights; "social issues" like prayer, busing, pornography, and abortion; and now, gun control and the Second Amendment.<sup>39</sup>

But in addition to the well-documented law-and-order and libertarian frames, racial-justice claims were also present from the very start.<sup>40</sup> Patrick J. Charles has uncovered the initial appearance of claims asserted by gun-rights advocates linking gun control with racial justice in the early 1970s.<sup>41</sup> These advocates reasoned that in light of higher crime rates in communities of color, gun-control measures disproportionately burdened Black people's capacity for self-defense. In 1975, for instance, the American Pistol and Revolver Association—a gun-rights advocacy organization—printed form letters for Black gun-rights supporters to send to their local congressman to oppose gun-licensing laws. The letter read:

Dear Congressman \_\_\_\_\_:

I had to wait until 1964, after the Civil Rights Act was passed, before I could buy my guns. Prior to that, gun dealers told me "We don't sell guns to [n\*\*\*ers]" and they asked me "to leave." . . . It is in the ghetto and the

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39. See *id.* at 212-13.

40. The historical accounts in Parts I and II explore the conservative gun-rights movement's incorporation of racial-justice claims in their advocacy efforts. There is, however, a near-contemporaneous history, beginning as early as the 1960s, of Black Power groups asserting the rights of Black Americans to bear arms for self-defense. Unlike the efforts described in this Note, these groups were not self-consciously engaged in constitutional movement lawyering. But their arguments were often expressed in a constitutional register.

For instance, a 1966 Black Panther pamphlet declared: "The Second Amendment of the Constitution of the United States gives us a right to bear arms. We therefore believe that all black people should arm themselves for *self-defense*." Patrick J. Charles, *The Black Panthers, NRA, Ronald Reagan, Armed Extremists, and the Second Amendment*, SECOND THOUGHTS (Apr. 8, 2020), <https://sites.law.duke.edu/secondthoughts/2020/04/08/the-black-panthers-nra-ronald-reagan-armed-extremists-and-the-second-amendment> [https://perma.cc/G4XK-3DEA]. Malcolm X similarly drew on constitutional authority in articulating the case for armed Black self-defense: "Article number two of the constitutional amendments provides you and me the right to own a rifle or a shotgun." WINKLER, *supra* note 23, at 233 (quoting ALEXANDER DECONDE, *GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL* 173 (2001)).

Legislative resistance to open carry by Black Panthers was swift. In May of 1967, a group of thirty Black Panthers appeared visibly armed at the California State Capitol. Their appearance "utterly shocked California lawmakers and all but ensured passage" of the Mulford Act, which made it a felony to carry any firearm in public places without a government license. Charles, *supra*. Today, the Mulford Act is frequently invoked as an example of the racist roots of gun control. Notably, the NRA helped draft and advocate for the Act's passage by the California legislature. *Id.*

41. See Charles, *supra* note 28, at 1359-61.

high crime areas where law abiding negroes like myself need guns to protect our homes and our families. Now that they are talking about licensing all hand guns, will I be turned down from obtaining a license from my white Chief of Police, my white Sheriff, or my white government bureaucrat again like I was before the 1964 Civil Rights Act was passed? I consider owning firearms my most important civil right. . . . If you are really for Civil Rights, you would be for this right too. . . .

Sincerely,  
(Sign your name)<sup>42</sup>

At the same time, Charles observed that gun-rights advocates in the 1970s also compared gun control to a form of pernicious social control wherein “liberals and communists were insidiously using the high crime rates among communities of color to first subjugate them, which would then be followed by subjugation of the general white population.”<sup>43</sup> In 1974, NRA president Harlon Carter authored an op-ed in *Guns & Ammo* magazine titled “Crime Control=Gun Control=Race Control???” He wrote: “The black man will quickly see he is being used as a silent instrument to obtain complete gun control, . . . [h]e gains nothing and he is at once the victim of tyranny and the instrument by which tyranny is imposed on the white man.”<sup>44</sup>

Early in their development, racial-justice claims asserted by gun-rights activists in the 1970s lacked the sophistication of the arguments we see today in *Bruen*. Indeed, Carter’s editorial remarks sound more like conspiracy than law or policy. How did we get from the claims we see here to the claims we see before the Supreme Court? The remainder of this Part documents how these race-conscious forms of reasoning matured over time – inside and outside the court.

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42. *Id.* at 1359 (alteration in original) (citing ELLIOTT GRAHAM, AM. PISTOL & REVOLVER ASS’N, INC., *THE PISTOL OWNER’S LEGISLATIVE HANDBOOK* 105-06 (1975)). Legislative advocacy groups were not the only ones observing the potential disparate impact that gun-control laws could have on communities of color. In 1976, for example, Judge David J. Shields – a judge on Chicago’s “Gun Court” – published a reflection on adjudicating unlawful possession cases. He wrote:

The judiciary is seriously concerned about putting someone in a ghetto area on probation, because one condition of probation is that the offender cannot have a weapon during the probationary period – yet if he follows the law, he is without protection in his home or store or on the streets of his community.

David J. Shields, *Two Judges Look at Gun Control*, 57 CHI. BAR REC. 180, 184-85 (1976).

43. Charles, *supra* note 28, at 1360.

44. *Id.* (citing Harlon Carter, *Crime Control=Gun Control=Race Control???*, GUNS & AMMO, Feb. 1974, at 26-27, 76-78).

B. *Gun-Rights Mobilization in the 1980s*

The formalization of racial-justice claims came early in the 1980s. Reagan's election as President in 1980 raised hopes that the libertarian, law-and-order understanding of the Second Amendment might soon become law. In the Senate, Reagan's election swept Republicans to power, giving conservatives an opportunity to refashion the constitutional law under which gun-control laws would be judged. Upon assuming chairmanship of the Senate Subcommittee on the Constitution, Senator Orrin Hatch directed extensive historical research on the Second Amendment. The Committee's research culminated in a February 1982 report entitled *The Right to Keep and Bear Arms*,<sup>45</sup> described by Professor Siegel as a form of "legislative constitutionalism" that helped embody in law the "principles and policies that members of the New Right had worked out in the 1970s."<sup>46</sup> The report declared itself as having "uncovered . . . long-lost . . . proof that the second amendment to our Constitution was intended as an individual right of the American citizen to keep and carry arms in a peaceful manner, for protection of himself, his family, and his freedoms."<sup>47</sup>

Crucially, the Senate report relied on the history of Black disarmament as proof that the Second Amendment protects an individual citizen's right to bear arms. First, the report cited a passage from Chief Justice Taney's decision in *Dred Scott v. Sandford* that would become a frequent talking point for gun-rights advocates. In *Dred Scott*, Taney argued that according Black Americans the status of full citizenship would extend to them the right "to keep and carry arms wherever they went"<sup>48</sup>—the implication being, then, that the constitutional right to keep and bear arms protected a *personal* right.

Second, the report pointed to the history of Reconstruction. The Reconstruction Amendments, the report argued, "recognized the right to keep and bear arms as an existing constitutional right of the individual citizen and as a right specifically singled out as one protected by the civil-rights acts and by the Fourteenth Amendment to the Constitution, against infringement by state authorities."<sup>49</sup> Reacting to the advent of Black militia, Southern States enacted "black

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45. See SUBCOMM. ON THE CONST. OF THE S. COMM. ON THE JUDICIARY, 97TH CONG., *THE RIGHT TO KEEP AND BEAR ARMS*, at VII (1982) [hereinafter SUBCOMM. REPORT] ("Immediately upon assuming chairmanship of the Subcommittee on the Constitution, I sponsored the report . . . [on] the history of the controversy over the right to keep and bear arms."); see Siegel, *supra* note 23, at 216.

46. Siegel, *supra* note 23, at 216.

47. SUBCOMM. REPORT, *supra* note 45, at VIII.

48. *Id.* at 9 (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV).

49. *Id.*



codes' which either outlawed gun ownership by blacks entirely, or imposed permit systems for them, and permitted the confiscation of firearms owned by blacks."<sup>50</sup> The Reconstruction Congress, the report concluded, enacted legislation to invalidate these codes and restore the constitutional rights of Black people to possess guns.<sup>51</sup> Keep these historical arguments in mind because, as this Note discusses later on, they become especially influential in the jurisprudential evolution of the modern Second Amendment.

As the Senate report planted the first seeds of a more expansive Second Amendment theory that drew on the history of Black disarmament, gun-rights activists continued to develop the position that gun-control measures would disproportionately impact poor, Black communities by depriving them of their right to self-defense. These arguments became increasingly popular in the 1980s as states and localities introduced novel forms of gun-control legislation. In 1981, when Chicago Mayor Jane Byrne proposed a bill that would effectively freeze handgun ownership, Reverend Russ Meek—a vocal Black opponent of gun control in Chicago—denounced the effort as a form of “race control.”<sup>52</sup> Referring to the bill as the “‘most dangerous’ piece of legislation since ‘The Black Codes’ and ‘The Grandfather Clauses’ of the Pre- and Post-Civil War Era,” Meek pointed explicitly to the Second Amendment for support: “The right to keep and bear[] arms is in the Constitution, and it does not say ‘*For whites only!*’[] It says [‘] *The*

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50. *Id.*

51. *Id.* at 10 (asserting that legislative history and contemporary views of incorporation make “clear that the right to keep and bear arms was meant to be and should be protected under the civil rights statutes and the Fourteenth Amendment against infringement by officials acting under color of state law”).

52. Russ Meek, *Gun Control Just Pure Racism*, CHI. DEF., June 22, 1981, at 6; see also William E. Farrell, *Majority at Hearing in Chicago Urges Congress to Ban Pistols*, N.Y. TIMES, Apr. 16, 1975, at 24 (quoting Russ Meek’s testimony against gun control in Chicago: “Gun control is race control. . . . If you come after my gun, you’re coming after me and I’m not ready to go. . . . I don’t intend to fend off a sawed-off shotgun with a broom or a dust mop”).

people,’ and that means ‘US!’”<sup>53</sup> Testimony like Reverend Meek’s appeared at public hearings about gun-control measures nationwide.<sup>54</sup>

Although these testimonies were often sporadic, uncoordinated appeals by activists scattered across the country, gun-rights organizations increasingly began organizing campaigns around the “gun control is race control” frame. Roy Innis, the national chairman of the Congress of Racial Equality (CORE), became a stalwart of this view. Taking helm of the civil-rights organization in 1968, Innis transformed CORE into a conservative advocacy group that championed expansive Second Amendment rights. Innis himself would later become the only Black board member of the NRA in 1995<sup>55</sup>—and frequently partnered with the NRA in his capacity as the head of CORE.

Collaborating with the NRA, Innis incorporated racial-justice claims into mainstream national organizing efforts for gun rights—and, in the process, forged new constitutional understandings about the nature and history of gun control. In a widely circulated op-ed in the *Wall Street Journal* entitled “Gun Control Sprouts from Racist Soil,” Innis laid out the antiracist case against gun control.<sup>56</sup> The piece wove together an origin story of gun-control measures as inseparably tethered to discriminatory purposes. “Do [Black leaders] realize,” Innis asked, “that America’s gun-control movement sprouted from the soil of Roger B. Taney, the racist chief justice who wrote the infamous *Dred Scott* decision of 1857?”<sup>57</sup> Innis was referring to the *Dred Scott* passage cited in the Hatch Senate report. He proceeded to argue that “[g]un control was *never* an issue in America until after the Civil War when black slaves were freed . . . . The specter of a black man with rights of a freeman, bearing arms, was too much for the early heirs of

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53. Russ Meek, *Beware of Byrne’s ‘Doomsday’ Gun Control Bill*, CHI. DEF., Oct. 17, 1981, at 11. Meek also pointed to the failure of the state to preserve public safety in Black communities:

With black unemployment increasing every day, the cost of living spiraling out of reach, and a rent increase every year, not only the streets but the highways, public transportation, our schools, automobiles, homes, apartment buildings, places of business and even our churches are under attack by hardened, professional criminals (also first offenders, criminal psychopaths, rapists and murderers); the police cannot protect us, nor can security guards protect us!

*Id.*

54. See, e.g., *SL: No to Gun Control!*, WORKERS VANGUARD, July 9, 1982, at 3 (quoting testimony from a public hearing in San Francisco for a proposed measure to ban handgun ownership: “Gun control kills. It kills blacks in particular. . . . No to gun control! For the right of black armed self-defense against racist terror! For labor/black mobilizations to stop the fascists!”).

55. See *Straight Shooter: Black Militia Man Stares Down Stereotype*, DET. FREE PRESS, July 23, 1995, at 5G.

56. Roy Innis, *Gun Control Sprouts from Racist Soil*, WALL ST. J., Nov. 21, 1991, at A14.

57. *Id.*

Roger Taney to bear.”<sup>58</sup> From this history, Innis concluded that gun-control laws “were implicitly racist in conception” and “invidiously targeted blacks.”<sup>59</sup>

In addition to racist origins, Innis also commented on the racially disparate impact of New York’s Sullivan Law—the same handgun-licensing law that was under review by the Supreme Court in *Bruen* three decades later. Throughout the law’s history, Innis argued, “mainly the rich and powerful have had easy access to licenses to carry handguns.”<sup>60</sup> Innis noted that fewer than two percent of handgun-carry licenses in New York City were issued to Black people—“who live and work in high-crime areas and really are in need of protection.”<sup>61</sup>

Indeed, Innis would appear at trials involving gun crimes—especially when the defendant was Black—to highlight disparate enforcement of gun laws. In 1987, Innis traveled to Chicago for the trial of Robert Holloway, a Black man charged with possession of an unregistered handgun.<sup>62</sup> He accompanied Holloway to Gun Court in Chicago’s police headquarters to express the view “that enforcement of handgun laws discriminates against blacks.”<sup>63</sup> “The racism of the gun laws and their application can’t be ignored,” Innis said. “Almost every defendant [in Gun Court] is black. White folks are allowed to have legal guns . . . but they don’t let the decent man, if he is poor and black, have a gun.”<sup>64</sup>

Marshaling these arguments, Innis opposed the enactment of state and local gun-control measures across the country. For example, when a Maryland state court allowed gunshot victims to collect damages from weapons’ makers and distributors in 1985, Innis filed an appellate brief arguing that “the ruling will impede low-income blacks’ right to defend themselves by preventing the sale of inexpensive handguns.”<sup>65</sup> The ruling, he said, “will have a negative impact on blacks, the biggest victims of crimes, by denying them protection.”<sup>66</sup> In 1987,

58. *Id.* (emphasis added).

59. *Id.*

60. *Id.*

61. *Id.*

62. Charlie Gofen, *Bias Charged in Handgun Case: National Civil Rights Leader Says Law Is Unfair to Blacks*, CHI. TRIB., Nov. 3, 1987, at 6, ProQuest, Doc. No. 282405119.

63. *Id.*

64. *Id.* In 1988, Innis returned to Oak Park for the trial of Lamar Richardson, a Black man charged with violating Oak Park’s handgun ban—the same law that Innis spoke out against at a rally the year before. Juanita Bratcher, *Oak Park Gun Trial Continued; Racism Charged by Attorney*, CHI. DEF., Jan. 19, 1988, at 3, ProQuest, Doc. No. 2541766981. One observer, reacting to Richardson’s trial, called it “nothing more than a blatant slap in the face to the Black community and Oak Park residents.” *Id.*

65. Robert Benjamin, *Two Groups Ask Md. Court to Withdraw Gun Decision*, SUN, Nov. 5, 1985, at 3D, ProQuest, Doc. No. 535593847.

66. *Id.*

Innis spoke at a rally in Oak Park, Illinois, where he claimed that “[t]he problem with gun licensing laws is that they are designed to keep [guns] in the hands of a select few – the rich and the powerful.”<sup>67</sup>

The types of concerns voiced by Innis began making their way into materials authored and circulated by libertarian gun-rights groups. In 1988, for example, libertarian lawyer and NRA ally David B. Kopel – who would eventually help litigate the *Heller* case – authored a report for the Cato Institute laying out the case against gun control.<sup>68</sup> One section of the report, titled “Gun Control and Social Control,” argued that gun control “harms most those groups that have traditionally been victimized by society’s inequities.”<sup>69</sup> Kopel discussed pre- and post-Civil War laws disarming Black people (citing *Dred Scott*), the importance of armed self-defense for Black civil-rights activists against the threat of racist mobs “whom the police cannot or will not control,” the present importance of armed self-defense for Black people against high rates of urban violence, and finally, the fact that “[g]un control laws are discriminatorily enforced against blacks, even more so than other laws” – citing arrest rates in Chicago as an example.<sup>70</sup>

### C. Race-Conscious Advocacy

Gun-rights organizations were often transparent about the fact that the decision to marshal racial-justice arguments was largely a strategic one – motivated by the need to turn the tide of public opinion in Black communities. Then, as now, an overwhelming majority of Black voters supported gun-control legislation.<sup>71</sup> In response, gun-rights groups like the NRA began to tailor their advocacy efforts to communities of color – investing heavily in campaigns and forms of argument that appealed directly to the interests of Black voters.

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67. Juanita Bratcher, *CORE’s Innis Set for Oak Park Rally*, CHI. DEF., Oct. 14, 1987, at 1, ProQuest, Doc. No. 2542006777.

68. See David B. Kopel, *Trust the People: The Case Against Gun Control*, CATO INST. (July 11, 1988), <https://www.cato.org/policy-analysis/trust-people-case-against-gun-control> [https://perma.cc/E25H-AZJM].

69. *Id.* at 14.

70. *Id.* at 14-17.

71. See John Lancaster, *Md. Gun Law Opponents Try to Enlist Blacks: Ad Drive for Referendum Focuses on Self-Defense in Urban Areas*, WASH. POST, Sept. 5, 1988, at A1, ProQuest, Doc. No. 139438796; see also Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns> [https://perma.cc/XB9E-BJQP] (“About eight-in-ten Black adults (82%) say gun violence is a very big problem – by far the largest share of any racial or ethnic group.”).

Consider, for example, an NRA campaign to repeal a Maryland handgun law in 1988. That year, Maryland became one of the first states to ban the sale of cheap handguns – commonly known as “Saturday Night Specials.”<sup>72</sup> The law established a special commission that would determine which handguns could be manufactured and sold in Maryland.<sup>73</sup> Shortly following the bill’s passage, gun-rights activists gathered enough signatures to force a state referendum.

The state referendum soon exploded into a record-breaking multimillion-dollar battle over gun control with national stakes.<sup>74</sup> To organize the repeal campaign, local activists founded the Maryland Committee Against the Gun Ban, an organization that would be bankrolled in large part by the NRA. By Election Day, the Maryland Committee’s effort to overturn the state’s new handgun law raised nearly \$5 million – 98% of which was provided by the NRA.<sup>75</sup> The repeal effort became the most expensive election-year campaign ever waged in the state of Maryland.<sup>76</sup> For all involved, the Maryland fight was a “national test case for gun control legislation, with the fate of similar measures elsewhere thought to hang in the balance.”<sup>77</sup>

But the repeal campaign was also significant for its efforts to rally support in Maryland’s Black community. From the beginning, the Maryland Committee planned to spend 22%, or nearly \$1 million, of its budget on outreach to Black voters. The campaign’s appeal to Black voters rested on the idea that “the new law would deprive them of their legitimate right to self-defense by removing

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72. *Maryland Is First State to Ban Cheap Handguns*, CHI. TRIB., May 24, 1988, at 4, ProQuest, Doc. No. 282370393.

73. See George E. Curry, *Campaign ’88: NRA Turns Sights on Maryland Gun Law*, CHI. TRIB., Oct. 25, 1988, at 2, ProQuest, Doc. No. 890234810.

74. See *id.* (“What began as a modest effort to outlaw ‘Saturday Night Specials’—cheap, small pistols often used in crimes—has exploded into a multimillion-dollar battle over gun control that may overshadow the presidential election in Maryland.”).

75. See John Lancaster, *\$4 Million Drive to Kill Gun Law Md.’s Costliest*, WASH. POST, Oct. 29, 1988, at A1, ProQuest, Doc. No. 139384709.

76. *Id.*

77. John Lancaster, *Gun Law Survives; Sarbanes Wins Easily*, WASH. POST, Nov. 9, 1988, at A1, ProQuest, Doc. No. 139349385; see also James Bock, *Nov. Gun Vote Puts State in U.S. Spotlight: NRA, Critics Expect Nationwide Impact*, SUN, Oct. 9, 1988, at 1A, ProQuest, Doc. No. 1477693925 (“Maryland’s handgun-law referendum a month from now won’t merely settle a local score, but it will also sway future legislative battles across the country between the National Rifle Association and gun control advocates, according to veterans of the nation’s gun-control wars.”).

inexpensive weapons from the market,” claiming that Black people could not afford more expensive guns.<sup>78</sup> The Committee hired a Black-run public-relations firm, aired advertisements on Black-oriented radio stations, and coordinated canvassing in Black neighborhoods in Baltimore and Prince George’s County.<sup>79</sup> The Committee also sought the support of Innis, who campaigned on the repeal effort’s behalf and filmed an ad titled, “It’s a Bad Law.”<sup>80</sup> Claiming that the handgun law was “racism in its worst form,” Innis argued that “[t]o make inexpensive guns impossible to get is to say you’re putting a money test on getting a gun.”<sup>81</sup>

In addition to Innis, the Repeal Committee hired several prominent Black community leaders in Baltimore as consultants and campaign coordinators. They made appearances on television and radio talk shows, organized public rallies, and led get-out-the-vote efforts before Election Day.<sup>82</sup> The campaign also paid canvassers, some of them teenagers, six dollars an hour to distribute pamphlets in their neighborhoods.<sup>83</sup>

The backlash from within the Black community was swift.<sup>84</sup> George Buntin, Executive Secretary of the Baltimore NAACP, accused the Repeal Committee of “buying off the community,”<sup>85</sup> noting elsewhere that “[w]e’ve always had prostitutes in our community and we always will.”<sup>86</sup> Irwin Conway, Director of the Baltimore Welfare Rights Organization, who was subject to the campaign’s recruitment efforts, responded that “I just let them know that I had more principle than to sell out my community, because it’s black kids that are being shot.”<sup>87</sup>

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78. Lancaster, *supra* note 71, at A1; *see also Gun Law Opponents Target Black Voters*, L.A. SENTINEL, Sept. 8, 1988, at A15, ProQuest, Doc. No. 565510408 (“Using an economic argument, the group has insisted Blacks would be deprived of their right to self-defense because they can’t afford more expensive guns.”).

79. Lancaster, *supra* note 71, at A1.

80. *Id.* at A13.

81. *Id.* at A1.

82. John Lancaster, *Black Leaders in Baltimore Hired by Gun Law Opponents: Inner-City Voters Targeted in Referendum*, WASH. POST, Nov. 4, 1988, at A1, ProQuest, Doc. No. 139406018.

83. *Id.*

84. *See* Lancaster, *supra* note 77, at A43 (“[T]he disclosure law week that the gun lobby was paying consulting fees and salaries to some black activists in Baltimore prompted an angry rebuke from black law enforcement officials, civil rights activists and preachers.”); *see also* James Bock, *Baltimore Ministers Vow to Mobilize for Gun Law*, SUN, Sept. 9, 1988, at 5D, ProQuest, Doc. No. 1474416887 (“[F]ormer Representative Parren J. Mitchell . . . called black opponents of the handgun law ‘modern-day Judases’ who would sell out for ‘30 pieces of silver.’”).

85. Lancaster, *supra* note 82, at A1.

86. Lancaster, *supra* note 71, at A13.

87. Lancaster, *supra* note 82, at A14.

Although the repeal effort was ultimately defeated on Election Day—thus handing the NRA its first defeat in a statewide referendum<sup>88</sup>—these types of race-conscious advocacy strategies organized and implemented by gun-rights groups persisted. Across the country, localities proposed and implemented gun-control measures with the NRA in tow, frequently asserting race-based arguments. That same year, for example, the Housing Authority of Portland, Oregon proposed a local gun ban and held a hearing to gather testimony. Innis provided a statement which read: “Again, a discriminatory and fundamentally unfair denial and attack against minorities, the poor and the powerless is being made by the anti-gun elite in the guise of high moral progress.”<sup>89</sup>

D. *The “Afro-Americanist Reconsideration” in the Academy*

As race-conscious arguments against gun control percolated within the gun-rights movement, legal scholars began to translate and disseminate these claims within the academy in ways legible to audiences receptive to professional forms of legal reasoning—specifically, as applied to Second Amendment interpretation. In 1991, Professors Robert J. Cottrol and Raymond T. Diamond published an article in the *Georgetown Law Journal* calling for an “Afro-Americanist reconsideration” of the Second Amendment.<sup>90</sup> They suggested that the Second Amendment right to bear arms “may have had greater and different significance for blacks and others less able to rely on the government’s protection.”<sup>91</sup>

Cottrol and Diamond interpreted the Second Amendment in light of the state’s inability and refusal to protect Black people from private and public forms of violence over the course of American history.<sup>92</sup> The racialized history of the right to bear arms, they concluded, supports the view that the Second Amendment protects an individual, rather than collective, right to bear arms.<sup>93</sup> Surveying the enactment of statutes disarming Black people from the colonies to postrevolutionary America and past the Civil War, Cottrol and Diamond argued that “a re-examination of this history can lead us to a modern realization of what the framers of the Second Amendment understood: that it is unwise to place the means of protection totally in the hands of the state, and that self-defense is also

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88. Lancaster, *supra* note 77, at A43.

89. Patrick Massa, *Proposed Gun Ban Draws Fire*, SKANNER, Sept. 7, 1988, at 1.

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

91. *Id.* at 359.

92. *See id.* at 318-19.

93. *See id.* at 319.

a civil right.”<sup>94</sup> Upon publication, Cottrol and Diamond’s article, which has been called a “milestone” in the Second Amendment’s modern historiography,<sup>95</sup> received widespread coverage in national news media.<sup>96</sup>

The Cottrol and Diamond article was only the beginning. A wave of articles appeared in law journals throughout the 1990s, all advancing variations of the claim that gun control is race control.<sup>97</sup> For example, the same year that Cottrol and Diamond’s article was published, a lawyer working in the NRA’s office of general counsel, Stefan B. Tahmassebi, authored a law-review article arguing that 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 elements.’”<sup>98</sup> Nearly two decades later, Cottrol, Diamond, and Tahmassebi would team up to file an amicus brief in *Heller* on CORE’s behalf—and funded by the NRA Civil Rights Defense Fund—presenting their arguments about the racist history and effects of gun control.<sup>99</sup> These

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94. *Id.* at 361. Robert J. Cottrol and Raymond T. Diamond also pointed to the racist purpose of gun-control statutes and the value of Black self-defense as a means of resisting private and public domination. *See id.* at 354-55 (“The willingness of blacks to use firearms to protect their rights, their lives, and their property, alongside their ability to do so successfully when acting collectively, renders many gun control statutes, particularly of Southern origin, all the more worthy of condemnation. This is especially so in view of the purpose of these statutes, which, like that of the gun control statutes of the black codes, was to disarm blacks.”).

95. Don B. Kates, *A Modern Historiography of the Second Amendment*, 56 UCLA L. REV. 1211, 1219, 1224 n.71 (2009).

96. *See, e.g.*, Raymond T. Diamond & Robert Cottrol, *Gun Control Efforts Have Disproportionate Affect on Black Americans*, CALL & POST, Jan. 24, 1991, at 5A; *Researchers Say Gun Control Laws Will Backfire on Blacks*, PHILA. TRIB., Jan. 4, 1991, at 2A. One story in the *Los Angeles Times* reported that although the article “was aimed at the legal community, the NRA has promoted it widely” — much like how the NRA promotes the public defenders’ brief in *Bruen* today. Paul Ruffins, *To Fight Crime, Some Blacks Attack Gun Control*, L.A. TIMES, Jan. 19, 1992, at M6. And, as Part II describes, the article received significant attention from judges and practitioners faced with Second Amendment questions, even garnering Supreme Court citations. More than anyone else, Cottrol and Diamond successfully translated burgeoning social-movement claims about race and gun rights into legal claims legible in new fora and imbued with constitutional meaning.

97. *See, e.g.*, Robert J. Cottrol & Raymond T. Diamond, “*Never Intended to Be Applied to the White Population*”: *Firearms Regulation and Racial Disparity — The Redeemed South’s Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1309-11 (1995); T. Markus Funk, Comment, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. CRIM. L. & CRIMINOLOGY 764, 794 (1995); Cynthia Deitle Leonardatos, *California’s Attempts to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947, 948-49 (1999). *But see* David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387, 452 (1999) (rebutting Cottrol and Diamond).

98. Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67, 67 (1991).

99. Brief of Congress of Racial Equality as Amicus Curiae Supporting Respondent at 1, District of Columbia v. *Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 345044, at \*1.



early articles surveyed the “racist roots of gun control,”<sup>100</sup> cataloguing the history of Black disarmament from slavery to Black Codes to contemporary gun-control measures passed to disarm Black nationalist groups such as the Black Panthers.<sup>101</sup>

For decades before *Bruen*, the same race-conscious arguments against gun control have percolated within the gun-rights movement. And as these arguments were articulated at higher levels of sophistication, featuring in the pages of law journals, they eventually caught the eye of a more powerful audience: federal judges.

## II. JURISPRUDENCE

With the social-movement history of these claims at hand, this Part turns to unearthing the *jurisprudential* history of the race-conscious Second Amendment. It shows that racial-justice claims have always been a central component of gun-rights advocates’ legal strategy for reinventing the meaning of the Second Amendment. Indeed, at each stage of the Second Amendment’s modern development, the same racial-justice claims have been raised again and again to justify an increasingly expansive account of the constitutional right to possess and bear arms. Surveying the jurisprudential evolution of Second Amendment racial-justice claims helps us to see how the popular arguments described in Part I were transformed and made legible in formal jurisprudential settings: from the individual-rights theory of the Second Amendment (*Heller*) to Second Amendment incorporation (*McDonald*) – and now – to Second Amendment protection outside the home (*Bruen*).

### A. *The Road to Heller*

Racial-justice claims have been a part of modern Second Amendment jurisprudence from the very beginning. Our story here begins where it ends: with Justice Thomas, who eventually authored the majority opinion in *Bruen*. He was the first to suggest explicitly in an authored opinion that the Second Amendment

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100. Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL’Y 17, 17 (1994).

101. See, e.g., *id.* (describing a gun regulation enacted in California in response to the Black Panther Party); Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEO. MASON U. CIV. RTS. L.J. 105 (1995) (tracing a history of legislative debates and public commentary concerned with the citizenship rights of and the Second Amendment application for Black people).

could protect an *individual's* right to bear arms against federal gun regulation.<sup>102</sup> The argument did not arise in a Second Amendment case, instead appearing in his concurring opinion in the landmark 1997 anti-commandeering case, *Printz v. United States*.<sup>103</sup> In *Printz*, the Court held that provisions of the Brady Bill that required local law-enforcement officials to conduct background checks on prospective handgun purchasers violated the Tenth Amendment's prohibition of commandeering state and local officials to enforce federal law.<sup>104</sup>

In a concurring opinion joined by no other member of the Court, Justice Thomas suggested that the Brady Bill may also run afoul of the Second Amendment.<sup>105</sup> At the time, the controlling Second Amendment precedent was the Court's 1939 decision in *United States v. Miller*, which rejected the notion that the Second Amendment guarantees an individual right.<sup>106</sup> In *Printz*, Thomas wrote that if "the Second Amendment is read to confer a *personal* right to 'keep and bear arms,' a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections."<sup>107</sup> Pointing to "a growing body of scholarly commentary indicat[ing] that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right," Thomas cited Cottrol and Diamond.<sup>108</sup> One commentator noted that "Justice Thomas's concurrence offered inspiration, though perhaps not hope, to opponents of firearms regulation."<sup>109</sup>

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102. Cf. 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, 122-24 (1999) (suggesting that Justice Thomas had indicated in several pre-*Heller* cases that the Second Amendment could protect a personal right).

103. 521 U.S. 898, 936-39 (1997) (Thomas, J., concurring).

104. *Id.* at 935 (majority opinion).

105. *Id.* at 937-39 (Thomas, J., concurring).

106. 307 U.S. 174, 178 (1939) ("In the absence of any evidence tending to show that possession or use of a . . . shotgun . . . 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.").

107. *Printz*, 521 U.S. at 938 (Thomas, J., concurring).

108. *Id.* at 938 n.2.

109. Kevin T. Streit, Note, *Can Congress Regulate Firearms?: Printz v. United States and the Intersection of the Commerce Clause, the Tenth Amendment, and the Second Amendment*, 7 WM. & MARY BILL RTS. J. 645, 649 (1999). But others saw hope in Justice Thomas's writing. Sanford Levinson pointed to the concurrence as proof "that finally there is one justice, of the four needed to grant a petition for certiorari, who recognizes the existence of the Second Amendment and the crying need for the contemporary Court to wrestle with its meaning." Sanford Levinson, *Is the Second Amendment Finally Becoming Recognized as Part of the Constitution? Voices from the*

Nearly a decade would pass before the *Heller* Court finally adopted this individual-rights theory of the Second Amendment. But in the interim, the theory percolated among the lower courts—and along with it, racial-justice claims as evidence of the theory’s validity. Consider, for example, the 2002 Ninth Circuit case *Silveira v. Lockyer*.<sup>110</sup> In *Silveira*, the Ninth Circuit rejected a Second Amendment challenge to California’s Assault Weapons Control Act, holding that the Second Amendment does not protect an individual right to own or possess weapons.<sup>111</sup> Dissenting from the court’s denial of rehearing en banc, Judge Kozinski pointed to the history of slave disarmament to defend an expansive theory of the Second Amendment as protecting an individual’s right to keep and bear arms.<sup>112</sup> Citing *Dred Scott* and *Cottrol and Diamond*, he wrote that

tyranny thrives best where government need not fear the wrath of an armed people. . . . As Chief Justice Taney well appreciated, the institution of slavery required a class of people who lacked the means to resist. A revolt by Nat Turner and a few dozen other armed blacks could be put down without much difficulty; one by four million armed blacks would have meant big trouble.<sup>113</sup>

Judge Kleinfeld, writing separately, pointed to Black Codes enacted after the Civil War, positing that Congress intended the Fourteenth Amendment “to enable blacks to protect themselves from White terrorism and tyranny in the South. Private terrorist organizations, such as the Ku Klux Klan, were abetted by southern state governments’ refusal to protect black citizens, and the violence of such groups could only be realistically resisted with private firearms.”<sup>114</sup>

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*Courts*, 1998 BYU L. REV. 127, 131; see also Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639-40 (1989) (discussing the neglect of the Second Amendment by constitutional scholars).

110. 312 F.3d 1052 (9th Cir. 2002).

111. See *id.* at 1056.

112. *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc). Judge Kozinski had previously defended this interpretation of the Second Amendment in a footnote to his opinion in *United States v. Gomez*, 92 F.3d 770 (9th Cir. 1996)—although there, his argument did not appeal to the history of slavery. See *Gomez*, 92 F.3d at 774 n.7 (“The Second Amendment embodies the right to defend oneself and one’s home against physical attack.”). The two other judges on the panel concurred in the opinion but refused to concur in the footnote. See *id.* at 778-79 (Hall, J., concurring); *id.* at 779 (Hawkins, J., concurring).

113. *Silveira*, 328 F.3d at 569 (Kozinski, J., dissenting from denial of rehearing en banc) (citations omitted).

114. *Id.* at 577 (Kleinfeld, J., dissenting from denial of rehearing en banc); see also David A. Lieber, Comment, *The Cruikshank Redemption: The Enduring Rationale for Excluding the Second*

In the lead-up to *Heller*, the Judge Kozinski and Judge Kleinfeld dissents were frequently invoked in Second Amendment litigation to justify the individual-rights interpretation of the Second Amendment. Dissenting in another rejected Second Amendment challenge in the Ninth Circuit two years after *Silveira*, Judge Gould relied on his colleague's previous writings: "Judge Kozinski documents his argument persuasively, noting the 'sorry history' of our nation when disarmament was used in the South to subjugate slaves, and blacks who had been freed."<sup>115</sup> One brief filed in the Eighth Circuit described Kozinski's dissent as "[p]erhaps the best single statement of the central, grave purpose of the Second Amendment as a last resort to resist the tyranny of evil men."<sup>116</sup>

At the same time, the Executive Branch began to openly embrace the individual-rights theory. In May 2002, Attorney General John Ashcroft officially reversed the Department of Justice's Nixon-era policy concerning the Second Amendment's meaning, declaring that the "current position of the United States . . . is that the Second Amendment more broadly protects the rights of individuals."<sup>117</sup> Two years later, on August 24, 2004, the Department of Justice's Office of Legal Counsel (OLC) issued a memorandum "conclud[ing] that the Second Amendment secures a personal right of individuals" – affirming the government's official position.<sup>118</sup> The OLC memorandum elaborated on the historical arguments put forth by Judge Kleinfeld's *Silveira* dissent, recounting the disarming of former slaves by armed white mobs and via the enactment of Black Codes.<sup>119</sup> The memorandum provided that, in response, the Thirty-Ninth Congress passed the Civil Rights Act of 1866 and the Fourteenth Amendment to secure the Second Amendment rights of Black citizens.<sup>120</sup> Citing legislative history and contemporaneous commentary, the OLC memorandum concluded that "it was widely recognized that the right to keep and bear arms was protected by the

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*Amendment from the Court's Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079, 1082 (2005) ("Jurisprudential developments in 2003 and 2004 have only intensified the controversy surrounding the Second Amendment's meaning and its prospect for incorporation against the states.").

115. *Nordyke v. King*, 364 F.3d 1025, 1032 (9th Cir. 2004) (Gould, J., dissenting from denial of rehearing en banc).

116. Appellant's Principal Brief at 39, *United States v. Fincher*, 538 F.3d 868 (8th Cir. 2008) (Nos. 07-2514 & 07-2888), 2007 WL 6528204.

117. Brief for the United States in Opposition at 19 n.3, *Emerson v. United States*, 122 S. Ct. 2362 (2002) (No. 01-8780).

118. *Whether the Second Amend. Secures an Individual Right*, 28 Op. O.L.C. 126, 128 (2004).

119. *Id.* at 223-24.

120. *Id.* at 224.

Civil Rights Act and the Fourteenth Amendment, and that that right was understood to belong to individuals.”<sup>121</sup> For further evidence of the individual-rights theory, OLC pointed to actions the Reconstruction Congress took to disband Southern States’ militias which endangered freed slaves,<sup>122</sup> supposedly proving that “the overwhelming understanding of the right of the people to keep and bear arms was that it was a right that belonged to individuals.”<sup>123</sup>

### B. District of Columbia v. Heller

After years of percolation, these arguments eventually made their way into the briefing filed in *Heller* and, ultimately, the majority opinion itself. But before turning to the legal dispute in *Heller*, it bears emphasis that race was central to the passage of the handgun law at issue, the Firearms Control Act of 1975. The District of Columbia Council enacted the Act in 1976 in response to rising rates of handgun-related violence.<sup>124</sup> The law limited the registration, possession, and carrying of handguns, and “[t]aken together, these regulations effectively prohibited the ownership or use of handguns by private citizens in the District.”<sup>125</sup> The Act was approved nearly unanimously (a 12-1 vote) by D.C.’s first elected city council—eleven of whose thirteen members were Black—and signed into law by Walter Washington, D.C.’s first elected Black mayor in one-hundred years.<sup>126</sup> As Professor James Forman, Jr. has recounted, for the Act’s supporters among D.C.’s predominantly Black community, “D.C.’s gun control law was a civil rights triumph.”<sup>127</sup> At the time of the Act’s passage, the number of killings—especially gun-related killings—in D.C. had reached new heights.<sup>128</sup> D.C. Council member John Wilson, a veteran of the civil-rights movement, defended the handgun law in race-conscious terms, stating, “The problem of guns for black people is simply this: We have so many, that we are killing, injuring and robbing ourselves to the brink of chaos.”<sup>129</sup> Wilson’s proposal garnered the vocal support

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121. *Id.* at 225.

122. *Id.* at 226.

123. *Id.*

124. For a discussion of the firearm-violence rates that motivated the handgun ban, see Michael B. de Leeuw, Dale E. Ho, Jennifer K. Kim & Daniel S. Kotler, *Ready, Aim, Fire?* District of Columbia v. Heller and Communities of Color, 25 HARV. BLACKLETTER L.J. 133, 142-43 (2009).

125. *Id.* at 138.

126. See JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 19, 71 (2017).

127. *Id.* at 73.

128. See *id.* at 50.

129. *Id.* at 55 (quoting an untitled document from John Wilson’s papers held at George Washington University).

of Black victims of gun violence and D.C.'s Black religious leaders, who testified before the Council to relay their personal experiences of the harm that gun violence had inflicted on their communities.<sup>130</sup>

The sole dissenting vote, D.C. Council member Doug Moore, mounted his opposition by appealing to the need for guns as a means of Black self-defense.<sup>131</sup> Moore referred not only to individual self-defense but also to the Black community's collective self-defense from white violence.<sup>132</sup> In so arguing, Moore drew on the Black tradition of arms that reached back to Reconstruction. Moore's argument was soundly defeated – until *Heller*.

Over three decades later, the parties challenging D.C.'s handgun regulation would themselves marshal racial-justice claims to invalidate the law. The *Heller* lawsuit was the product of a collaboration between libertarian lawyers Clark Neily, Robert Levy, and Alan Gura.<sup>133</sup> In light of the public defenders' brief in *Bruen*, it is worth recounting that *Heller* was itself fast-tracked by these libertarian lawyers who were worried that defense lawyers for criminal defendants would bring a Second Amendment challenge against a gun-control law first. Noticing that criminal-defense lawyers nationwide were deploying Second Amendment arguments to challenge gun-crime charges, Levy realized that there was a good chance a violent criminal could be the face of the next big Second Amendment case: "You don't want a bank robber or a crackhead up there as a poster boy for the Second Amendment," he explained.<sup>134</sup>

Instead, Levy sought out law-abiding plaintiffs who wanted to own guns because they *feared* violent criminals.<sup>135</sup> The original lead plaintiff in *Heller* was Shelley Parker – a Black resident of Washington, D.C., who wanted to keep handguns in her home to defend herself against neighborhood drug dealers.<sup>136</sup> Parker claimed that she faced threats and vandalism from local drug dealers for her efforts to clean up her neighborhood, and that even local police advised her

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130. See *id.* at 57–60.

131. Moore was himself a veteran of the civil-rights movement, one of the first to lead anti-segregation sit-in protests in the South. See Bart Barnes, *Douglas Moore, Provocative Presence in Civil Rights and D.C. Politics, Dies at 91*, WASH. POST (Sept. 4, 2019, 6:04 PM EDT), [https://www.washingtonpost.com/local/obituaries/douglas-moore-provocative-presence-in-civil-rights-and-dc-politics-dies-at-91/2019/09/04/4fe6a1ee-ca92-11e9-a4f3-co81a126de70\\_story.html](https://www.washingtonpost.com/local/obituaries/douglas-moore-provocative-presence-in-civil-rights-and-dc-politics-dies-at-91/2019/09/04/4fe6a1ee-ca92-11e9-a4f3-co81a126de70_story.html) [https://perma.cc/EP9M-MT4P].

132. See FORMAN, *supra* note 126, at 64–65.

133. See WINKLER, *supra* note 23, at 50–56.

134. *Id.* at 59.

135. See *id.*

136. See *The Right to Keep and Bear Arms: 10 Years After Heller*, CATO POL'Y REP. 16 (Sept./Oct. 2008), <https://www.cato.org/sites/cato.org/files/serials/files/policy-report/2018/10/cpr-v40n5-9.pdf> [https://perma.cc/NA3T-LADF].

to obtain a gun for self-defense.<sup>137</sup> In choosing Parker as a plaintiff, Levy referred to the impact litigation of the civil-rights movement. He explained that, like “the strategy that Thurgood Marshall and the NAACP had pursued with great success in the civil rights arena,” his Second Amendment suit “required sympathetic clients, a media-savvy approach, and strategic lawyering.”<sup>138</sup> Parker was later dismissed from the lawsuit for lack of standing; but for the time being, as Professor Adam Winkler observed, “this poor woman, whose life was repeatedly threatened by thugs, was the perfect person to represent a group of law-abiding citizens who wanted guns for self-defense.”<sup>139</sup>

Race was also a significant presence in the case briefing. Cottrol, Diamond, and Tahmassebi—authors of some of the first academic articles about race and the Second Amendment in the early nineties—teamed up to coauthor an amicus brief on behalf of CORE and funded by the NRA Civil Rights Defense Fund.<sup>140</sup> Relaying their research to the Court, the brief argued that “[t]he history of gun control in America has been one of discrimination, disenfranchisement and oppression of racial and ethnic minorities, immigrants, and other ‘undesirable’ groups.”<sup>141</sup> It surveyed the history of gun control in the Slave Codes, citing Chief Justice Taney’s remarks in *Dred Scott*, before turning to gun control in the Black Codes and Congress’s subsequent enactment of the civil-rights bills and ratification of the Fourteenth Amendment.<sup>142</sup>

In addition to these familiar historical arguments, the brief argued that contemporary gun-control efforts disparately impact marginalized communities. As the authors put it, “The worst abuses at present occur under the mantle of facially neutral laws that are, however, enforced in a discriminatory manner” that has “a disparate impact upon blacks, the poor, and other minorities.”<sup>143</sup> The brief even called out “New York’s Sullivan Law,” arguing that it was “originally enacted

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137. See Bill Mears, *Court Decision on Gun Control Is Personal for 2 Women*, CNN (Mar. 18, 2008, 11:22 AM EDT), <https://www.cnn.com/2008/US/03/17/scotus.guns/index.html> [<https://perma.cc/9RES-6N2L>]; cf. Stephanie Mencimer, *Whitewashing the Second Amendment*, MOTHER JONES (Mar. 20, 2008), <https://www.motherjones.com/politics/2008/03/whitewashing-second-amendment> [<https://perma.cc/6CEX-VF5Y>] (“If the Supreme Court invalidates the city’s handgun ban, any ensuing uptick in gun violence is likely to have a disproportionate impact on African Americans, particularly young men.”).

138. WINKLER, *supra* note 23, at 90–91 (quoting Robert A. Levy, *Anatomy of a Lawsuit: District of Columbia v. Heller*, ENGAGE, Oct. 2008, at 27, 29).

139. *Id.* at 60.

140. Brief of Congress of Racial Equality as Amicus Curiae Supporting Respondent, *supra* note 99, at 1–2.

141. *Id.* at 2.

142. See *id.* at 4–16.

143. *Id.* at 25.

to disarm Southern and Eastern European immigrants” and “continues to be enforced in a racist and elitist fashion.”<sup>144</sup> In addition to the CORE brief, several other briefs discussed the importance of gun rights for marginalized groups to resist forms of state and private domination.<sup>145</sup>

The Court’s *Heller* decision finally enshrined some of these arguments in law. Writing for the majority, Justice Scalia surveyed the history of the right to keep and bear arms in America. He described pre-Civil War state cases holding that the Second Amendment right to bear arms did not extend to free Black people, the implication being that courts understood the Constitution to protect an individual, not a collective right.<sup>146</sup> Then, reviewing post-Civil War legislation, Scalia fully embraced the argument that the Reconstruction Congress, reacting to the enactment of Black Codes in Southern States, restored Second Amendment rights to newly freed Black citizens with the understanding that the constitutional right to keep and bear arms refers to the rights of individuals:

Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks’ constitutional right to keep and bear arms. Needless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia. . . . It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense.<sup>147</sup>

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144. *Id.* at 26.

145. See, e.g., Brief for Jews for the Preservation of Firearms Ownership as Amici Curiae Supporting Respondent at 2, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (“Throughout history, the disarmament of populations has all too frequently resulted in genocide and mass oppression.”); Brief for Pink Pistols and Gays and Lesbians for Individual Liberty as Amici Curiae Supporting Respondent at 2-3, *Heller*, 554 U.S. 570 (No. 07-290) (“Laws that prevent the use of firearms for self-defense in one’s own home disproportionately impact those individuals who are targets of hate violence due to their minority status, whether defined by race, religion, sexual orientation, or other characteristic.”); Brief for Southeastern Legal Foundation and Second Amendment Sisters as Amici Curiae Supporting Respondent at 3, *Heller*, 554 U.S. 570 (No. 07-290) (“This right to use a handgun or firearm for self-defense is especially important to women, the elderly and the physically disabled.”).

146. *Heller*, 554 U.S. at 611-12.

147. *Id.* at 614, 616. In his dissent, Justice Stevens first responded that post-Civil War history “cannot possibly” be evidence of the Second Amendment’s original intent. *Id.* at 670 (Stevens, J., dissenting). Second, in light of violent backlash to the post-Civil War creation of state militias in which Black people were permitted to serve, Stevens argued that some of the statements on which Justice Scalia’s opinion relied could “actually . . . refer to the disarmament of black militia members.” *Id.* at 671. As evidence, Stevens recounted the lynching of Jim Williams, a member of one of the new “Negro militias,” by local Klan members in South Carolina. *Id.*



Although the majority opinion did not go so far as to adopt Judge Kozinski's formulation of the insurrectionist Second Amendment or the disparate-impact arguments deployed in amicus briefs, the history of racist disarmament played its part in justifying the individual-rights theory of the Second Amendment that remains the law of the land.

### C. *McDonald v. Chicago*

No time at all passed between the Court's decision in *Heller* and the commencement of the next significant Second Amendment challenge. On June 26, 2008, the day the Court decided *Heller*, a preprepared lawsuit was filed in federal court in Chicago challenging on Second Amendment grounds the city's ordinance banning any unregistered guns—led, once again, by Alan Gura.<sup>148</sup> The case, *McDonald v. City of Chicago*, would reach the Supreme Court in 2010, posing the question of whether the Second Amendment fully applies to the states.<sup>149</sup> The Court held that it does.<sup>150</sup> In *McDonald*, the same Reconstruction history of Black disarmament invoked by the *Heller* opinion to show that the Second Amendment protects an individual right was repurposed and extended to show that the Second Amendment protects a fundamental right that applies to the states.

Here too, Gura sought out diverse plaintiffs “who can tell the story well and in a way that the public can connect with.”<sup>151</sup> This time, Gura chose Otis McDonald—a seventy-six-year-old Black Chicagoan who wanted to own handguns to defend himself from burglars—as lead plaintiff.<sup>152</sup> The son of Louisiana sharecroppers, McDonald's role as lead plaintiff would evoke the history of racist disarmament cited in the Court's *Heller* opinion; as one report put it, “Like the freed slaves, McDonald is a black person who, the thinking goes, has been disarmed.”<sup>153</sup> McDonald himself embraced the historical narrative, reflecting on his

148. See Lyle Denniston, *Second Amendment Drama: Act II*, SCOTUSBLOG (Feb. 25, 2010, 4:17 PM), <https://www.scotusblog.com/2010/02/second-amendment-drama-act-ii> [<https://perma.cc/526R-BTMW>].

149. 561 U.S. 742, 742 (2010).

150. *Id.*

151. Colleen Mastony, *The Public Face of Gun Rights*, CHI. TRIB. (Jan. 30, 2010, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-2010-01-30-ct-news-chicago-gun-ban-20100129-story.html> [<https://perma.cc/GD6Y-GZGB>].

152. *Id.*

153. *Id.* The NRA has cited the choice of Otis McDonald as lead plaintiff in the *McDonald* case as proof that the gun-rights movement is not racist. See Wayne LaPierre, *Those Who Call the NRA Racist Don't Know Our History*, NRA (Sept. 27, 2017), <https://www.americas1stfreedom>

experience in the case: “There was a wrong done a long time ago that dates back to slavery time. I could feel the spirit of those people running through me as I sat in the Supreme Court.”<sup>154</sup>

The Court held that Second Amendment protections are made fully applicable to the states by the Due Process Clause of the Fourteenth Amendment.<sup>155</sup> Writing for a plurality of the Court, Justice Alito relied on Reconstruction-era history to prove that Second Amendment rights are incorporated in the guarantees of due process. Referring to “systematic efforts”<sup>156</sup> undertaken by Southern States to disarm Black Americans, Alito argued that the Thirty-Ninth Congress’s “efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental.”<sup>157</sup> Addressing respondents’ claim that these Reconstruction enactments merely adopted an antidiscrimination rule – and not positive protections for the right to bear arms – Alito pointed out that such a narrow reading would have left Black people in the South “vulnerable to attack by many of their worst abusers: the state militia and state peace officers.”<sup>158</sup> He continued:

In the years immediately following the Civil War, a law banning the possession of guns by all private citizens would have been nondiscriminatory only in the formal sense. Any such law – like the Chicago and Oak Park ordinances challenged here – presumably would have permitted the possession of guns by those acting under the authority of the State and would thus have left firearms in the hands of the militia and local peace officers. . . . [T]hose groups were widely involved in harassing blacks in the South.<sup>159</sup>

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[.org/articles/2017/9/27/those-who-call-the-nra-racist-dont-know-our-history](https://perma.cc/297Y-8YQC) [https://perma.cc/297Y-8YQC].

154. Dahleen Glanton, *Otis McDonald, 1933-2014: Fought Chicago’s Gun Ban*, CHI. TRIB. (Apr. 6, 2014, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-2014-04-06-ct-otis-mcdonald-obituary-met-20140406-story.html> [https://perma.cc/LL27-LYHF].

155. *McDonald*, 561 U.S. at 791 (plurality opinion).

156. *Id.* at 771.

157. *Id.* at 773.

158. *Id.* at 779.

159. *Id.*

Embedded in his historical argument, then, Alito offered a subtle nod to the notion that facially neutral gun-control laws – then and today – leave Black Americans defenseless against armed law enforcement.<sup>160</sup>

In reaching its decision, the plurality dismissed petitioners' request that it revisit the *Slaughter-House Cases* to find that the Privileges or Immunities Clause protects the right to keep and bear arms.<sup>161</sup> But in a fascinating concurring opinion, Justice Thomas rested his conclusion that the Second Amendment is applicable to the states squarely on the Privileges or Immunities Clause.<sup>162</sup> Citing *Cottol and Diamond*, Thomas's opinion extensively surveyed the pre- and post-Civil War history of Black disarmament.<sup>163</sup> Thomas also argued that *United States v. Cruikshank*<sup>164</sup> – which held that the Privileges or Immunities Clause did not incorporate the Second Amendment to limit state or local governments – should be overturned. *Cruikshank*'s holding, Thomas explained, “enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive blacks from the voting booth and force them into peonage, an effective return to slavery.”<sup>165</sup> Recounting the lynching of Black people in the South by white militias including the Ku Klux Klan, Thomas wrote that “[t]he use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence.”<sup>166</sup>

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160. Writing in dissent, Justice Breyer dismissed any relationship between the Second Amendment right to self-defense and antisubordination. He argued that “there is no reason here to believe that incorporation of the private self-defense right will further any other or broader constitutional objective.” *Id.* at 921 (Breyer, J., dissenting). Citing *Carolene Products* footnote four, Breyer noted:

We are aware of no argument that gun-control regulations target or are passed with the purpose of targeting “discrete and insular minorities.” Nor will incorporation help to ensure equal respect for individuals. . . . [T]he private self-defense right does not constitute a necessary part of the democratic process . . . .

*Id.* (citations omitted).

161. *Id.* at 758 (plurality opinion).

162. *Id.* at 858 (Thomas, J., concurring); see also Randy Barnett, *Privileges or Immunities Clause Alive Again*, SCOTUSBLOG (June 28, 2010, 5:01 PM), <https://www.scotusblog.com/2010/06/privileges-or-immunities-clause-alive-again> [<https://perma.cc/7KQQ-SCZB>] (arguing that because Justice Thomas provided the critical fifth vote and only a plurality of the Court based their decision on the Due Process Clause, the Privileges or Immunities Clause has been revived).

163. *McDonald*, 561 U.S. at 836-50 (Thomas, J., concurring).

164. 92 U.S. 542 (1875).

165. *McDonald*, 561 U.S. at 855-56 (Thomas, J., concurring).

166. *Id.* at 857.

In the end, five Justices in *McDonald* appealed to the history of Black disarmament—and, in turn, the value of Black self-defense—to hold that the Second Amendment is a *fundamental* constitutional right whose limitations extend beyond the federal government.<sup>167</sup>

D. New York State Rifle & Pistol Ass’n v. Bruen

1. *The Second Amendment as a Second-Class Right*

After *McDonald*, the Court fell silent for over a decade.<sup>168</sup> But in the interim, the racial-justice frame in Second Amendment law lingered. For years, lower courts struggled and diverged over questions about the Second Amendment’s application outside the home. Overall, lower courts largely upheld firearm regulations, and the “basic regulatory environment for weapons” remained essentially stable.<sup>169</sup> Time after time, the Supreme Court turned down opportunities to clarify the issue.<sup>170</sup> Among gun-rights organizations like the NRA, a common refrain emerged: lower courts were eviscerating the post-*Heller* Second Amendment, and the Supreme Court was nowhere to be found.<sup>171</sup> The Second Amendment had become a “second-class right.”<sup>172</sup>

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167. See Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 286 (2011) (“In the wake of the *McDonald* opinion, however, this history is likely to achieve considerably greater salience. As courts look at various cities’ gun control laws, the racial roots of gun control may be particularly relevant.”); Zick, *supra* note 27, at 251 (noting that the Supreme Court in *Heller* and *McDonald* “relied on aspects of the early ‘ugly history,’ the law and order trope of ‘high crime areas,’ and the equality concerns about racial and other minorities”).

168. In *Caetano v. Massachusetts*, 577 U.S. 411 (2016), the Court, in a per curiam opinion, vacated a Massachusetts high-court decision holding that stun guns are not arms protected by the Second Amendment. The decision offered some insight into the Court’s willingness to police lower-court compliance with *Heller*, but it is not treated as a significant Second Amendment ruling. See Jake Charles, *Caetano’s Erasure*, DUKE CTR. FOR FIREARMS L. (Jan. 8, 2020), <https://firearmslaw.duke.edu/2020/01/caetanos-erasure> [<https://perma.cc/625M-RW8E>].

169. Darrell A.H. Miller, *The Second Amendment and Second-Class Rights*, HARV. L. REV. BLOG (Mar. 5, 2018), <https://blog.harvardlawreview.org/the-second-amendment-and-second-class-rights> [<https://perma.cc/X83Z-LBXD>].

170. See *infra* note 175.

171. See, e.g., *Turning Their Back on the Supreme Court*, NRA INST. FOR LEGIS. ACTION (May 2, 2017), <https://www.nra.org/articles/20170502/turning-their-back-on-the-supreme-court> [<https://perma.cc/N836-8Q9A>].

172. See *infra* notes 173-175.

Over the years, Justice Thomas authored a series of dissents from denial of certiorari in Second Amendment cases, accusing the Court of rendering the Second Amendment a “constitutional orphan.”<sup>173</sup> Citing Justice Alito’s statement in *McDonald* that the Second Amendment is not a “second-class right,”<sup>174</sup> Thomas’s dissents consistently warned that the Court’s unwillingness to reverse lower-court decisions – inconsistent with the constitutional right to bear arms – “undermine[s] that declaration.”<sup>175</sup> These dissenting Justices deployed a civil-rights frame in defense of the Second Amendment. Beyond the substantive claim itself about the Court’s treatment of the Second Amendment in relation to other constitutional provisions, the “second-class right” language is a rhetorical move that sounds in antisubordination. And as Professor Darrell A.H. Miller noted in reaction to this phenomenon, “[T]hat the only sitting African-American Justice applies rhetoric most associated with the Civil Rights Era to a movement comprised largely of white males undoubtedly gives the latter political cover.”<sup>176</sup>

At the same time that gun-rights activists and Justice Thomas bemoaned the Second Amendment’s second-class treatment, the “gun control is racist” story gained popularity in the public eye. As Professor Timothy Zick observed, “After *McDonald*, online articles with titles like, ‘Gun Control is Racist,’ ‘The Racist History of Gun Control,’ or even more insistently, ‘The (Really Really) Racist History of Gun Control in America,’ began to appear with increasing frequency.”<sup>177</sup> In addition to highlighting arguments against gun control that appeal to racial equality, these articles showcased the stories of individual Black gun owners, featured the emergence of new Black gun-rights organizations,<sup>178</sup> and

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173. *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari).

174. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

175. *Silvester*, 138 S. Ct. at 952 (Thomas, J., dissenting from denial of certiorari) (charging lower courts and the Supreme Court with treating the Second Amendment as a disfavored right); see also *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (asserting that the Court’s repeated denials of certiorari in cases involving firearms treats the Second Amendment as a disfavored right); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (similar).

176. Miller, *supra* note 169; see also Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. ONLINE 57, 65-67 (2018) (empirically examining the allegation that lower courts are more likely to deny gun-rights claims than other constitutional claims).

177. Zick, *supra* note 27, at 252.

178. See, e.g., Isaac Scher, Barbara Corbellini Duarte, Hannah Jiang & Mark Abadi, *A Group Called ‘Black Guns Matter’ Is Teaching Black Americans How to Use Firearms*, BUS. INSIDER (July 15, 2020, 2:03 PM), <https://www.businessinsider.com/black-guns-matter-maj-toure-second->

described increasing rates of gun ownership in communities of color in the wake of social unrest, police brutality, and COVID-19.<sup>179</sup>

## 2. *Racial History and Public Carry*

Even before the filings in *Bruen*, a number of judges began to invoke the history of Black disarmament to defend extending *Heller* outside the home. Ten years after *McDonald*, many observers thought the Court was finally ready to speak when certiorari was granted in *New York State Rifle & Pistol Ass'n v. City of New York (NYSRPA)*,<sup>180</sup> a case involving a Second Amendment challenge to a New York City law banning the transport of handguns outside the city. A few months after the Court granted certiorari, however, New York City changed its regulations to allow gun owners to transport their guns and, as a result, the Court concluded that the case had become moot.

On the same day that *NYSRPA* was decided, the Court distributed for consideration ten other Second Amendment cases that had been on hold. But a month later, the Court denied review in all ten cases. For *Rogers v. Grewal*, a case from New Jersey where the court permitted a requirement of “justifiable need”

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amendment-2020-6 [https://perma.cc/WUP7-WMF2]; Robert Kraychik, *Black Guns Matter Founder: ‘Governor Blackface’ Is Pushing ‘Tyrannical’ and ‘Racist’ Gun Control Policies*, BREITBART (Jan. 21, 2020), https://www.breitbart.com/radio/2020/01/21/black-guns-matter-founder-what-governor-blackface-is-trying-to-do-is-tyrannical [https://perma.cc/SL48-JY9Q]; Awr Hawkins, *Latino Rifle Association Founder Warns San Jose Gun Control Hurts Minorities*, BREITBART (July 18, 2021), https://www.breitbart.com/politics/2021/07/18/latino-rifle-association-founder-warns-san-jose-gun-control-hurts-minorities [https://perma.cc/UVA3-YDBZ]; see also Jeff Jacoby, Opinion, *Black and White Americans Are Embracing the Second Amendment*, BOS. GLOBE, June 24, 2020, 3:00 AM, https://www.bostonglobe.com/2020/06/24/opinion/black-white-americans-are-embracing-second-amendment [https://perma.cc/J4DF-FWG5] (noting that the National African American Gun Association began in 2015 as a single chapter and now has 100 chapters with 40,000 members).

179. See, e.g., Martha Asencio-Rhine & Kavitha Surana, *Photo Essay: Black Gun Owners Around Tampa Bay Share Their Stories*, TAMPA BAY TIMES (Dec. 13, 2021), https://www.tampabay.com/news/2021/12/07/photo-essay-black-gun-owners-around-tampa-bay-share-their-stories [https://perma.cc/B2DC-YRH8]; Maya King, *‘It’s My Constitutional Freaking Right’: Black Americans Arm Themselves in Response to Pandemic, Protests*, POLITICO (July 26, 2020, 7:00 AM EDT), https://www.politico.com/news/2020/07/26/black-americans-gun-owners-380162 [https://perma.cc/KP5Z-A993]; Jeff Mordock, *Record Number of Blacks Buy Firearms, Boost Overall Gun Sales During COVID-19 Pandemic*, WASH. TIMES (Jan. 4, 2022), https://www.washingtontimes.com/news/2022/jan/4/black-gun-ownership-fuels-record-number-firearms-p [https://perma.cc/B5ZM-R8QT].

180. 140 S. Ct. 1525 (2020).

to gain a license to carry a handgun in public, Justice Thomas once again dissented from the denial of review.<sup>181</sup> Arguing that the Second Amendment protects a right to carry in public, Justice Thomas again drew on the history of Black disarmament “in the wake of the Civil War.”<sup>182</sup> He argued that discussions in the Reconstruction Congress over how best to secure constitutional rights – including Second Amendment rights – for newly freed slaves “confirm that the Second Amendment right to bear arms was understood to protect public carry at the time the Fourteenth Amendment was ratified.”<sup>183</sup> Citing Cottrol and Diamond again, Thomas pointed out that some Black Codes “explicitly prohibited blacks from carrying arms without a *license* (a requirement not imposed on white citizens).”<sup>184</sup> He concluded: “The importance of the right to carry arms in public during Reconstruction and thereafter cannot be overstated. ‘The use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence.’”<sup>185</sup>

Lower-court judges listened. One year later, in *Young v. Hawaii*, the Ninth Circuit upheld a Hawaii law requiring its residents, except members of law enforcement, military personnel, and those with “exceptional cases or demonstrated urgency,” to obtain a license in order to carry firearms in public.<sup>186</sup> In reaching its decision, the en banc appeals court held that individuals do not have a Second Amendment right to carry weapons openly in public. Writing in dissent, and joined by three other judges, Judge O’Scannlain argued that the Second Amendment protects the right of an individual to carry a handgun outside the home for self-defense.<sup>187</sup> Following the model of Justice Thomas’s *Rogers* dissent, the dissenting opinion recounted the by now all-too-familiar narrative of post-Civil War Black disarmament via the enactment of Black Codes as evidence of its conclusion. Citing the infamous *Dred Scott* passage and Justice Thomas’s concurrence in *McDonald*, O’Scannlain claimed that “those who had sought to dispossess black Americans of the right to carry arms for self-defense understood that they were really seeking to dispossess black Americans of *fundamental constitutional rights*.”<sup>188</sup> For further support that the Second Amendment extends beyond the home, O’Scannlain cited Chief Justice Taney’s language in *Dred Scott* asserting that granting citizenship status to Black Americans

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181. 140 S. Ct. 1865, 1865 (2020) (Thomas, J., dissenting from denial of certiorari).

182. *Id.* at 1873.

183. *Id.*

184. *Id.* (emphasis added).

185. *Id.* (citing his concurrence in *McDonald v. City of Chicago*, 561 U.S. 742, 857 (2010)).

186. 992 F.3d 765, 773, 777 (9th Cir. 2021) (en banc).

187. *Id.* at 829 (O’Scannlain, J., dissenting).

188. *Id.* at 840.

would entail extending to them the “full liberty . . . to keep and carry arms wherever they went.”<sup>189</sup>

Responding to Judge O’Scannlain’s dissent, the majority opinion noted that while it “d[id] not disagree with the history the dissent recounts,” it was “not clear how that history informs the issue before us.”<sup>190</sup> It was true, the majority conceded, that the Reconstruction Congress, in response to the Black Codes, enacted equality provisions in the Civil Rights Act of 1866 and the Fourteenth Amendment that guaranteed “that all citizens would enjoy the same rights as ‘white citizens,’ including Second Amendment rights.”<sup>191</sup> “But those provisions,” the court argued, “do not tell us anything about the substance of the Second Amendment, any more than an equal right to enter into contracts or inherit property tells us whether the state may alter the Statute of Frauds or the Rule Against Perpetuities, so long as it does so for all citizens.”<sup>192</sup> In other words, the court seemed to be saying, the racialized history marshaled in *Heller* and then in *McDonald* could only go so far to justify ever-more expansive interpretations of the Second Amendment. Here, it simply was not relevant.

### 3. *Disentangling Racial-Justice Claims in Bruen*

Finally, we arrive at *Bruen* – the impetus for this Note. *Bruen* is the first major Second Amendment decision in more than a decade – and the decision dramatically expands that constitutional guarantee. In *Bruen*, the Court struck down a New York law that – much like the New Jersey law at issue in *Rogers* – required applicants seeking an unrestricted license to carry a concealed handgun to demonstrate “proper cause” as inconsistent with the Second Amendment.<sup>193</sup>

The *Bruen* litigation represents a high watermark in the expression and deployment of racial-justice claims in the Second Amendment context. In total, forty-seven amicus briefs were filed and docketed in support of the petitioner challenging the licensing law.<sup>194</sup> Eleven of those briefs – nearly a quarter – raised arguments about the disparate impact of gun-control laws on marginalized groups.<sup>195</sup> Before reviewing the role of race in the Court’s eventual decision, this Section unpacks the different strands of race-conscious argument that appear in

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189. *Id.* at 841 (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416-17 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV).

190. *Id.* at 822 n.43 (majority opinion).

191. *Id.*

192. *Id.*

193. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2122-23 (2022).

194. See Ogorek, *supra* note 6.

195. *Id.*



the *Bruen* briefs. Doing so helps us both to analytically differentiate the various claims asserted *and* to take stock of how far these arguments have come. After decades of development through social-movement organizing and litigation, racial-justice claims are now one of the most popular genres of constitutional argument marshaled before the Supreme Court in support of expanding Second Amendment rights.

*a. Racial Disparities in Policing and Prosecution*

Among the numerous briefs filed in support of the petitioner, one in particular has received significant public attention: the brief filed by a coalition of New York public defenders and legal-aid attorneys.<sup>196</sup> Widely touted by gun-rights advocates after its filing,<sup>197</sup> the public defenders' brief sheds light on the disparate impact of New York's licensing regime. The brief argues that the "effect of [the licensing law's] enforcement by police and prosecutors today" is to "criminalize gun ownership by racial and ethnic minorities."<sup>198</sup> "For our clients," the public defenders explain, "New York's licensing regime renders the Second Amendment a legal fiction. Worse, virtually all our clients whom New York prosecutes for exercising their Second Amendment right are Black or Hispanic," and "[t]he consequences for our clients are brutal."<sup>199</sup>

New York prosecutors charge virtually every unlawful firearm possession case as a violent felony, punishable by 3.5 to fifteen years in prison.<sup>200</sup> The New York Police Department (NYPD) has broad discretion over the licensing regime. In addition to requiring applicants to pay over \$400 in fees – pricing out indigent individuals – the police department adjudicates its own "moral character" test.<sup>201</sup> The result, the public defenders note, "is that the NYPD unilaterally decides whose firearm possession is an unlicensed crime and whose is a licensed

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196. Amici came from eleven different legal organizations with "first-hand experience representing hundreds of indigent people each year who are arrested, jailed, and prosecuted for exercising their constitutional rights to keep and bear arms." Brief of the Black Attorneys of Legal Aid, *supra* note 11, at 1-4.

197. See, e.g., Damon Root, *Public Defenders vs. Gun Control*, REASON (Nov. 2021), <https://reason.com/2021/10/17/public-defenders-vs-gun-control> [<https://perma.cc/HAP5-7ZM4>]; Tom Knighton, *Public Defenders Continue Advocating for Less Gun Control*, BEARING ARMS (Nov. 30, 2021, 8:30 PM), <https://bearingarms.com/tomknighton/2021/11/30/public-defenders-n52677> [<https://perma.cc/95ZW-UPBY>].

198. Brief of the Black Attorneys of Legal Aid, *supra* note 11, at 5.

199. *Id.*

200. *Id.* at 4-5, 6-7.

201. *Id.* at 8-9.

right.”<sup>202</sup> This broad police discretion results in disparate enforcement along racial lines. “New York City,” the brief argues, “aggressively sends its police onto the streets with a strict directive: take firearms away from minority men and deter them from carrying.”<sup>203</sup> Indeed, in 2020, “while Black people made up 18% of New York’s population, they accounted for 78% of the state’s felony gun possession cases.”<sup>204</sup>

*b. The Discriminatory Origins of New York’s Sullivan Law*

Several briefs, including the public defenders’, also pointed to the discriminatory origins of New York’s Sullivan Law—the 1911 law that originated the state’s licensing regime. The public defenders observe that the Sullivan Law “responded to years of hysteria over violence that the media and the establishment attributed to racial and ethnic minorities—particularly Black people and Italian immigrants.”<sup>205</sup> A group of primarily Italian American New York City jurists and attorneys filed a brief arguing that the bill was enacted based “on a biased suspicion of Italian immigrants.”<sup>206</sup> The intended purpose of the law was “to disarm Italian immigrants, whom many believed were predominantly responsible for violent crime.”<sup>207</sup> This brief was authored in full by an assistant general counsel at the NRA.<sup>208</sup>

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202. *Id.* at 12.

203. *Id.* at 12–13.

204. *Id.* at 14.

205. *Id.* at 9.

206. Brief of Italo-American Jurists and Attorneys as Amici Curiae Supporting Petitioners at 1, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843).

207. *Id.* at 2.

208. *Id.* at 1 n.1; see also Sarah Gervase, NRA FOUND. ANN. NAT’L FIREARMS L. SEMINAR, <https://lawseminar.nrafoundation.org/biographies/sarah-gervase/#:~:text=Sarah%20Gervase%20has%20been%20Assistant,trusts%20and%20states%2C%20and%20contracts> [https://perma.cc/WEV2-PVF3] (“Sarah Gervase has been Assistant General Counsel at the National Rifle Association since 2006.”); Will Van Sant, *The NRA Paid a Gun Rights Activist to File SCOTUS Briefs. He Didn’t Disclose It to the Court.*, TRACE (Nov. 3, 2021), <https://www.thetrace.org/2021/11/scotus-nra-foundation-david-kopel-nysrpa-v-bruen-documents> [https://perma.cc/9LLP-KVL3] (suggesting based on a “hacked document” that the “NRA Foundation has paid an attorney and Second Amendment activist to write favorable briefs in Supreme Court cases” without disclosure).

c. *The Racist History of Gun Control*

Looking beyond New York's particular regime, some briefs deployed the racist history of gun-control measures to support more expansive Second Amendment rights – echoing passages from *Heller* and *McDonald*. A brief authored by gun-rights advocate and frequent NRA collaborator Stephen Halbrook, on behalf of the National African American Gun Association (NAAGA), exemplifies this approach – an approach that, by now, we are intimately familiar with. “New York’s discretionary licensing scheme,” the brief argues, “is within a similar legacy as the Black Codes and Jim Crow regimes that prohibited the carrying of firearms by African Americans without a license subject to the discretion of the licensing authority.”<sup>209</sup> These types of licensing laws – or total bans on firearm possession – reflected Black people’s “[s]tatus as [s]laves or [n]on-citizens.”<sup>210</sup> In response to these laws, the Reconstruction Congress enacted the Freedmen’s Bureau Act, the Civil Rights Act of 1866, the Fourteenth Amendment, and the Civil Rights Act of 1871 to protect Black Americans’ right to keep and bear arms in and out of the home – independent of state infringement or discretion.<sup>211</sup>

d. *Gun Rights and the Civil-Rights Tradition*

Halbrook’s brief for NAAGA also appealed to the carrying of firearms as an essential part of the history and tradition of the civil-rights movement. Writing that “African Americans, including civil rights icons, had a long tradition of carrying firearms to protect themselves and their communities,”<sup>212</sup> Halbrook suggests that licensing laws “surely hampered the ability of civil rights workers to protect themselves.”<sup>213</sup> Halbrook notes that Dr. Martin Luther King, Jr. was himself denied a license to carry in Alabama because, local authorities determined, he had not shown “good cause.”<sup>214</sup> The brief concludes with a comparison to New York’s licensing regime:

Would Rev. King have been able to get a carry license under New York’s discretionary “proper cause” law? . . . Wasn’t King in a similar threatened

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209. Brief for National African American Gun Association, Inc. as Amicus Curiae Supporting Petitioners at 4, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

210. *Id.*

211. *Id.* at 20-27.

212. *Id.* at 30.

213. *Id.* at 33.

214. *Id.* at 31.

situation as many others in the civil rights movement? In historical perspective, New York's law is heir to the Black Codes and Jim Crow regimes except that, instead of discriminating only against black people, it deprives the people at large of the right to bear arms, which is reserved to members of a privileged class determined by government officials to have "good cause."<sup>215</sup>

*e. Self-Defense and the Marginalized*

Finally, several briefs argued that a Second Amendment right to carry in public is necessary for members of marginalized groups to exercise their right to self-defense — especially because they cannot rely on the state to protect their wellbeing. A brief filed by Black Guns Matter — an organization formed to educate Black communities about their gun rights — argues that "[t]he need for armed self-defense is most critical when the local, state and federal government fails to offer assistance," but the New York licensing law "relegates [African Americans and other minorities] to a system dependent on government elites."<sup>216</sup> The brief also cites increasing rates of urban gun violence and civil unrest in the last year, and in turn, increasing rates of Black gun ownership.<sup>217</sup> Another brief filed by the Asian Pacific American Gun Owners Association pointed to the recent spike in hate-crime incidents against Asian Americans during the COVID-19 pandemic, noting that the majority of those crimes took place in public spaces.<sup>218</sup> Asian Americans, the brief explains, "are part of a tradition of minority gun ownership going back at least as far as Reconstruction" — they are "the latest minority individuals — but certainly not the first and unlikely the last — to experience first-hand precisely how significant a role the Second Amendment plays as a guarantor of minority safety."<sup>219</sup>

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<sup>215</sup> *Id.* at 34.

<sup>216</sup> Brief of Black Guns Matter, A Girl & A Gun Women's Shooting League, and Armed Equality as Amici Curiae Supporting Petitioners at 11, 12, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

<sup>217</sup> *Id.* at 12-13; *see also id.* at 11 ("Armed self-defense has always been vitally important to the African American community").

<sup>218</sup> Brief of Asian Pacific American Gun Owners Association as Amicus Curiae Supporting Petitioners at 5-7, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

<sup>219</sup> *Id.* at 1, 3. The minority-safety argument was not confined to racial minorities. The Independent Women's Law Center filed a brief arguing that the Second Amendment should be interpreted as extending beyond the home because the self-defense rationale applies in public spaces — especially for women who are at greater risk of facing violence outside the home. Brief for the Independent Women's Law Center as Amicus Curiae Supporting Petitioners at 3-5, *Bruen*, 142 S. Ct. 2111 (No. 20-843). "A firearm is a powerful equalizer that makes it possible for a woman to defend herself from a physically more powerful attacker," the brief concluded. *Id.* at 9.

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Inside and outside the courtroom, these arguments changed the terms of the gun debate. At oral argument, Justice Alito drew on these briefs to pose a question about the discriminatory origins of New York’s law. “There’s a debate about the impetus for the enactment of the Sullivan Law, is there not?” Alito asked. “[T]here are those who argue . . . that a major reason for the enactment of the Sullivan Law was the belief that certain disfavored groups, members of labor unions, blacks, and Italians were carrying guns and they were dangerous people and they wanted them disarmed.”<sup>220</sup> And Paul Clement, who argued on petitioner’s behalf, closed his presentation by urging the Justices to heed the public defenders’ brief:

[T]he discretion here has real-world costs. If you want to look at it, look at the amicus brief in our support by the Bronx Public Defenders and other public defenders. The cost of this kind of discretion is that people are charged with violent crimes even though they have no . . . <sup>221</sup>

The race-based arguments asserted in *Bruen* to support petitioners did not appear out of thin air. Rather, they represent the culmination of many decades of social-movement organizing, academic writing, and jurisprudential development that have imbued constitutional understandings about the Second Amendment with racial meaning.

#### *E. Bruen and a Demosprudence of Race*

Twenty-five years after he first suggested that the Second Amendment guaranteed an individual right to bear arms in *Printz* (citing *Cottrol* and *Diamond*), Justice Thomas authored the 6-3 majority opinion in *Bruen* extending Second Amendment protection outside the home. In addition to striking down New York’s restrictive may-issue licensing law, Thomas’s opinion upends an enduring consensus in the federal courts of appeal by mandating a history-and-tradition-only test for *all future* Second Amendment challenges. His opinion concludes triumphantly, “The constitutional right to bear arms in public for self-defense is not ‘a *second-class right* . . . .’”<sup>222</sup>

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220. Transcript of Oral Argument at 103-04, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

221. *Id.* at 121-22.

222. *Bruen*, 142 S. Ct. at 2156 (emphasis added) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion)).

More than any previous contemporary Second Amendment decision, Justice Thomas's majority opinion in *Bruen* employs forms of racialized constitutional memory. In striking down New York's licensing regime on historical grounds, Justice Thomas drew, unsurprisingly, on the history of Black disarmament in the wake of the Civil War and deliberations of the Reconstruction Congress. By now, the race-conscious sources the *Bruen* opinion relies on are more than familiar. Thomas begins by asserting that "[e]ven before the Civil War commenced in 1861, this Court indirectly affirmed the importance of the right to keep and bear arms in public."<sup>223</sup> Thomas refers there, of course, to Chief Justice Taney's *Dred Scott* opinion. "[E]ven Chief Justice Taney recognized (albeit unenthusiastically in the case of blacks)," Thomas writes, "that public carry was a component of the right to keep and bear arms – a right free blacks were often denied in antebellum America."<sup>224</sup>

Justice Thomas proceeds to recount the disarmament of freed slaves following the Civil War, noting "the Southern abuses violating blacks' right to keep and bear arms."<sup>225</sup> Thomas cites Freedman's Bureau reports that described "how blacks used publicly carried weapons to defend themselves and their communities," pointing to one report in which a mayor in Maryland urged Black people (and teachers) to bring guns to school for self-defense.<sup>226</sup> He also quotes from one Reconstruction Congress report providing that "there [was] the strongest desire on the part of the freedmen to secure arms," "[s]eeing that government was inadequately protecting them" from white-supremacist violence.<sup>227</sup> In response, Thomas tells us, Congress extended the 1866 Freedman's Bureau Act which, among other things, reaffirmed the freedman's equal entitlement to "the constitutional right to keep and bear arms."<sup>228</sup>

Justice Thomas's opinion channels contemporary concerns about the racist impact of gun control through the veneer of constitutional history and tradition. The unspoken lesson of the histories he invoked is that extensive Second Amendment guarantees are antistatist – that Black communities require the right to bear arms in public to defend themselves against extrajudicial violence when the state is unwilling.

Or consider the disparate-impact argument briefly discussed in Section III.D. Justice Thomas's opinion never cites the public defenders' brief. But in a footnote attached to his account of Reconstruction-era history, Thomas observes

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223. *Id.* at 2150.

224. *Id.* at 2151.

225. *Id.*

226. *Id.*

227. *Id.* (quoting H.R. REP. NO. 30, pt. 3, at 102 (1866)).

228. *Id.* (quoting Freedmen's Bureau Act of 1866, ch. 200, § 14, 14 Stat. 173, 176).

that “Southern prohibitions on concealed carry were not always applied equally” – echoing contemporary arguments about the disparate enforcement of gun regulation against people of color.<sup>229</sup> Thomas cites an officer in Florida who registered “how local enforcement of concealed-carry laws discriminated against blacks.”<sup>230</sup> The officer’s account in the congressional record read:

To sentence a negro to several dollars’ fine for carrying a revolver concealed upon his person, is in accordance with an ordinance of the town; but still the question naturally arises in my mind, “Why is this poor fellow fined for an offense which is committed hourly by every other white man I meet in the streets?”<sup>231</sup>

Without referring directly to the public defenders’ brief or similar arguments raised by litigants about the impact of today’s concealed-carry laws, Thomas lends credence to the disparate-impact argument against gun-regulation measures.

Justice Alito, on the other hand, filed a concurring opinion that forcefully brought these claims to the fore. Writing separately from the majority opinion’s historical soliloquy, Alito painted a grim picture of the importance of carrying firearms in New York today for purposes of self-defense. Some New Yorkers, Alito writes, “must traverse dark and dangerous streets in order to reach their homes after work or other evening activities.”<sup>232</sup> Without a handgun, “[o]rdinary citizens” returning home will fear that they may be “murdered, raped, or suffer some other serious injury” – especially as “there can be little doubt that many muggers and rapists are armed and are undeterred by the Sullivan Law.”<sup>233</sup>

Justice Alito relies on the string of amicus briefs previously discussed to show that “[s]ome are members of groups whose members feel especially vulnerable.”<sup>234</sup> Citing the Black public defenders’ brief, he notes that “a law-abiding person was driven to violate the Sullivan Law because of fear of victimization and as a result was arrested, prosecuted, and incarcerated.”<sup>235</sup> “Some briefs,” Alito calls out, “were filed by members of groups whose members feel that they have special reasons to fear attacks” – citing briefs filed by the Asian Pacific American

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229. *Id.* at 2151 n.27.

230. *Id.*

231. *Id.* (quoting H.R. EXEC. DOC. NO. 57, at 83 (1867)).

232. *Id.* at 2158 (Alito, J., concurring).

233. *Id.*

234. *Id.*

235. *Id.* at 2159.

Gun Owners Association, DC Project Foundation, Black Guns Matter, the Independent Women's Law Center, and NAAGA.<sup>236</sup>

*Bruen* is a high watermark in the expression and deployment of racial-justice claims in the Second Amendment context. In the end, six Justices in *Bruen* signed on to an opinion that appealed heavily to the history of Black disarmament, the value of Black self-defense, and the disparate enforcement of concealed-carry regulation to hold that the Second Amendment guarantees a right to bear arms outside the home. *Bruen* is the latest culmination in the story of how racial-justice frames have always been fundamental to understanding the evolution of the modern Second Amendment from both a social-movement and a jurisprudential perspective.

Still, some may object that these forms of argument are insignificant because arguments about the disparate impact that gun-control measures have on communities of color or the racist history of gun control are not an integral part of Second Amendment doctrine's internal logic. As historian Patrick J. Charles mused before *Bruen*, "Whether the 'gun control is racist' narrative will ever gain jurisprudential traction is unknown."<sup>237</sup> With the *Bruen* opinion at hand, it is fair to say that this narrative has indeed gained enormous jurisprudential traction. Justice Thomas's *Bruen* opinion endorses the "gun control is racist" narrative without having to say so explicitly (as Justice Alito does). It draws on all the sources, constitutional memories, and forms of argument that conservative gun-rights activists have marshaled for decades to lend credence to the idea that gun control is racist.

The racial-justice frame in the Second Amendment context, then, is significant as a successful form of "demosprudence." The concept of demosprudence is typically invoked to analyze progressive social movements.<sup>238</sup> But despite the frequent association between demosprudence and progressive politics, Guinier and Torres are clear that "demosprudence is not a philosophy of the left or the

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236. *Id.*

237. Charles, *supra* note 28, at 1367.

238. Lani Guinier and Gerald Torres, for example, explored the Montgomery Bus Boycott, the Mississippi Freedom Democratic Party, and the United Farm Workers in California as case studies to illustrate demosprudence in action. See Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749, 2762-95 (2014). Justice Sotomayor's dissent in *Utah v. Strieff*—a Fourth Amendment decision expanding the scope of police-stop powers—itself cites landmark work by Guinier and Torres: "We must not pretend that the countless people who are routinely targeted by police are 'isolated.' They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere." 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) (citing LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* 274-83 (2002)).



right.”<sup>239</sup> Rather, demosprudence is a “philosophical commitment to the law-making force of meaningful participatory democracy” that has and can be practiced by social movements “ranging from the abolitionists and suffragettes to the evangelical Christian, property rights, and *gun rights* movements of today.”<sup>240</sup>

One way of articulating the upshot of Parts I and II is that gun-rights advocates have long embraced a demosprudence of racial justice. From the very beginning of the modern gun-rights movement in the late 1960s, conservative gun-rights advocates have participated in a longstanding and enduring dialogue with movement activists, gun owners, voters, legislators, legal academics, and federal judges about the relationship between gun rights and racial justice. These advocates have turned to federal courts not only to resolve formal legal disputes but also to change public constitutional understandings and connotations about the Second Amendment. Drawing on race-conscious forms of argument has given gun-rights advocates the chance to extend the frame of the debate beyond esoteric questions of Second Amendment interpretation and call attention to the racialized consequences of gun control in ways that have changed the terms (and traditional political alignments) of public gun-control debates. Federal judges like Justices Thomas and Alito, in turn, have been in conversation with “a conservative constituency of accountability,” acknowledging that “their audience is not just their colleagues or the litigants in the cases before them.”<sup>241</sup> When judges write in such a way to recognize the race-based arguments for expansive Second Amendment rights, they “encourage a ‘social movement to fight on.’”<sup>242</sup>

### III. ANTISUBORDINATION AND THE SECOND AMENDMENT

This case of right-wing demosprudence presents a significant challenge for progressive gun-control advocates and calls for a race-conscious movement response – what we might call a counterdemosprudence of gun rights and racial antisubordination from the left. The remainder of the Note answers this call. It seeks to develop a historical and normative foundation for what this Note calls “antisubordinating” the Second Amendment. This framework articulates an account of gun regulation as essential to addressing forms of racial subordination that obstruct free and equal participation in the democratic polity.

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239. Guinier & Torres, *supra* note 238, at 2751.

240. *Id.* (emphasis added).

241. Guinier, *supra* note 21, at 444.

242. *Id.* (quoting Lani Guinier, *The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 112 (2008)).

In offering this framework, Part III asks the “subordination question” with respect to contemporary Second Amendment and firearms law and policy, bringing to the fore “problems of racialized group-based social harms” that commonly surround problems of gun rights and gun control.<sup>243</sup> Responding to the race-conscious case for gun rights, Part III proposes a racialized counternarrative that acknowledges the tendency of expansive gun rights to reinforce, rather than combat, existing racial inequalities. It imagines antistatizing the Second Amendment by reducing, rather than reinforcing, inequalities in the distribution of public safety and democratic participation that are a consequence of concentrated levels of gun violence in communities of color. Antistatizing the Second Amendment requires recognizing that just as guns can be tools of self-defense, they can also serve as means of domination.

To start, advocates of gun regulation must tell competing stories about past efforts for gun regulation motivated by the project of racial antistatization. Section III.A offers a competing history. Contrary to the claim that gun-control measures are intrinsically tied to racist motives,<sup>244</sup> it shows that supporters of gun-control measures in the late twentieth century frequently marshaled racial-justice arguments to *support* gun control. It tells the underappreciated story of the civil-rights movement for gun control in the 1990s. As Black communities faced devastating rates of gun homicide, civil-rights organizations made combating gun violence a national priority on racial-equality grounds. For one, the story of these advocacy efforts shows that actors on *both sides* of the contemporary gun-rights conflict invoked racial justice to support their claims—a historical fact that is frequently lost in contemporary discussions about guns and race. But perhaps more importantly, recounting the efforts of these civil-rights organizations in the 1990s helps us to build a normative account of the relationship between public safety, antistatization, and democratic equality. In short, it provides the foundation for antistatizing the Second Amendment based on past struggle.

Drawing on the arguments asserted by these civil-rights activists, Section III.B reconstructs a theory of public safety as a social condition for democratic equality. On this account, the disproportionate harm that gun violence inflicts on Black communities is considered a form of racial subordination—and gun regulation is a necessary antistatization strategy. Section III.C then considers the practical problem posed by the public defenders’ brief—namely, that gun

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243. Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1073 (2005) (applying the “subordination question” to national security).

244. For a discussion of these historical arguments, see Patrick J. Charles, *Some Thoughts on Addressing Racist History in the Second Amendment Context*, DUKE CTR. FOR FIREARMS L. (Jan. 14, 2022), <https://firearmslaw.duke.edu/wp-content/uploads/2022/01/Charles-Some-Thoughts-on-Addressing-Racist-History.pdf> [<https://perma.cc/6FGT-8NQ3>].

control can itself take on subordinating forms – and asks whether a more expansive Second Amendment doctrine is the proper solution. How do we reconcile the need to address gun violence with the harms of discriminatory enforcement of criminal gun laws? Section III.C determines that a more expansive Second Amendment doctrine – exemplified by the Court’s decision in *Bruen* – is not the proper answer. Indeed, such a historicist Second Amendment is ultimately insensitive to the interest communities of color have in equal conditions of public safety.

After rejecting Second Amendment expansionism as a potential remedy, Section III.D concludes that antisubordinating the Second Amendment must begin with seeking solutions via constitutional politics outside the court – and within marginalized communities, just as civil-rights activists of the 1990s understood. Truly fostering the social conditions for equal public safety requires moving towards decarceral foundations for gun-control regimes, derived through the ordinary processes of democratic self-government. Reasoning about the need for antisubordinating gun regulation in politics can help lay the groundwork for future courts to recognize a truly antisubordinated Second Amendment.

Before proceeding, two clarifications are in order about what this Note means by antisubordinating the Second Amendment. First, as a counter-demosprudence, the project of antisubordinating the Second Amendment refers not only to the formal Second Amendment as it is construed by judges, but to the Second Amendment outside the Constitution as well. Part III imagines how our body of law governing the right to keep and bear arms – whether constitutional or extraconstitutional – may reinforce subordinating status relations, and how that body of law can be altered to address them.<sup>245</sup> In terms familiar to constitutional theorists, the project of antisubordinating the Second Amendment operates in both the realm of the big-C and small-c constitutions.<sup>246</sup>

Second, in posing the antisubordination question, Part III treats antisubordination as a Second Amendment value. The value of antisubordination is most invoked in discussions of Fourteenth Amendment equal-protection doctrine, where it is often compared to anticlassification views. But it can also be understood as a more general principle that underlies the American civil-rights tradition. Proponents of the antisubordination principle contend that “guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce

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245. For an articulation of the concept of the non-Second Amendment law of gun rights, see generally Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581 (2022).

246. See generally Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079 (2013) (theorizing the “big-C bundle” and “small-c bundle” of constitutionality).

the secondary social status of historically oppressed groups.”<sup>247</sup> For many anti-subordination theorists, the principle finds its constitutional home in the Equal Protection Clause of the Fourteenth Amendment, which they read as vindicating antisubordination values. But as many scholars have observed, the guarantees of equal citizenship that animate the antisubordination principle are implicated across legal disciplines. In the past few years alone, legal scholars have begun to explore how First Amendment doctrine,<sup>248</sup> Fourth Amendment law,<sup>249</sup> separation-of-powers law,<sup>250</sup> administrative law,<sup>251</sup> tax law,<sup>252</sup> and the laws regulating abortion<sup>253</sup> preserve subjugating status relations with respect to race.

Here, it is worth distinguishing between the treatment of antisubordination as an internal value as opposed to an external value. In the context of Fourteenth Amendment equal-protection doctrine, scholars treat antisubordination as an internal value because it operates as the value that underlies and animates equal-protection doctrine. Or consider Professor Genevieve Lakier’s concept of an “antisubordinating First Amendment”: for Lakier, First Amendment doctrine should be reformed to protect the expressive freedom of the powerless precisely because the democratic value that underlies the First Amendment’s free-speech guarantee requires “substantive equality in expressive opportunity.”<sup>254</sup> On both of these accounts, the internal purpose of the First and Fourteenth Amendments is to advance some conception of antisubordination.

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247. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9 (2003).

248. See, e.g., Lakier, *supra* note 22, at 2139-40 (observing “the tendency of contemporary free speech law to reinforce rather than combat existing inequalities in wealth and power” and defending “an antisubordinating First Amendment . . . that reduces, rather than reinforces, the inequalities in expressive opportunity that are a consequence of the highly, and increasingly, unequal distribution of economic and political power in the United States”); Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1962 (2018) (responding to the “egalitarian anxieties about the First Amendment”).

249. See, e.g., Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017).

250. See, e.g., Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78 (2021) (calling for the incorporation of antisubordination into both institutional and doctrinal separation-of-powers analysis).

251. See, e.g., Christina Isabel Ceballos, Davis Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370 (2021) (arguing that administrative law must incorporate antidiscrimination, disparate-impact assessments).

252. See, e.g., DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021); Dorothy A. Brown, *Split Personalities: Tax Law and Critical Race Theory*, 19 W. NEW ENG. L. REV. 89 (1997).

253. See, e.g., Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021).

254. Lakier, *supra* note 22, at 2120.

But antisubordination can also be treated as an external value. When scholars explore how Fourth Amendment law, tax law, or international law enforce racial subordination, they need not claim that antisubordination is the value that animates (or ought to animate) these bodies of law.<sup>255</sup> Instead, they treat antisubordination as an external value – an independent standard against which our legal system should be measured. In that way, the internal approach to the antisubordination question is transsubstantive – in any field of law, it can be asked how law reinforces relations of second-class citizenship. Indeed, the Supreme Court itself has, on several occasions, given special weight to racial-justice arguments in cases that don't involve racial discrimination claims at all.<sup>256</sup>

This Note's project of antisubordinating the Second Amendment takes the external approach. Its claim is not that social equality is an internal value that underlies Second Amendment jurisprudence. As the Court reasons today, self-defense is the value that animates the constitutional right to bear arms. But as the discussion in Parts I and II illustrates, gun-rights advocates have long held Second Amendment law against the standard of racial antisubordination – not as its animating purpose, but still as an independently important value. Cottrol and Diamond's seminal article itself took this approach. Indeed, in imagining how to antisubordinate the Second Amendment, these Parts can be understood as a divergent descendant of Cottrol and Diamond's piece. Cottrol and Diamond themselves described the aim of their article as “integrating the study of the black experience into larger questions of legal and social policy.”<sup>257</sup> They sought to interpret the Second Amendment in ways sensitive to the systemic subordination of Black people throughout American history. In that way, they asked the subordination question of Second Amendment law. The below discussion follows that methodological tradition.

#### A. *Gun Violence and Civil Rights*

The conservative demosprudence of racial justice that gun-rights advocates have developed over time draws heavily on history to lend their constitutional

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<sup>255</sup>. See *supra* note 20 for additional examples.

<sup>256</sup>. Commentators have observed that the Supreme Court itself has begun treating racial antisubordination as an independent value in various contexts. Melissa Murray points out that a previous court's failure to account for a law's racialized harms or discriminatory origins can constitute a “special justification” for overruling precedent. See Murray, *supra* note 253, at 2072-83; see also Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 681-89 (2022) (observing that the Roberts Court increasingly introduces nondispositive race-based arguments in criminal cases where racial discrimination is not at issue).

<sup>257</sup>. Cottrol & Diamond, *supra* note 90, at 359.

claims authority. Their frequent invocations of the memories of slavery, Reconstruction, discriminatory gun regulation, and the Black tradition of arms bearing as a mode of resistance against white terror help them claim the mantle of the civil-rights movement. Weaving together a competing demosprudence—one that antistatizes the Second Amendment—requires engaging in memory games. That is, advocates of gun regulation need to tell competing stories about past efforts for gun regulation motivated by the project of racial antistatization.

That gun regulation has an antiracist history is indisputable.<sup>258</sup> Recall, for instance, the antiracist motivations of the D.C. handgun law passed in 1976 and eventually invalidated in *Heller*. That law was the direct product of burgeoning Black political power and representation in D.C., spurred by concerns about the scourge of gun violence on the vitality of D.C.'s Black community in particular.<sup>259</sup> But these antiracist roots can be traced as far back as Reconstruction. Second Amendment scholar Mark Anthony Frassetto, for example, notes that many public-carry regulations were enacted by states during Reconstruction as a result of rising Black political power; “[w]hen southern states elected new Republican-controlled governments, which included many Freedmen, they enacted laws regulating public carry to protect Freedmen from the extreme levels of racist violence from groups like the [Ku] Klux Klan.”<sup>260</sup> Findings such as these complicate the memory of Reconstruction that gun-rights advocates relay, showing that even then, gun regulation was understood as important to the project of obtaining equal citizenship. The aim of these histories is not to deny that some gun

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258. Although this Section focuses on the antiracist history of gun regulation, it is worth noting that some scholars have pointed, on the other hand, to the *racist* history of the Second Amendment. Most recently, Carol Anderson argued that the Second Amendment's protection of militias was forged as a safeguard against slave revolts. Anderson's argument echoes Carl Bogus's 1998 argument that the Second Amendment was designed to protect slave patrols. See *supra* note 19 and accompanying text.

259. See *supra* notes 124-149 and accompanying text.

260. Mark Anthony Frassetto, *The Nonracist and Antiracist History of Firearms Public Carry Regulation*, 74 SMU L. REV. F. 169, 175 (2021). In a previous piece, Mark Anthony Frassetto focuses on a piece of Reconstruction legislation regulating the public carry of firearms in the state of Texas. See Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 97-98 (2016) (“Texas, like most Southern states, suffered widespread violence against freedmen and their Republican supporters during the Reconstruction period. But unlike in many states, Republican Unionists in Texas confronted racist reactionaries’ violence with strong legislative and executive action. On the heels of the Fourteenth Amendment—which Republicans drafted and ratified—Republicans in Texas enacted a law prohibiting the carrying of firearms under most circumstances.”).

regulations have a discriminatory past. Rather, they resist the idea that gun regulation is inherently – or even primarily – the product of racist traditions.<sup>261</sup>

This Section begins to build an account of antistubordinating the Second Amendment by adding another competing history to the mix. In the 1990s, civil-rights organizations were looking to modernize their advocacy agendas, tailoring them to the evolving needs of communities of color. As high rates of urban gun violence devastated Black communities, these groups turned their attention to gun control as the civil-rights issue of the decade. These movements treated public safety itself as an antistubordination value, publicly articulating the ways in which the lack of public safety in Black communities that resulted from – among other things – high rates of gun violence were itself a form of social domination. Recounting this story provides a theoretical and historical basis for my normative account of antistubordinating the Second Amendment. But it also reminds us that racial-justice claims were present on both sides of the gun-control debate.

### 1. *Equal Public Safety as a Civil Right*

In 1991, on the twenty-third anniversary of Dr. Martin Luther King, Jr.'s assassination, leaders of national civil-rights organizations like the NAACP, the Southern Christian Leadership Conference (SCLC), and Operation PUSH/Rainbow Coalition gathered in Atlanta, Georgia, for the African-American Leadership Summit where they pledged to “refocus[]” their tactics and priorities to “better represent and serve minorities.”<sup>262</sup> At the time, these leaders conceded, civil-rights organizations were “hurting in finances, membership and media attention.”<sup>263</sup> What outside observers called an identity crisis for the civil-rights movement, civil-rights leaders took as an opportunity to rethink and broaden the concept of civil rights itself.<sup>264</sup> They met in Atlanta to contemplate

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261. See generally Charles, *supra* note 28 (arguing that the “gun control is racist” narrative relies on a bad-faith and selective reading of history).

262. Jerry Thornton, *Civil Rights Groups ‘Refocusing’ Tactics*, CHI. TRIB., Apr. 5, 1991 (§ 2), at 1, ProQuest, Doc. No. 1620670134.

263. *Id.*

264. Compare Clarence Page, *Anniversary March for Civil Rights Lacks Cohesion, Purpose*, CHI. TRIB., Aug. 25, 1993 (§ 1), at N15, ProQuest, Doc. No. 1824616367 (arguing that the 1993 March on Washington was “overloaded with issues unrelated to each other and only loosely related to the rights of blacks”), with Maurice Dawkins, *Are Liberal Democrats the Only Advocates of Civil Rights*, NEW PITT. COURIER, Sept. 25, 1993, at A7, ProQuest, Doc. No. 368201082 (noting that, at the 1993 March on Washington, activists marched “not to revitalize the old civil rights movement: It was to create a new movement and a definition for civil rights”). See generally Charles F. Abernathy, *When Civil Rights Go Wrong: Agenda and Process in Civil Rights Reform*, 2 TEMP. POL. & C.R. L. REV. 177, 178 (1993) (noting the “sclerotic condition” of the civil-rights movement while suggesting ways to reinvigorate it by “reconceiv[ing] ‘civil rights’”).

how to use “the methods that swelled their ranks in the 1950s and ‘60s to attack the issues of the 1990s.”<sup>265</sup> And gun violence sat atop that list of issues.<sup>266</sup>

In 1993, the NAACP launched a nationwide campaign against gun violence—beginning with an endorsement of the Brady Bill.<sup>267</sup> Underlying its campaign was the premise that gun violence was itself a matter of *civil rights*—that beyond saving lives, addressing gun violence in Black communities was a necessary condition for the realization of social, political, and economic equality. Wade Henderson, the director of the NAACP’s Washington bureau, penned an op-ed in *The Washington Post* in which he declared that the organization’s “support for the Brady bill is a reflection of a broader understanding of civil rights advocacy in the 1990s.”<sup>268</sup> “Gun-related violence,” Henderson wrote, “is a barrier to the full enjoyment of civil rights” because it “undermines respect for the rule of law. The NAACP’s efforts to promote democratic participation, economic empowerment, educational opportunity, and other aspects of a progressive civil rights agenda are compromised if African Americans are not safe in their homes and communities.”<sup>269</sup> In another interview, Henderson insisted that “[c]ivil rights also includes the right to be safe in your community. Those other rights become secondary if you don’t have the first right—the right not to be harmed.”<sup>270</sup>

Not only was addressing gun violence an instrumental prerequisite to other civil-rights goals, but civil-rights groups also stressed that the burdens of gun violence disproportionately fell on the shoulders of Black communities. Henderson called on the NAACP to “respond to the growing and disproportionate number of African Americans victimized by crime[s]” and “ensnared in the criminal

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265. Thornton, *supra* note 262, at 1.

266. “We . . . set a course for 1991 including a legal plan, lobbying for,” among other things, “the Brady Bill on gun control,” said Southern Christian Leadership Conference President Joseph Lowery. *Id.*

267. Wade Henderson, Opinion, *Angry and Depressed About Guns*, WASH. POST, Mar. 18, 1993, <https://www.washingtonpost.com/archive/opinions/1993/03/18/angry-and-depressed-about-guns/384b5eb9-144f-476c-b7f7-3eac0ee8379b> [<https://perma.cc/SB35-P6LE>].

268. *Id.*; see also Editorial, *Give Peace a Chance*, N.Y. TIMES, Dec. 12, 1993 (§ 4), at 14 (comparing the conditions of the fight for federal gun-control legislation in 1993 to Dr. Martin Luther King, Jr.’s nonviolent advocacy for civil-rights legislation). As NAACP Executive Director Reverend Benjamin F. Chavis, Jr. put it, “We can’t talk about economic development in our communities when bullets are flying.” James Bock, *NAACP Backs Bill to License Guns*, BALTIMORE SUN, Jan. 12, 1994, at 1B, ProQuest, Doc. No. 2289233986.

269. Henderson, *supra* note 267.

270. *The Battle over Gun Control*, BLACK ENTER., July 1993, at 27; see also Hugh B. Price, *To Be Equal: We Must Replace War on Crime with Crusade to Save Our Children*, MIA. TIMES, Dec. 8, 1994, at 5A, ProQuest, Doc. No. 363102093 (calling for more targeted approaches to addressing crime such as “tougher gun control” given the “racial dimension[s]” of violent crime and incarceration).



justice system.”<sup>271</sup> At the time, homicide was the leading cause of death for Black males from age fifteen to twenty-four – firearms were involved in nearly eighty percent of those deaths.<sup>272</sup> “Gun violence is a priority issue for African-Americans,” explained William Reed of the *Philadelphia Tribune*, because “people of color are hardest hit.”<sup>273</sup>

Contrary to claims that gun-control measures are inherently tainted by discriminatory purposes, civil-rights organizations appealed to Black communities’ interest in equal public safety to support gun-control legislation throughout the 1990s. “In reaction to the alarming rate in which Black youth are being killed by gun violence,” the NAACP pledged its support for the Brady Bill – a “top priority” that it viewed as a “potentially effective measure to reduce what it consider[ed] the appalling rates of firearm use and homicides in the African-American community.”<sup>274</sup> Beyond the Brady Bill, civil-rights groups supported local licensing laws and background checks,<sup>275</sup> assault-weapon bans,<sup>276</sup> and restrictions on gun manufacturing and distribution.<sup>277</sup>

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271. Henderson, *supra* note 267. Reacting to the NAACP’s campaign in support of the Brady Bill, Sarah Brady noted: “It is fitting that the NAACP should take the lead on this issue, for no other group suffers from random gun violence as much as does the African-American community.” William Reed, *NAACP Urges Congress to Pass the Brady Bill*, PHILA. TRIB., Apr. 16, 1993, at 2A, ProQuest, Doc. No. 533072346; *see also* Kevin Chavous, *Gun Violence Is Killing the Next Generation*, WASH. INFORMER, Feb. 23, 1994, at 16, ProQuest, Doc. No. 367718581 (“Firearm homicide is the number one cause of death for Black men between the ages of 15 and 34. A young Black male is nine times more likely to be murdered than a young White male. For Black males aged 15 to 19, firearm homicides have increased 124 percent since 1984.”); Douglass I. Miles, *When Will It End?*, AFRO-AM. RED STAR, May 8, 1993, at A5, ProQuest, Doc. No. 369778695 (noting that gun violence in Baltimore “threatens to annihilate a generation of young African-American males”); David Snelling, *The Cry Goes Up Against Violence: ‘We Are Killing Our Own People,’* MIA. TIMES, Feb. 13, 1997, at 1A, ProQuest, Doc. No. 363178480 (“If nothing is done about gun control in Miami, the Black population will decrease. We are killing ourselves and leaving few of us in this city.”); Derrick Johnson, *Opinion, Gun Safety Is About Freedom*, BLACKPRESSUSA, Mar. 6, 2018, <https://www.blackpressusa.com/opinion-gun-safety-is-about-freedom> [<https://perma.cc/Q8GB-CQJN>].

272. Henderson, *supra* note 267.

273. Reed, *supra* note 271.

274. *Id.*

275. *See* James Bock, *NAACP Backs Bill to License Guns: Rally Scheduled in Annapolis*, BALT. SUN, Jan. 12, 1994, at 1B, ProQuest, Doc. No. 2289233986.

276. *See* Katharine Q. Seelye, *House Approves Bill to Prohibit 19 Assault Arms*, N.Y. TIMES (May 6, 1994), <https://www.nytimes.com/1994/05/06/us/house-approves-bill-to-prohibit-19-assault-arms.html> [<https://perma.cc/43TL-WGL5>].

277. *See* Joseph P. Fried, *N.A.A.C.P. Suit Seeks Change in Marketing and Sale of Guns*, N.Y. TIMES (July 17, 1999), <https://www.nytimes.com/1999/07/17/nyregion/naacp-suit-seeks-change-in-marketing-and-sale-of-guns.html> [<https://perma.cc/8UQJ-9DHY>].

## 2. *The Turn to Community-Based Remedies*

For these civil-rights organizations, gun violence threatened the safety of the Black community. Of course, high rates of gun crime endangered the lives of individuals, but the civil-rights movement against gun violence was more concerned with the collective or group harm.<sup>278</sup> Disproportionate incidence of gun violence was devastating the integrity of Black communities.

That much of the gun violence faced by the Black community was inflicted by community members against other members (so-called “Black-on-Black” violence) was critical to the way civil-rights leaders conceived of the problem—and, in turn, appropriate remedies. For these leaders, the collective nature of the problem called for community-based solutions; individual members, they argued, had a special obligation to address gun violence within their communities. Noting that “the number of blacks killed by other blacks in one year is higher than the total number of blacks killed in lynchings throughout history,”<sup>279</sup> Reverend Jesse Jackson, leader of the Rainbow Coalition, declared that “[v]iolence—particularly black-on-black violence—is spiritual surrender.”<sup>280</sup> Speaking at a 1994 Rainbow Coalition conference with the Congressional Black Caucus, Jackson called on Black communities to take initiative for themselves: “The victims must rise up and demand a change. We must change our own ways first. . . . In cities across the country, we want to rouse a movement to demilitarize our streets.”<sup>281</sup>

So, along with efforts to enact the Brady Bill and other forms of gun-control legislation at the federal and local levels, civil-rights groups turned toward community-oriented methods of regulating gun possession. Just as the civil-rights movement of the 1990s focused its attention on new issues, it also experimented with new methods. Whereas the civil-rights movement of the 1950s and 1960s sought change through transformative civil-rights legislation and legal recogni-

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278. For a discussion of group harms against Black Americans, see generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107 (1976).

279. Ruben Castaneda & David Montgomery, *In King’s Name, a Mandate*, WASH. POST (Jan. 17, 1994), <https://www.washingtonpost.com/archive/local/1994/01/17/in-kings-name-a-mandate/d4850c19-5a2c-4a47-a392-57cc84fdb90b> [<https://perma.cc/CWH6-6WGE>].

280. William J. Eaton, *Forum Focuses on Violence Among Blacks: Crime: Rainbow Coalition’s Conference Urges African Americans to Take Action on the Issue. Number of Solutions Are Proposed.*, L.A. TIMES (Jan. 8, 1994, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-1994-01-08-mn-9723-story.html> [<https://perma.cc/VB3G-GHLK>].

281. *Id.* As Henderson put it, “We have a particular responsibility to address the question both for our own survival, and because we have the greatest stake in the outcome of the debate.” *The Battle over Gun Control*, *supra* note 270, at 27.

tion via constitutional litigation, emerging movements in the 1990s began shifting attention to community-led efforts as alternatives to state intervention and juricentric-enforcement mechanisms.<sup>282</sup>

The NAACP pledged its commitment to a number of community-based solutions that it viewed as important long-term solutions to curbing gun violence in Black communities. In 1993, the organization's Philadelphia branch declared its support for "preventative techniques to stop these actions from occurring," such as "[c]onflict resolution skills, improvement of family systems, racial identity workshops and educational seminars."<sup>283</sup> In 1994, NAACP Executive Director Dr. Benjamin F. Chavis, Jr. pledged the organization's support for "toy-for-guns" and similar gun-exchange programs, citing New York City's program that exchanged a Toys "R" Us gift certificate for weapons. Arguing that "[t]he best form of gun control is gun removal," Chavis urged "the White House and corporate America to create a national program exchanging jobs for guns."<sup>284</sup>

Concurrent with the NAACP, the SCLC initiated its own grassroots initiatives to combat gun violence in Black communities. Two years following the Atlanta summit, in April 1993, the SCLC hosted a week-long observance of the twenty-fifth anniversary of the assassination of Dr. Martin Luther King, Jr. — the original founder of the SCLC. There, Reverend Joseph Lowery, the organization's president, declared to attending activists, "It's time for the African-American community and the community of conscience to turn this gun powder to soul powder."<sup>285</sup> Lowery called for action from *within* the Black community, urging members to mobilize against "the trickle down effect of violence into black communities."<sup>286</sup> SCLC began hosting a series of gun buy-back programs. Organized across the country, these programs encouraged Black people to "combat growing urban violence by turning in their guns."<sup>287</sup> While these exchanges usu-

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282. In 1993, Charles F. Abernathy wrote: "The old model of relying almost exclusively on government to incarcerate offenders . . . omits a wide range of additional, perhaps more effective, remedies that are within the community's, rather than the government's, control." Abernathy, *supra* note 264, at 204.

283. *Local NAACP Favors Gun Control Measure*, PHILA. TRIB., May 28, 1993, at 5B, ProQuest, Doc. No. 533072989.

284. *NAACP Pledges Full Support for "Toys for Guns" Program*, CLEV. CALL & POST, Jan. 6, 1994, at 2A, ProQuest, Doc. No. 2663052805.

285. United Press Int'l, *SCLC Head Urges Blacks to End Urban Violence*, ATLANTA DAILY WORD, Apr. 11, 1993, at 1, ProQuest, Doc. No. 491743788.

286. *Id.*

287. *Id.*

ally involved paying people for their guns, some of these buy-back programs offered merchant's certificates for foods or goods<sup>288</sup>—some even targeted at-risk youths by offering Janet Jackson concert tickets in exchange for guns.<sup>289</sup>

The emphasis that these community-based approaches placed on preventing youth violence also led to mass mobilization among Black youth. From the mid-1980s to the mid-1990s, as Black communities faced devastating rates of gun violence, youth were among the hardest-hit groups. Firearm deaths among Black youth between the ages of fifteen and nineteen increased from slightly over 700 in 1985 to more than 2,200 in 1993.<sup>290</sup> At a summit with Black community leaders in Chicago, Reverend Jesse Jackson called the movement against youth violence “the new frontier of the civil rights movement.”<sup>291</sup> Long before the advent of the youth-driven March for Our Lives movement of today,<sup>292</sup> Black youth-based advocacy groups led the charge against gun violence. The NAACP, for example, positioned its Youth and College Division at the forefront of their national lobbying efforts to enact the Brady Bill and other forms of gun control. “Young people,” Henderson wrote, “are on the front line of one of today’s most challenging social crises,” referring to the high rates of young Black men killed by gun violence.<sup>293</sup> The NAACP encouraged youth activism “to demonstrate that they are not powerless to affect issues that have a direct impact on their lives” and because “there are few advocates who bring greater moral authority to the debate about gun-related violence.”<sup>294</sup> William Gibson, chairman of the NAACP Board of Directors, noted that the organization was “especially troubled by the (impact of) gun-related violence on our youth. Firearm deaths of young Black males has reached crisis proportions.”<sup>295</sup> Their direct and collective involvement was essential to building “political power.”<sup>296</sup>

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288. *SCLC to Begin Phase II of Gun Buy-Back Program*, ATLANTA DAILY WORLD, Dec. 7, 1993, at 1, ProQuest, Doc. No. 491753848.

289. *SCLC Honors King with Gun Buy-Back Program*, ATLANTA DAILY WORLD, Jan. 16, 1994, at 1, ProQuest, Doc. No. 491757929.

290. SEKOU M. FRANKLIN, *AFTER THE REBELLION: BLACK YOUTH, SOCIAL MOVEMENT ACTIVISM, AND THE POST-CIVIL RIGHTS GENERATION* 157 (2014).

291. James L. Tyson, *Mayors Urge the Congress to Go Beyond Crime Bill*, CHRISTIAN SCI. MONITOR (Nov. 17, 1993), <https://www.csmonitor.com/1993/11/17/17031.html> [<https://perma.cc/7YH6-PL87>].

292. See MARCH FOR OUR LIVES, <https://marchforourlives.com> [<https://perma.cc/3GUH-M2U8>]. In the 1990s—as today—young students spoke at gun-control rallies to describe how gun violence was disrupting their education.

293. Henderson, *supra* note 267.

294. *Id.*

295. Reed, *supra* note 271.

296. *Id.*

In addition to the NAACP's Youth and College Division, two Black youth-based advocacy organizations prioritized campaigns against gun violence in the 1990s: the Black Student Leadership Network (BSLN) and the Children Defense Fund's Black Community Crusade for Children (BCCC).<sup>297</sup> Notably, as Professor Sekou M. Franklin has documented, these youth advocacy groups campaigned in support of gun-control measures *and against* harsh criminal-justice policies. The campaigns "mobilize[d] young people and local organizations to oppose gun violence through youth speak-outs, community forums, teach-ins, workshops, and protest marches."<sup>298</sup> At the same time, these groups mobilized constituencies in favor of ameliorative juvenile-justice policies and decarceral community-based interventions.<sup>299</sup> The BCCC convened a group of social workers, healthcare professionals, religious leaders, and grassroots organizers who ran "community-based and grass roots violence prevention organizations."<sup>300</sup>

In sum, youth-led Black advocacy groups in the 1990s understood both the importance of pursuing gun-control measures to promote public safety and curtailing draconian crime policies that, like gun violence itself, ravaged Black communities.

### 3. *The Court Battle Against Gun Manufacturers*

Even as these groups increasingly relied on community-oriented initiatives, they certainly did not abandon litigation strategies altogether. The NAACP also understood that courts could offer an effective forum to assert gun-control claims in the face of legislative inaction. In 1999, the NAACP filed a lawsuit against nearly one-hundred gun manufacturers, joining a series of cities and gunshot victims seeking to hold gunmakers liable for shootings with illegally obtained handguns. Unlike the other suits, however, the NAACP did not seek monetary damages. Instead, it asked the court to order the manufacturers to change marketing and distribution practices that fostered an illicit handgun market.<sup>301</sup>

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297. FRANKLIN, *supra* note 290, at 142.

298. *Id.* at 157.

299. *Id.* at 158-59.

300. *Id.* at 159 (citation omitted).

301. See Joseph P. Fried, *N.A.A.C.P. Suit Seeks Change in Marketing and Sale of Guns*, N.Y. TIMES (July 17, 1999), <https://www.nytimes.com/1999/07/17/nyregion/naacp-suit-seeks-change-in-marketing-and-sale-of-guns.html> [<https://perma.cc/C9HU-N3CP>]. The NAACP sought requirements that manufacturers and retailers be barred from selling more than one handgun per person in any thirty-day window, be subject to quarterly inspections of wholesalers, and be ordered not to supply dealers who sold handguns to gun shows. *Id.*

The NAACP made sure that race was center stage in the lawsuit. At the heart of the NAACP's complaint was the claim that the gun industry negligently distributed its products in ways that had a disparate impact on Black communities. Accusing manufacturers and retailers of a "complete absence of civic responsibility," the NAACP alleged that the gun industry took a "hear-no-evil, see-no-evil" approach to firearm distribution and sale.<sup>302</sup> Specifically, the NAACP argued that manufacturers and retailers targeted distribution efforts in jurisdictions with "lax" gun-control laws and, as a result, gun traffickers could siphon firearms into urban areas with tighter gun restrictions.<sup>303</sup> Citing disparities in homicide rates, the NAACP's complaint also listed NAACP members whose relatives had been victims of gun violence.<sup>304</sup> Industry conduct resulted in "special and particularized damages" to "the NAACP's members and African-Americans whose interests it represents."<sup>305</sup>

Speaking at the organization's National Convention in 1999, the NAACP's president and CEO Kweisi Mfume declared that the organization hoped to "break the backs of those who help perpetuate this over saturation of weapons in our communities."<sup>306</sup> He defended the lawsuit as protecting the security of Black communities, observing that "the illegal trafficking of firearms disproportionately affects minority communities."<sup>307</sup> Mfume expressly framed the lawsuit as a form of social-movement lawyering in response to congressional inaction on gun control. That is why the NAACP sought changes in gun-industry practices rather than monetary damages.<sup>308</sup> He predicted that "in the absence of tougher

302. Myron Levin, *NAACP Files Lawsuit Against Handgun Makers*, L.A. TIMES (July 17, 1999), <https://www.latimes.com/archives/la-xpm-1999-jul-17-fi-56767-story.html> [<https://perma.cc/AHB9-5G8R>] (quoting an NAACP complaint against firearm manufacturers and distributors); see Ron Stodghill II, *N.A.A.C.P. to Take Up Arms Against Gun Industry*, TIME (July 19, 1999), <https://content.time.com/time/subscriber/article/0,33009,991537,00.html> [<https://perma.cc/FY6P-WU84>]; Associated Press, *N.A.A.C.P. May Join Cities in Gun Suits*, N.Y. TIMES (Feb. 22, 1999), <https://www.nytimes.com/1999/02/22/us/naacp-may-join-cities-in-gun-suits.html> [<https://perma.cc/J8J8-RXHB>].

303. See Paul M. Barrett, *NAACP Suit Puts Issue of Race on the Table in the Gun Debate*, WALL ST. J. (Aug. 13, 1999, 12:01 AM ET), <https://www.wsj.com/articles/SB934494584186409643> [<https://perma.cc/54SY-RRC4>].

304. Fifth Amended and Consolidated Complaint ¶¶ 14-17, *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003) (Nos. 99 Civ 3999 & 99 Civ 7037).

305. *Id.* ¶ 316.

306. *NAACP to 'Break the Back' of the Gun Industry*, AFRO-AM. RED STAR, July 17, 1999, at A1, ProQuest, Doc. No. 369769325.

307. *Id.*

308. See Michael A. Fletcher, *Once Down, NAACP in Fighting Form*, WASH. POST (July 16, 1999), <https://www.washingtonpost.com/archive/politics/1999/07/16/once-down-naacp-in-fighting-form/a4500c78-b33f-44fc-9aa5-c4eb79a1fc9d> [<https://perma.cc/PM8L-DZU7>].

legislative gun control, the group’s gun suit will galvanize social reforms by means of the courts,” comparing the action to the NAACP’s “earlier legal battles to desegregate schools and enforce blacks’ right to vote.”<sup>309</sup>

In the end, after four years of acrimonious litigation,<sup>310</sup> Judge Weinstein on the Eastern District of New York dismissed the lawsuit. Weinstein concluded that the NAACP’s disparate-harms claim did not constitute “the special kind of harm” necessary to establish a private cause of action under New York law.<sup>311</sup> Although the organization had shown that “its members and potential members – now predominantly African-American – did suffer relatively more harm from the nuisance created by defendants through the unnecessary illegal availability of guns in New York,” it could not show how this harm was “different *in kind*” from that experienced by other New Yorkers.<sup>312</sup> Acknowledging that “[a]ll are entitled to law enforcement that provides as much equal protection as is practicable,” Weinstein nevertheless concluded that, “[I]ike their fellow countrymen, NAACP members and potential members are ‘hurt [with] the same weapons;’ when shot by illegal handguns they, like others, ‘bleed,’” quoting Shakespeare.<sup>313</sup>

Despite its ultimate dismissal, the NAACP lawsuit should be understood as a form of demosprudence. A federal court offered an alternative forum for the civil-rights group to articulate and amplify race-conscious challenges to gun-distribution practices – and educate the public about the disparate impacts that gun-industry negligence was having on communities of color.<sup>314</sup>

309. Barrett, *supra* note 303.

310. See William Glaberson, *Trying Again to Make Gun Makers Liable for Shootings*, N.Y. TIMES (Mar. 23, 2003), <https://www.nytimes.com/2003/03/23/nyregion/trying-again-to-make-gun-makers-liable-for-shootings.html> [<https://perma.cc/E7RB-YT3G>] (“The bitterness of the legal battle has intensified as the case has moved toward trial. An industry group, the National Shooting Sports Foundation, recently released a statement attacking the chief lawyer for the N.A.A.C.P., Elise Barnes, as a ‘radical anti-gun lawyers,’ and the federal judge in the case, Jack B. Weinstein, as an ‘activist, anti-gun jurist.’”).

311. NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 451 (E.D.N.Y. 2003).

312. *Id.*

313. *Id.* (quoting WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 3, sc. 1., ll. 60, 64). Notably, turning to claims about culpability for violent urban crime, Judge Weinstein noted that an Equal Protection Clause challenge against the government could be a more promising approach: “Were it shown that the government was giving inadequate protection against gun violence to neighborhoods of a predominantly African-American population, a suit would lie against the municipality on equal protection or other grounds.” *Id.* But no such showing existed in the present suit, and in any event, the gun manufacturers and retailers “could not be deemed responsible for gun violence under such a theory.” *Id.* at 452.

314. For an account of the unique forum that courts offer marginalized communities to assert their claims, see Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1908 (2021), which states:

#### 4. *The Dark Side of the 1990s Gun Fight*

Even as civil-rights organizations like the NAACP pursued creative litigation and community-based solutions to gun violence in the 1990s, the turn toward increasingly aggressive forms of carceral intervention was hard to resist. In *Locking Up Our Own*, Professor James Forman, Jr. tells the story of the turn toward policing strategies to address urban gun violence in the 1990s.<sup>315</sup> These strategies, implemented with the express purpose of addressing gun violence in Black communities as a civil-rights problem, resulted in discriminatory policing and overincarceration – doing further violence to these communities.<sup>316</sup>

Professor Forman focuses on the rollout of Operation Ceasefire in Washington, D.C. by then-U.S. Attorney for the District of Columbia, Eric Holder. The first African American to serve in that position, Holder agreed with Wade Henderson that public safety was “a civil rights issue.”<sup>317</sup> He even supported community-based solutions, expressing his intention “to enlist athletes and musicians in a public relations campaign to ‘break our young people’s fascination’ with guns.”<sup>318</sup> Yet, Holder viewed these community-based programs primarily as long-term solutions; saving lives in the present required disarming those most at risk of participating in gun violence – usually young Black men.<sup>319</sup>

The mechanics of Operation Ceasefire were simple: “Stop cars, search cars, seize guns.”<sup>320</sup> Inspired by similar programs implemented in other cities around the country, Holder’s program increased investigatory stops and trained D.C. officers to conduct pretextual vehicle searches for firearms.<sup>321</sup> Operation Ceasefire resulted in an enormous number of innocent drivers being stopped and searched.<sup>322</sup> Moreover, while officers rarely found guns in stopped vehicles, they

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By engaging with the facts giving rise to the cases, we can see how courts figure both in top-down and in bottom-up stories of democratic struggle: Judges may grant rights, or, when *all* branches of government reject the claims of dominated groups, courts may provide members of those groups alternative fora in which to speak, mobilize, and break into politics.

315. FORMAN, *supra* note 126, at 194–211.

316. *Id.*

317. *Id.* at 202–03.

318. *Id.* at 197 (quoting Paul Duggan, *D.C. Residents Urged to Care, Join War on Guns*, WASH. POST (Jan. 14, 1995), <https://www.washingtonpost.com/archive/local/1995/01/14/dc-residents-urged-to-care-join-war-on-guns/ob361f3-27ac-4685-8fb6-3eda372e93ac> [https://perma.cc/AQA4-2MZ7]).

319. *See id.*

320. *Id.*

321. *See id.* at 197–98.

322. *See id.* at 200–01.



more frequently discovered evidence of minor crimes like marijuana possession.<sup>323</sup> Coupled with the fact that the program was implemented in majority-Black D.C. neighborhoods where rates of gun crime were highest, these pretextual traffic stops also increased racial disparities in arrest rates for drug crime.<sup>324</sup>

Operation Ceasefire—and other programs like it—were precursors to the discriminatory stop-and-frisk policing tactics that the public defenders’ brief in *Bruen* calls out today. There is no denying that the national call to address gun violence as a civil-rights issue in the 1990s was also used to justify imposing punitive policies that targeted Black communities. Crafting an antisubordinating approach to gun control will require taking account of both the successful innovations and unfortunate pitfalls of the 90s civil-rights organizing against gun violence. This Note turns to that task now.

### *B. Guns, Democracy, and Social Equality*

Recall the insurrectionist theory of the Second Amendment espoused by Judge Kozinski. Kozinski’s argument provides one rough account of the relationship between gun rights and antisubordination: it imagines gun rights as safety valves for oppressed groups when faced with tyranny or enslavement.<sup>325</sup> Armed resistance, the argument goes, provides a bulwark for democratic government.<sup>326</sup> The story of gun-violence advocacy efforts in the 1990s helps illustrate why this is an impoverished account of an antisubordinating Second Amendment. It is impoverished because it is insensitive to the ways that unfettered gun rights—particularly in the public sphere—can hinder the social and political conditions necessary for the realization of democratic participation and equality. The equitable maintenance of *public safety* is itself a social condition for democracy and the realization of free and equal political status.

Antisubordinating the Second Amendment requires treating the right to equal public safety as a civil right. On this view, articulated by civil-rights activists in the 1990s, equal conditions of public safety in a community are necessary for members’ participation in civic life on equal footing. The right to equal public safety protects collective interests from group-based harms. When marginalized groups are deprived of the right to public safety, efforts to obtain the status of equal citizenship are themselves undermined.

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<sup>323</sup>. See *id.* at 201.

<sup>324</sup>. See *id.* at 201-02.

<sup>325</sup>. See *supra* notes 112-113 and accompanying text.

<sup>326</sup>. See *supra* notes 114-116 and accompanying text.

The entitlement to equal public safety can be understood as a guarantee of equal freedom critical to the realization of democratic equality. As philosopher Elizabeth S. Anderson put it, “Democratic equality guarantees all law-abiding citizens effective access to the social conditions of their freedom at all times.”<sup>327</sup> The kind of freedom contemplated by theories of democratic equality entitles people to “the capabilities necessary for functioning as an equal citizen in a democratic state.”<sup>328</sup> Social conditions of public safety safeguard these capabilities.

Groups like the NAACP have emphasized that conditions of public safety are necessary for effective access to certain essential civil liberties—among them “democratic participation, economic empowerment, [and] educational opportunity.”<sup>329</sup> Safety is one of the most basic requirements if people are to be capable of functioning as equal citizens.

When conditions of public safety are distributed unequally, the communities in which threats of violence are disproportionately concentrated are subordinated. Black communities devastated by gun violence cannot participate in the democratic polity on equal terms when their members lack an equal and adequate opportunity to flourish. Today, Black Americans are ten times more likely to die by gun homicide than white Americans.<sup>330</sup> Young Black men and youths between the ages of fifteen to thirty-four made up 37% of gun homicides in 2019—twenty times higher than white males of the same age.<sup>331</sup> A growing body of research confirms the individual and collective harms that gun violence inflicts on Black communities.

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327. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *ETHICS* 287, 289 (1999).

328. *Id.* at 316.

329. Henderson, *supra* note 267.

330. *Invisible Wounds: Gun Violence and Community Trauma Among Black Americans*, EVERYTOWN (Jan. 23, 2022) [hereinafter *Invisible Wounds*], <https://everytownresearch.org/report/invisible-wounds-gun-violence-and-community-trauma-among-black-americans> [https://perma.cc/6DBN-YYMZ].

331. Nada Hassanein, *Young Black Men and Teens Are Killed by Guns 20 Times More than Their White Counterparts, CDC Data Shows*, USA TODAY (Feb. 25, 2021, 7:40 AM ET), <https://www.usatoday.com/story/news/health/2021/02/23/young-black-men-teens-made-up-more-than-third-2019-gun-homicides/455929001> [https://perma.cc/Q9M2-8DNK].

Beyond death and physical injury, widespread gun violence and exposure to gun fatality are associated with a higher prevalence of mental-health problems.<sup>332</sup> Exposure to homicide among young children can impair learning, cognitive development, and self-esteem.<sup>333</sup> Social scientists have documented the ways in which elevated levels of gun violence in Black communities can result in a collective experience of community trauma, “which can penetrate the attitudes and values of a community and promote a collective idea of hopelessness, degradation, and despair.”<sup>334</sup> These forms of communal harm that result from the concentration of gun violence in Black communities exemplify deprivations of democratic equality. The social pathologies associated with gun violence prevent Black Americans from participating as equal citizens in the polity. As Professors Joseph Blocher and Reva B. Siegel have argued, a government’s interest in regulating firearms to promote public safety protects “collective life as well as individual lives”<sup>335</sup>—it safeguards the body politic by “protecting the constitutional order and building a community in which citizens have an equal claim to security and to the exercise of liberties.”<sup>336</sup> Put simply, public safety is a social condition of living a free life.

Throughout the history of the contemporary Second Amendment, judges and advocates have invoked the history of Reconstruction to defend ever-more expansive conceptions of the right to bear arms. In pursuit of equal citizenship, they argue, the Reconstruction Congress acted to extend the right to bear arms—

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332. See Melissa E. Smith, Tanya L. Sharpe, Joseph Richardson, Rohini Pahwa, Dominique Smith & Jordan DeVlyder, *The Impact of Exposure to Gun Violence Fatality on Mental Health Outcomes in Four Urban U.S. Settings*, 246 SOC. SCI. & MED. art no. 112587 (2020).

333. See Patrick T. Sharkey, Nicole Tirado-Strayer, Andrew V. Papachristos & C. Cybele Raver, *The Effect of Local Violence on Children’s Attention and Impulse Control*, 102 AM. J. PUB. HEALTH 2287, 2287 (2012); James Garbarino, Catherine P. Bradshaw & Joseph A. Vorrasi, *Mitigating the Effects of Gun Violence on Children and Youth*, 12 FUTURE CHILD. 73, 76 (2002).

334. Ijeoma Opara, David T. Lardier Jr., Isha Metzger, Andriana Herrera, Leshelle Franklin, Pauline Garcia-Reid & Robert J. Reid, “Bullets Have No Names”: *A Qualitative Exploration of Community Trauma Among Black and Latinx Youth*, 29 J. CHILD & FAM. STUDS. 2117, 2118 (2020); see *Invisible Wounds*, *supra* note 330, at 5; Howard Pinderhughes, Rachel A. Davis & Myesha Williams, *Adverse Community Experiences and Resilience: A Framework for Addressing and Preventing Community Trauma*, PREVENTION INST. 11 (2016), <https://www.preventioninstitute.org/sites/default/files/publications/Adverse%20Community%20Experiences%20and%20Resilience.pdf> [<https://perma.cc/B3Q5-DFNG>]. Indeed, in 1993, the Philadelphia Branch of the NAACP released a statement calling attention to collective trauma caused by gun violence: “The emotional and economic costs of those killings are staggering. For example, the loss of so many males prior to their entrance into the job market crumbles the foundation and economic growth of the Black family.” *Local NAACP Favors Gun Control Measure*, PHILA. TRIB., May 28, 1993, at 5B, ProQuest, Doc. No. 533072989.

335. Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U. L. REV. 139, 161 (2021).

336. *Id.* at 143.

as an individual and public right—to Black Americans. They have, in short, marshaled the memory of Reconstruction for their cause.<sup>337</sup> In doing so, these gun-rights advocates lend authority to their constitutional arguments. But the value of equal public safety that lies at the heart of this Note’s normative account of an antisubordinated Second Amendment should also be understood as reclaiming the spirit of Reconstruction. Reconstruction was about making citizens of slaves—its structural purpose was to eradicate vestiges of second-class citizenship to secure conditions of equal citizenship.<sup>338</sup> Today, the underlying aims of Reconstruction support gun regulation—not an ever-more-expansive Second Amendment.<sup>339</sup> Gun violence poses a threat not only to Black communities’ physical security, but to their equal social and political standing as well. These are the basic principles that should guide our consideration of antisubordinating solutions.

### C. Bruen’s *Racial-Justice Problems*

The efforts of civil-rights organizations in the 1990s to combat gun violence begin to provide a roadmap for an antisubordinating gun-regulation regime. It centers the value of equal public safety and articulates why addressing contemporary gun violence through gun control is essential to that value’s realization. But even as Black communities are disproportionately impacted by gun violence, they also frequently bear the brunt of gun-control laws that criminalize the possession of firearms. As Professor Forman has shown, efforts to confront gun violence as a civil-rights issue in the 1990s also involved a turn toward increasingly aggressive forms of policing that harmed Black communities. The disparate impact of firearms policing also lies at the heart of the public defenders’ case for expanding Second Amendment protection—and there is nothing to be gained by denying it.

Faced with these challenges, the remainder of the Note begins to confront the remedies question: where does the proper solution lie? To start, this Section

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337. For an account of “constitutional memory” and its role in constitutional argument, see Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL’Y. 19 (2022); and Jack M. Balkin, *Constitutional Memories*, WM. & MARY BILL RTS. (forthcoming), <https://ssrn.com/abstract=4106635> [<https://perma.cc/9Q8K-EHMG>].

338. See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1816–19 (2010).

339. How gun rights relate to substantive demands of social and political equality can shift over time. Forman, for instance, observes that by the mid-1970s, the “hundred-year-old black tradition of arms” had faded. FORMAN, *supra* note 126, at 72. Forman attributes its declines to two reasons. First, the tradition was motivated by “a history of white-on-black violence” that had since been replaced by the threat of gun violence *within* Black communities. *Id.* at 72–73. And second, an increase in Black political power meant that Black communities were more willing to place trust in lawmakers to guarantee public safety. *Id.* at 73.

maintains that *Bruen* is not the solution. It offers a sustained challenge to the Court's *Bruen* decision from a racial-justice perspective. The Section identifies two racial-justice problems with *Bruen*. First, from a practical standpoint, *Bruen* threatens Black communities' right to equal public safety. And second, *Bruen*'s exclusively historical method of interpretation is a subordinating form of justification that disrespects Black Americans' status as equal members of the polity.

Before proceeding to these objections, it is worth asking why amici have turned to the Second Amendment to address problems that sound in equality. After all, although Second Amendment rights surely implicate the principle of antisubordination, equality claims are traditionally channeled through another feature of our constitutional order: the Fourteenth Amendment's guarantee of equal protection. Why wasn't New York's gun-licensing law challenged on Fourteenth Amendment grounds instead? (Especially when nothing in the text or history of the Second Amendment suggests an enforceable equality provision?)

Indeed, at oral argument in *Bruen*, Justice Sotomayor expressly pointed out that "[w]e now have the Fourteenth Amendment to protect" against laws like post-Civil War Black Codes that "deny Black people the right to hold arms."<sup>340</sup> And organizations like the NAACP have argued that the Fourteenth Amendment—not the Second—provides the proper avenue of relief.<sup>341</sup> That is, if gun-control laws are implemented by law enforcement and prosecutors in ways that have disparate impacts on communities of color, the Fourteenth Amendment's guarantee of equal protection provides a more promising solution given that the Equal Protection Clause's "central purpose" is to address "official conduct discriminating on the basis of race."<sup>342</sup> Even David B. Kopel, in 1988, suggested that "[g]un control is also suspect under the equal protection clause of the Fourteenth Amendment, for it harms most those groups that have traditionally been victimized by society's inequities."<sup>343</sup>

Under an earlier jurisprudential regime—one friendlier to disparate-impact claims—perhaps. But not so today. Professors Blocher and Siegel have observed that the Court has eviscerated Fourteenth Amendment Equal Protection Clause

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340. Transcript of Oral Argument at 22, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843).

341. See, e.g., Leeuw et al., *supra* note 124, at 171 ("[T]o the extent that the enforcement of criminal firearms laws occurs in a racially discriminatory manner, the most appropriate avenue to challenge such action is the traditional vehicle for rooting out racial discrimination: the Equal Protection Clause of the Fourteenth Amendment, or, where the actions of the federal government are at issue, the Due Process Clause of the Fifth Amendment.").

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

343. Kopel, *supra* note 68, at 14.

protections, particularly when it comes to cases involving prosecutorial discretion in the criminal-justice context.<sup>344</sup> As a result, federal courts enforcing the Equal Protection Clause are unlikely to provide relief from the forms of bias that public defenders describe in their *Bruen* brief. And perhaps not unreasonably, “the public defenders have apparently concluded that the conservative Justices are more likely to grant their clients gun rights than equality rights.”<sup>345</sup>

In light of the futility of raising Fourteenth Amendment challenges, the question is whether bringing Second Amendment challenges in their place is justified, considering inequitable law enforcement *and* concentrated gun violence in Black communities. Any critical approach to Second Amendment law must account for the racial disparities in the enforcement of gun laws. But this Note contests the premise that judicial expansion of Second Amendment rights is an appropriate – or even effective – remedy for that problem.

The Court’s decision in *Bruen* exemplifies why the Second Amendment is subordinating, as opposed to liberatory. It illustrates how the public defenders’ brief did not represent a full accounting of the potential ramifications of a holding in their favor. Beyond the expansion of Second Amendment protection outside the home, the brief failed to account for the methodological revolution that the majority opinion in *Bruen* would herald for Second Amendment jurisprudence – one that confines the future of Second Amendment law to history and tradition. The practical ramifications of *Bruen* for gun regulation are inseparable from the decision’s methodological move. As such, this Note’s race-sensitive objections to *Bruen* are tethered to this historicist turn in Second Amendment interpretation.

These methodological ramifications represent a significant oversight of the public defenders’ brief. From the start, litigants raised methodological questions about *how* future courts should interpret and apply the Second Amendment to scrutinize forms of gun regulation. Indeed, previewing the case, Professors Joseph Blocher and Eric Ruben observed that “when it comes to Second Amendment doctrine and methodology, the stakes are higher than they’ve been in a decade.”<sup>346</sup> They were right.

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344. See Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449, 453–55 (2022).

345. *Id.* at 452. To succeed on an Equal Protection enforcement challenge to a facially neutral criminal law, the Court has held that a party must show that implementation of the law is motivated by discriminatory intent. See *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979). Yet since its introduction, this standard has *never* been satisfied. See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1783 (2012).

346. Joseph Blocher & Eric Ruben, *Disrupting the Consensus on Second Amendment Doctrine Would Be a Mistake*, SCOTUSBLOG (Nov. 20, 2019, 10:36 AM), <https://www.scotusblog.com/2019/11/symposium-disrupting-the-consensus-on-second-amendment-doctrine-would-be-a-mistake> [<https://perma.cc/D8BW-4AXJ>].

Before *Bruen*, federal courts of appeals applied the “two-step test” when faced with Second Amendment challenges. This two-part framework began with a threshold inquiry about whether the Second Amendment applies at all.<sup>347</sup> *Heller* made clear that certain regulations—for example, bans on possession by felons, “dangerous or unusual” weapons, or weapons in “sensitive places”—are exempt from Second Amendment scrutiny.<sup>348</sup> For regulations that implicate the Second Amendment, courts proceed to the second step and apply means-end scrutiny—evaluating the state interests served by the regulation against the methods designed to further those interests.<sup>349</sup>

In *Bruen*, the Supreme Court rejected this consensus approach wholesale, replacing it with a new two-part analysis confined to text, history, and tradition:

[W]e hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent *with this Nation’s historical tradition of firearm regulation*. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”<sup>350</sup>

The new historical approach dispenses with means-end scrutiny altogether as inappropriate interest balancing that invites arbitrary judicial discretion. On this view, a gun regulation’s historical pedigree is a necessary and sufficient condition for its constitutionality.

Academics have criticized the historical approach as unworkable and unprincipled.<sup>351</sup> And for good reason. How old does a firearm regulation have to be to pass constitutional muster? At what level of generality should courts treat historical practice? What metrics should courts employ to judge whether a contemporary firearm regulation is analogous to a historical one? How many analogous

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347. *Id.*

348. *Id.*

349. *Id.*

350. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (emphasis added) (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961)).

351. For some of these objections, see, for example, Patrick J. Charles, *The Fugazi Second Amendment: Bruen’s Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4222490> [<https://perma.cc/AR3G-BCD2>]; and Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4187143> [<https://perma.cc/JD8D-DSFF>].

laws make a tradition? In the years to come, lower courts (and the Supreme Court itself) will no doubt struggle with these questions – all in the name of an interpretive method supposedly designed to cabin judicial discretion. But the historical approach can and should also be challenged from an antisubordination perspective.

1. *An Objection from Equal Public Safety*

First, as a practical matter, *Bruen*'s Second Amendment renders communities of color less safe. In doing so, it further deprives them of the social conditions of equal public safety. Understood in light of the decision's methodological ramifications, *Bruen*'s invalidation of New York's licensing law has consequences beyond the law at issue – and, for that matter, beyond licensing laws more generally. The Court's expansive holding extending the Second Amendment's reach outside the home threatens any number of gun-regulation measures that restrict the possession and carrying of firearms in public spaces – including those that do not have a demonstrable disparate enforcement impact on communities of color. And as a direct result of the Court's holding that, moving forward, courts should confine Second Amendment interpretation to history and tradition, all those measures that were previously upheld by lower courts applying the two-step method are vulnerable to challenge all over again. Given disproportionate rates of gun violence in communities of color, there is good reason to believe that this expansive holding, which seriously limits a government's ability to design measures to limit gun rights, will have subordinating consequences.<sup>352</sup>

Public-carry restrictions are most directly in danger. As the *Bruen* Court itself notes, there are a half-dozen other states with may-issue licensing regimes like New York's that are now presumptively unconstitutional.<sup>353</sup> About a quarter of Americans live in states with "may issue" laws that give public officials unlimited discretion to prohibit civilians from carrying hidden handguns in public

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352. Legal commentator Elie Mystal, reacting to the public defenders' *Bruen* brief, expressed this concern:

The government must have some authority to regulate private arsenals in order to carry out its essential function of keeping people safe. . . . I completely support forcing the state to exercise its authority fairly and without racial bias, but doing away with the authority altogether is just going to get more people, *specifically Black people*, killed. I want racial justice, but I also don't want to be shot to death in a crossfire of "liberty."

Elie Mystal, *Why Are Public Defenders Backing a Major Assault on Gun Control?*, NATION (July 26, 2021), <https://www.thenation.com/article/society/black-gun-owners-court> [<https://perma.cc/HA7R-7C2L>].

353. See *Bruen*, 142 S. Ct. at 2122.



spaces.<sup>354</sup> The *Bruen* Court’s decision directly repudiated these laws and, as a result, deprived states of “their longstanding authority to restrict loaded firearms in public places, and entitle[d] virtually anyone to bring loaded guns virtually anywhere.”<sup>355</sup> A bevy of empirical research confirms that public-carry restrictions effectively reduce firearm violence – particularly in urban areas.<sup>356</sup> And the lifesaving value of these restrictions in urban areas is especially important to communities of color where the risk of gun violence is high.<sup>357</sup>

But the substantive ramifications extend beyond public-carry regimes. Since the Court issued its decision in *Bruen*, gun-rights advocates have successfully challenged a myriad of gun-control measures in lower courts on grounds that the measures lack historical support. In August, a federal district-court judge in Texas invalidated a Texas law preventing those under the age of twenty-one from carrying handguns in public.<sup>358</sup> The court found that no Founding Era practice existed to justify the age-based public-carry ban.<sup>359</sup> In September, responding to a nationwide push for these assault-weapons bans, gun-rights organizations filed a series of lawsuits challenging assault-weapons bans and ammunition-magazine size limits at both the state and local level in Massachusetts, Connecticut, Hawaii, and Illinois.<sup>360</sup> In Colorado, federal courts have already enjoined two local bans on AR-15 rifles on the grounds that assault-weapons bans lack historical precedent and are therefore impermissible under the new *Bruen* test.<sup>361</sup>

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354. See *Concealed Carry*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry> [<https://perma.cc/G64D-S3G4>].

355. Jonathan Lowy, *Alternate Facts, Dueling Realities, and the Second Amendment: On NYSRPA v. Bruen*, N.Y.U. L. REV. F. (Nov. 15, 2021), <https://www.nyulawreview.org/forum/2021/11/alternate-facts-dueling-realities-and-the-second-amendment-on-nyspra-v-bruen> [<https://perma.cc/YW9Q-7Q9N>].

356. Brief of the NAACP Legal Defense & Educational Fund, Inc., and the National Urban League as Amici Curiae Supporting Respondents at 15-17, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

357. *Id.* at 17-19.

358. *Firearms Pol’y Coal., Inc. v. McCraw*, No. 21-cv-1245, 2022 WL 3656996, at \*13 (N.D. Tex. Aug. 25, 2022).

359. *Id.* at \*9-11.

360. See Jake Fogelman, *Gun-Rights Group Files Five New Lawsuits Against ‘Assault Weapon,’ Magazine Bans*, RELOAD (Sept. 7, 2022, 6:29 PM), <https://thereload.com/gun-rights-group-files-five-new-lawsuits-against-assault-weapon-magazine-bans> [<https://perma.cc/MQH6-STE2>].

361. *Rocky Mountain Gun Owners v. Bd. of Cnty. Comm’rs.*, No. 22-cv-01685 (D. Colo. July 22, 2022) (temporarily restraining Superior, Colorado’s assault-weapons and large-capacity-magazines ban), *dismissed without prejudice* (Oct. 12, 2022); *Rocky Mountain Gun Owners v. Bd. Of Cnty. Comm’rs.*, No. 22-cv-02113 (D. Colo. Aug. 30, 2022) (temporarily restraining Boulder County, Colorado’s assault-weapons and large-capacity-magazines ban), *dismissed without prejudice* (Oct. 13, 2022).

In short, the practical consequences of the *Bruen* Court's holding extend far beyond New York's for-cause license regime because the new history-and-tradition method calls into question any gun-control measure that lacks support or analogue in Founding Era historical practice.

In addition to calling into question existing forms of gun regulation, the historical method apparently precludes the implementation of novel forms of regulation adapted to meet contemporary needs – including those designed to combat subordination. Much remains to be seen about how courts implement *Bruen*'s historical method. But there is no doubt that its logic is designed to discourage experimentation. The import of the public defenders' brief is that stakeholders in the fight against gun violence will need to move away from conventional carceral strategies toward innovative forms of gun regulation tailored to the needs of Black communities. But gun-regulation innovation is, in principle, inconsistent with *Bruen*'s history-and-tradition test. The decision striking down New York's licensing scheme, then, likely has the consequence of kneecapping future efforts to implement race-sensitive forms of gun regulation.<sup>362</sup>

Of course, for many gun-rights advocates, possessing guns for self-defense is the solution to gun violence. In response, we should ask: exactly who benefits from the expansion of Second Amendment rights? Gun-rights advocates call for robust Second Amendment protection. But Second Amendment protection for whom? Another way to formulate this question is to ask whether the values that underlie the Second Amendment are themselves equally distributed – chief among them, the right to self-defense. As described in Parts I and II, one popular line of argument – epitomized by the work of Cottrol and Diamond – asserts that expansive Second Amendment protection is necessary for Black self-defense, especially in light of the inability and/or unwillingness of the state to protect Black lives. That Black communities suffer disproportionately from gun violence is exactly why more robust Second Amendment guarantees – and, by extension, the right to self-defense – are necessary. Gun control, on the other hand, by disarming Black people, produces a disparate impact by rendering them vulnerable to the high rates of gun violence that uniquely plague their communities.

But the right to self-defense – just like the enforcement of gun-control laws – is itself racialized. In the wake of Trayvon Martin's killing at the hands of George Zimmerman in 2012, stand-your-ground laws became the focus of intense public and academic scrutiny. These laws provide a potential victim the right to use deadly force against a presumed attacker – provided the victim has reasonable fear of the assailant – even if the victim could circumvent the conflict

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362. As the next Section discusses, new gun regulation must bypass Second Amendment scrutiny altogether by avoiding the direct regulation of firearms ownership. For instance, gun-violence preventions programs like “community violence intervention” can avoid constitutional challenges because they do not legally restrict firearm ownership or possession.

by safely leaving the scene.<sup>363</sup> Since Martin’s killing, a body of academic literature exploring the racial implications of these laws has emerged. This body of literature explores how stand-your-ground laws have disparate impacts that reinforce racial-status relations.<sup>364</sup> One study conducted by the Urban Institute, for instance, concluded that the expansion of stand-your-ground laws in two dozen states exacerbated the racial disparities in findings of justifiable homicide.<sup>365</sup> White-on-Black homicides, the study found, have justifiable homicide determinations thirty-three percentage points more frequently than Black-on-white homicides – and determinations of justifiable homicide are sixty-five percent more likely in stand-your-ground states.<sup>366</sup> Finally, the study indicated that the odds a white-on-Black homicide is found justified are 281 percent greater than the odds a white-on-white homicide is found justified.<sup>367</sup> By contrast, a Black-on-white homicide has barely half the odds of being ruled justifiable relative to a white-on-white homicide.<sup>368</sup>

These findings tell us something about the relative availability of self-defense claims – and Second Amendment rights – to Black Americans under conditions of structural racism.<sup>369</sup> Social conditions and institutions that criminalize Black

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363. Curt Anderson & Lindsay Whitehurst, *Stand Your Ground Laws Proliferate After Trayvon Spotlight*, PBS (Feb. 25, 2022, 3:29 PM EST), <https://www.pbs.org/newshour/nation/stand-your-ground-laws-proliferate-after-trayvon-spotlight> [<https://perma.cc/C9DM-68EW>].

364. See, e.g., Donna Coker, “Stand Your Ground” in Context: Race, Gender, and Politics, 68 U. MIAMI L. REV. 943 (2014); Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961 (2014); D. Marvin Jones, “He’s a Black Male . . . Something Is Wrong with Him!” *The Role of Race in the Stand Your Ground Debate*, 68 U. MIAMI L. REV. 1025 (2014); LaKerri R. Mack & Kristie Roberts-Lewis, *The Dangerous Intersection Between Race, Class and Stand Your Ground*, 23 J. PUB. MGMT. & SOC. POL’Y 47 (2016).

365. See John K. Roman, *Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data*, URB. INST. 11 (July 2013), <https://www.urban.org/sites/default/files/publication/23856/412873-Race-Justifiable-Homicide-and-Stand-Your-Ground-Laws.PDF> [<https://perma.cc/4XVS-LZ72>].

366. *Id.* at 9–10.

367. *Id.* at 9.

368. *Id.*

369. See David A. Graham, *The Second Amendment’s Second-Class Citizens*, ATLANTIC (July 7, 2016), <https://www.theatlantic.com/politics/archive/2016/07/alton-sterling-philando-castile-2nd-amendment-guns/490301> [<https://perma.cc/X3GD-E8NG>] (“[T]he most relevant question right now is not whether gun laws should change, but whether existing gun laws apply equally to all Americans – and if not, why they don’t.”); Carl Takei & Paige Fernandez, *Does the Second Amendment Protect Only White Gun Owners?*, ACLU (Dec. 5, 2018), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/does-second-amendment-protect-only-white-gun-owners> [<https://perma.cc/7Z39-GWWW>].

bodies result in an inequitable distribution of the right to self-defense.<sup>370</sup> And, as Professor Kami Chavis put it, “Valuing Black lives also means ensuring equal access to self-defense claims and treating similarly-situated defendants similarly.”<sup>371</sup> These insights are frequently expressed counterfactually in popular discourse when white assailants are treated with seeming impunity. When Kyle Rittenhouse was acquitted of murder and attempted murder for shooting three people (ultimately killing two) at a Black Lives Matter demonstration in Kenosha, Wisconsin, many commentators questioned whether the outcome would have been different if Rittenhouse had been Black—or whether he would have even lived to face trial.<sup>372</sup>

The same insight can be applied to the insurrectionist theory of the Second Amendment. Does a robust Second Amendment provide Black Americans with the tools of resistance in the face of tyranny and enslavement? Consider the racialized counterfactuals frequently posed after the January 6th Capitol riots. What would have happened if the rioters trying to overturn the results of the election were Black? What if the demonstration were a Black Lives Matters protest? Speaking after the riot, then President-elect Biden said, “No one can tell me

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370. See Nicole Ackermann, Melody S. Goodman, Keon Gilbert, Cassandra Arroyo-Johnson & Marchello Pagano, *Race, Law, and Health: Examination of ‘Stand Your Ground’ and Defendant Convictions in Florida*, 142 SOC. SCI. & MED. 194, 199 (2015) (“Our data support the existing evidence about how Blacks are criminalized and profiled; many Americans conflate blackness with crime. As a result of these cultural associations, Blacks are at a higher risk of legal action being taken when they are the perpetrator against a White individual . . .” (citation omitted)). For a defense of Black armed self-defense that acknowledges these realities, see Gregory S. Parks, *When CRT Meets 2A*, DUKE CTR. FOR FIREARMS L. 10 (Jan. 11, 2022), <https://firearmslaw.duke.edu/wp-content/uploads/2022/01/Parks-When-CRT-Meets-2A.pdf> [<https://perma.cc/4C4S-LRJ6>], which states that “Black people have long had to choose between non-ideal options. I believe, in the world we live in today, the better of those options is to be armed and well-trained.”

371. Kami Chavis, *The Dangerous Expansion of Stand-Your-Ground Laws and Its Racial Implications*, DUKE CTR. FOR FIREARMS L. (Jan. 18, 2022), <https://firearmslaw.duke.edu/wp-content/uploads/2022/01/Chavis-The-Dangerous-Expansion-of-Stand-Your-Ground-Laws.pdf> [<https://perma.cc/M8LC-2BQV>].

372. See, e.g., *id.* (“Many observers have opined that had Rittenhouse been a Black man, he surely would not have lived to stand trial, and even if he survived, he would have been unlikely to receive the sympathy that so many had for Rittenhouse.”); Michael Harriot, Opinion, *Kyle Rittenhouse Wasn’t Convicted Because, in America, White Reasoning Rules*, GUARDIAN, Nov. 20, 2021, 1:00 AM EST, <https://www.theguardian.com/us-news/2021/nov/19/kyle-rittenhouse-conviction-america-white-privilege> [<https://perma.cc/V8FL-F6S6>] (“The Rittenhouse verdict is proof that it is reasonable to believe that the fear of Black people can absolve a white person of any crime.”); Kathleen Foody, *Black Americans See Biased System in Kyle Rittenhouse Verdict*, DENVER POST (Nov. 19, 2021, 6:12 PM), <https://www.denverpost.com/2021/11/19/black-americans-kyle-rittenhouse-verdict> [<https://perma.cc/2MQL-CCSR>] (quoting Kenosha resident Frankie Cook’s statement that “Rittenhouse wouldn’t have been acquitted if he was a Black man”).

that if it had been a group of Black Lives Matters protesting yesterday, they wouldn't have been treated very, very differently from the mob of thugs that stormed the Capitol.”<sup>373</sup> As one commentator put it, “Had they been Black, blood would have flowed down those white steps.”<sup>374</sup>

At the end of the day, it is worth stressing that on *Bruen*'s own terms, whether the Second Amendment makes communities of color more or less safe is now irrelevant to the constitutional analysis. That is because *Bruen*'s new historical method eschews purportedly values-based analysis altogether in the name of limiting judicial discretion. Any empirical findings about the impact of gun-regulation measures on public safety in communities of color are erased from the constitutional calculus. Defending the Court's reliance on history and tradition, Professor William Baude has countered that “[i]n cases like *Bruen*, the court relies on historical arguments that the right to keep and bear arms was especially vital to newly freed African Americans in the wake of the Civil War.”<sup>375</sup> But how

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373. Nandita Bose & Makini Brice, *If Rioters Were Black, 'Hundreds' Would Have Been Killed: Washington Reflects on Capitol Rampage*, REUTERS (Jan. 8, 2021, 7:06 AM), <https://www.reuters.com/article/us-usa-election-inequality/if-rioters-were-black-hundreds-would-have-been-killed-washington-reflects-on-capitol-rampage-idUSKBN29D1HM> [https://perma.cc/3ZZD-7THD].

Republican Senator Ron Johnson of Wisconsin seemed to confirm these suspicions when he stated that he “wasn't concerned” by the rioters storming the Capitol, adding that he “might have been a little concerned” had “President Trump won the election and those were tens of thousands of Black Lives Matter and Antifa protesters.” See Ben Leonard, *Ron Johnson Says He Didn't Feel Threatened Jan. 6. If BLM or Antifa Stormed Capitol, He 'Might Have.'* POLITICO (Mar. 13, 2021, 11:26 AM EST), <https://www.politico.com/news/2021/03/13/ron-johnson-black-lives-matter-antifa-capitol-riot-475727> [https://perma.cc/K2ZE-SV5A]. Reacting to Senator Johnson's remarks, Professor Miller noted, “The senator's implication is as clear as it is despicable—only whites can use violence to overthrow a white man's government.” Darrell A.H. Miller, *African Americans and the Insurrectionary Second Amendment*, BRENNAN CTR. 7 (June 29, 2021), <https://www.brennancenter.org/our-work/research-reports/african-americans-and-insurrectionary-second-amendment> [https://perma.cc/D7YR-W422].

374. Jenice Armstrong, Opinion, *Imagine What Would Have Happened if the Rioters Who Stormed the Capitol Had Been Black*, PHILA. INQUIRER, Jan. 7, 2021, <https://www.inquirer.com/opinion/trump-capitol-riot-mob-black-lives-matter-jenice-armstrong-20210107.html> [https://perma.cc/3BZR-XWCA]; see also Solomon Jones, *What if the Rioters Who Breached the US Capitol Were Black?*, WHY? (Jan. 7, 2021), <https://why.org/articles/what-if-the-rioters-who-breached-the-us-capitol-were-black> [https://perma.cc/U98U-C3P6] (“Would those insurrectionists have been allowed to breach the Capitol if they were Black? The answer is an unequivocal no.”); Chad Kautzer, *America as a Tactical Gun Culture*, BOS. REV. (Dec. 17, 2021), <https://bostonreview.net/articles/america-as-a-tactical-gun-culture> [https://perma.cc/A8GS-PNSF] (“The militarization of gun culture among both civilians and police reflects an increasingly energetic defense of white rule in the United States.”).

375. William Baude, Opinion, *Of Course the Supreme Court Needs to Use History. The Question Is How.*, WASH. POST, Aug. 8, 2022, 9:27 AM EDT, <https://www.washingtonpost.com/opinions/2022/08/08/supreme-court-use-history-dobbs-bruen> [https://perma.cc/PBZ2-CZHA].

are these historical arguments responsive to the needs of Black communities *today*? What comfort do these historical arguments offer to Black communities faced with gun violence and deprived of conditions of equal public safety?

The answer, in short, is very little. As Professor Bridges observed in her foreword, this fixation on pre-Civil Rights Era racism elevates an impoverished conception of racism that “causes the Court to overlook devastating harms to people of color when those harms do not harken back to ‘old-school’ racism.”<sup>376</sup> The civil rights efforts of the 1990s called attention to the subordinating impact that gun violence wrought on communities of color—and the role gun regulation could play in ameliorating those harms. But those racial harms are nowhere to be found in the *Bruen* Court’s reasoning.<sup>377</sup>

## 2. *An Objection from Equal Status*

The first objection challenged the *Bruen* decision—and its historical method—on the basis of its subordinating consequences for marginalized communities. But the historical method’s unresponsiveness to the needs of communities of color today gives rise to a second objection that stands independent from consequentialist considerations. By restricting constitutional interpretation to history and tradition, the method is a defective form of justification that fails to respect Black Americans’ equal status as members of the polity.

In challenging a method of interpretation, we can question its workability. We can also question the consequences of its application. But we should also ask whether the method supplies the kinds of justification that citizens, as members of the polity, are *owed*. The tradition of political liberalism has long sought to legitimate state coercion in light of each citizen’s status as a free and equal person. One answer has been to require state actors to publicly justify the exercise of power; when state agents or institutions coerce citizens, citizens are entitled to an explanation. But not any plain explanation will do. The state must justify its actions in a manner that citizens can accept in principle by “virtue of their status as free and equal members of a democratic society.”<sup>378</sup>

The second objection, then, is that Black Americans can reasonably reject the constitutional justifications from history and tradition required by *Bruen* on the basis of their equal political standing.

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376. Bridges, *supra* note 26, at 32.

377. *See id.* at 66 (“*Bruen* eschewed recognizing that allowing guns to go unregulated will mete out a racial injury on black people because, like the circumstances present in *Dobbs*, the injury did not recall the racism of yesteryear.”).

378. Micah Schwartzman, *Religion, Equality, and Public Reason*, 94 B.U. L. REV. 1321, 1323 (2014); *see also id.* at 1323 n.9 (collecting sources); *id.* at 1333-34 (discussing the idea of public reason).

As previously discussed, interpretive methods that emphasize history and tradition do not, in any way, track the value of antisubordination. But taken a step further, an interpretative method concerned with historical restoration or preservation is affirmatively inconsistent with the demands of racial justice. As Professor Jamal Greene has argued about originalist methods, “A racially-sensitive constitutionalism must always . . . hold out the possibility of legitimate dissent from history. Originalism denies that possibility, and so for me, as I suspect for many African-Americans, it speaks in a foreign tongue.”<sup>379</sup> Greene’s observation here moves beyond the method’s subordinating consequences and speaks to an estranged relationship between Black Americans and the historical method of argument itself.

In the Second Amendment context, consider how *Bruen*’s historical method treats the “gun control is racist” argument. What is the historical method to make of practices with racist histories? After all, a law can have a long historical pedigree – but that pedigree may be tainted with discriminatory purpose or effect. The *Bruen* opinion is silent on this question. Perhaps there could be some carveout for racist history such that racist history does not count in favor of a law’s constitutionality. But given the *Bruen* Court’s articulation of its historical methodology, it is hard to imagine how it could make an exception for racist history. Such an exception invites the kinds of value judgements and discretion that the *Bruen* majority sought to reject. In the end, no account of the historical approach makes an exception for gun regulations rooted in racist history.

Indeed, as a result of its insensitivity to racial equality, the traditionalist method actually *encourages* litigants to invoke racist Founding Era history in support of their desired outcome. For instance, the same gun-rights activists who endorse the “gun control is racist” narrative have, for decades, cited racist history to support expansive Second Amendment carry protections. Professor Charles has observed that

[s]ince the late 1980s, at the same time the ‘gun control is racist’ narrative was gaining acceptance within gun rights advocacy circles, so too was the argument that Southern compulsory arms bearing laws – laws intended to help suppress and subdue slave revolts – were indicative that the Second Amendment protected broad carry rights.<sup>380</sup>

Since *Bruen*, advocates defending gun-control measures have already begun invoking racist history as proof of historical regulatory traditions. One week after New York’s “proper cause” licensing requirement was invalidated in light of

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379. Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517, 522 (2011).

380. Charles, *supra* note 28, at 1367 n.119.

*Bruen*, New York State passed the Concealed Carry Improvement Act which replaced the “proper cause” requirement with a new license-application process that required applicants to show “good moral character,” complete firearm training, and complete a thorough applicant-screening process.<sup>381</sup> The law also provided a list of “sensitive locations” where carrying arms is prohibited.<sup>382</sup> Gun-rights groups in New York immediately challenged the law as inconsistent with the Court’s holding in *Bruen*.

In this context, litigants (and courts) treat racist history favorably. In its response brief defending the law and opposing a motion for preliminary injunction, New York State drew on discriminatory Founding Era laws to suggest that history was on its side. New York argued that the “good moral character” requirement was consistent with an Anglo-American tradition of disarming those deemed dangerous to the public order. Laws cited as forming this tradition included colonial laws disarming Native Americans as well as English and colonial laws disarming Catholics.<sup>383</sup> In a footnote, New York acknowledged that “[a]lthough these laws reflect the broad pre- and post-Founding understanding that gun possession could be restricted in cases where a person was dangerous or unfit, they . . . are based on racial or religious animus that is repugnant to a modern understanding of the Constitution.”<sup>384</sup> “A clear-eyed look at American history and doctrine will necessarily reveal episodes that are shameful,” the brief concluded, “but nonetheless relevant, as the *Bruen* opinion teaches us.”<sup>385</sup>

New York’s use of racist history as Second Amendment support was not novel. At least one member of the current Court has endorsed the use of racist history under the history-and-tradition method. In a dissent from the Seventh Circuit’s 2019 decision in *Kanter v. Barr*, then-Judge Barrett claimed that the American historical tradition of gun regulation—including laws disarming “[s]laves and Native Americans,” although blatantly unconstitutional today—supports laws “based on present-day judgments about categories of people whose possession of guns would endanger the public safety.”<sup>386</sup>

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381. See Concealed Carry Improvement Act, ch. 371, § 1, 2022 N.Y. Sess. Laws (McKinney).

382. *Id.* § 4.

383. Defendant Superintendent Bruen’s Memorandum of Law in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 26-28, *Antonyuk v. Bruen*, No. 22-CV-0734 (N.D.N.Y. Aug. 31, 2022), ECF No. 19.

384. *Id.* at 27 n.11.

385. *Id.*

386. 919 F.3d 437, 458, 464 (7th Cir. 2019) (Barrett, J., dissenting); see also Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting “Dangerous” Groups and Outsiders* (Duke L. Sch. Pub. L. & Legal Theory Series Working Paper, Paper No. 2020-80, 2020), <https://ssrn.com/abstract=3702696> [<https://perma.cc/WM4V-MUP5>] (offering an account of these laws).



The first major federal appellate decision applying *Bruen* adopted this logic. In *Range v. Attorney General*, the Third Circuit upheld the federal felon-in-possession law.<sup>387</sup> The court concluded that, “[b]ased on history and tradition, . . . ‘the people’ constitutionally entitled to bear arms are the ‘law-abiding, responsible citizens’ of the polity.”<sup>388</sup> In reaching its decision, the court drew on history that it openly admitted was “repugnant.”<sup>389</sup> In the late seventeenth century, the court pointed out, non-Anglican Protestants were disarmed after the English Civil War, due to “their perceived disrespect for and disobedience to the Crown and English law.”<sup>390</sup> Then, in colonial America, the “earliest firearm legislation . . . prohibited Native Americans, Black people, and indentured servants from owning firearms.”<sup>391</sup> In a footnote, the Third Circuit clarified that “[t]he status-based regulations of this period are *repugnant* (not to mention unconstitutional)” and “categorically reject[ed] the notion that distinctions based on race, class, and religion correlate with disrespect for the law or dangerousness.”<sup>392</sup> Nevertheless, the court wrote, “We cite these statutes only to demonstrate legislatures had the power and discretion to use status as a basis for disarmament.”<sup>393</sup>

After *Bruen*, the history-and-tradition method is definitively the Second Amendment law of the land. And far from condemning racist history as a point against gun regulation, the method encourages supporters of regulation to boast these repugnant histories to lend authority to their claims. The history-and-tradition method, then, is not merely neutral about the status of racist history. It affirmatively endorses its use as a valid means of justifying contemporary gun regulation.

The underlying point is that *Bruen*’s method limits the sources of legal authority that judges can draw on in Second Amendment disputes to historical practices adopted amidst background conditions of social and political inequality. And as much as practitioners and courts seek to disavow these histories, the method lends legitimacy to these practices. Faced with a post-*Bruen* challenge to a federal law barring felons from possessing firearms, Judge Carlton Reeves of the Southern District of Mississippi alluded to this exact deficiency: “This Court is not a trained historian. . . . And we are not experts in what white, wealthy, and

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387. 53 F.4th 262, 266 (3d Cir. 2022).

388. *Id.* (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2131 (2022)).

389. *Id.* at 276 n.18.

390. *Id.* at 274-75.

391. *Id.* at 276 (citing Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 *LAW & HIST. REV.* 567, 578-79 (1998)).

392. *Id.* at 276 n.18 (emphasis added).

393. *Id.*

male property owners thought about firearm regulation in 1791.”<sup>394</sup> In other words, the new controlling historical method of Second Amendment interpretation adopts a subordinating vantage point by granting exclusive authority to arms-related legislative practice at the Founding.<sup>395</sup> It is simply not a form of public justification that displays respect for Black Americans’ status as free and equal members of the polity.

Both of the objections articulated in this Section return to the same principal problem with the *Bruen* Court’s Second Amendment: it is entirely indifferent to the interests of communities of color. And, speaking more broadly, it bears no resemblance to the kinds of debates that ordinary citizens have about gun rights and regulation.<sup>396</sup> In all the social-movement history surveyed throughout this Note, never has an advocate on either side of the debate voiced concern that a gun-regulation measure lacked adequate support in history and tradition.

#### D. *Guns and Antisubordinating Constitutional Politics*

From a doctrinal perspective, antisubordinating the Second Amendment would require a return to means-end scrutiny and consequentialist reasoning. But the total eschewal of these forms of pragmatic reasoning is the hallmark of

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394. *United States v. Bullock*, No. 18-cr-165, 2022 WL 16649175, at \*1 (S.D. Miss. Oct. 27, 2022); see also *id.* at \*3 (asking the parties to indicate their position on appointing a historian to serve as an expert consultant).

395. The day after the Court handed down *Bruen*, it overruled *Roe v. Wade*, 410 U.S. 113 (1973), in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022). In *Dobbs*, like in *Bruen*, the Court adopted a history-and-tradition method of interpretation—this time in the context of substantive due process. The joint dissenters in *Dobbs* understood the subordinating implications of constitutional judging limited by historical inquiry:

“[P]eople” did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women’s liberty, or for their capacity to participate as equal members of our Nation. . . . When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

*Dobbs*, 142 S. Ct. at 2324-25 (Breyer, Sotomayor & Kagan, JJ., dissenting).

396. In that way, the *Bruen* opinion exacerbates what David E. Pozen and Adam M. Samaha have called the “resonance gap” between constitutional forms of reasoning and ordinary public reasoning. See David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 769 (2021); see also Jeremy Waldron, *Public Reason and “Justification” in the Courtroom*, 1 J.L. PHIL. & CULTURE 107, 132 (2007) (“It is worth bearing in mind, however, as we read what passes for ‘reasoning’ in Supreme Court decisions, that much of that discourse is oriented not to the specific merits of the moral issues that need to be confronted on the issue itself, but to issues about interpretive technique, or issues about precedent or jurisdiction or other legalisms.”).

the *Bruen* Court's historical method. *Bruen*'s narrow focus on history and tradition prevents courts from grappling with the potential subordinating effects of either gun regulation or gun violence. A state's interest in regulating guns in public to protect communities' interest in equal public safety is devoid of constitutional significance. *Bruen*'s formalism erases antisubordination from the Second Amendment calculus entirely.

And yet, the Court's declaration that the text-history-and-tradition method rules Second Amendment interpretation does not mean that ordinary citizens must reason about gun control in a purely historical register. Nor do they. Citizens are free to form their own opinions about the work of lawmakers and representatives. In particular, they are free to form their own constitutional judgments about a lawmaker's policies. This is what legal philosopher Jeremy Waldron calls "a politics of constitutionality."<sup>397</sup> That is, "we need to learn how to engage in such a politics ourselves without constant reference back to the deliverances of a court."<sup>398</sup>

Indeed, even lawyers litigating Second Amendment cases are not, in reality, constrained by historical argument. The public defenders' brief is a prime example of movement lawyering that argues outside the register of the Court's formal jurisprudence. In urging the Court to invalidate New York's law on Second Amendment grounds, the brief made no attempt to reason within the bounds of formal Second Amendment law – it made no argument from precedent or original meaning, and it made no attempt to apply the prevailing two-step approach. The public defenders' argument about disparate racial enforcement did not sound in these recognizable interpretative modalities. Instead, it reasoned purely from racial justice. Its role in the *Bruen* litigation illustrates the underlying point that demosprudential arguments – which are often dismissed as merely *political* – can carry legal weight even when they depart from the formal rules of prevailing constitutional jurisprudence.

Our constitutional reasoning about gun regulation, then, need not be limited by the Court's strict historical modalities. Outside the Supreme Court, we can engage in our own means-end scrutiny or interest balancing to judge for ourselves the constitutionality of gun regulation. Of course, for the foreseeable future, the *Bruen* Court's understanding of the Second Amendment is likely to govern in formal legal fora. But developing alternative (and antisubordinating) forms of constitutional politics can be jurisgenerative and help build the ground-

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397. Jeremy Waldron, *Denouncing Dobbs and Opposing Judicial Review* 12 (N.Y.U. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 22-39, 2022), <https://ssrn.com/abstract=4144889> [<https://perma.cc/8L8S-3FSX>].

398. *Id.*

work for a different constitutional law. A persistent public effort that asserts racial-justice arguments in support of gun-violence prevention measures can help illuminate how hollow and impoverished a history-and-tradition-based Second Amendment jurisprudence is over time. These arguments lay bare the degree to which Second Amendment jurisprudence has evolved in a manner so far afield from the issues communities care about.

Even as *Bruen*'s new methodological framework leaves in doubt swathes of existing or future gun-regulation schemes, it does not enact a wholesale ban on gun regulation. The *Bruen* Court made clear that the plain text of the Second Amendment governs the scope of its coverage. In other words, the Second Amendment is only at play if a law burdens the right to bear arms. That leaves room for lawmakers and communities to experiment with forms of regulation that combat gun violence without directly and categorically disarming citizens. Unencumbered by formal constitutional law, advocates can build an antistatutory Second Amendment in public fora—asserting the value of gun regulation to racial justice in the hope that future lawyers and courts are listening. This final Section begins to imagine an antistatutory Second Amendment politics in the years to come.

To treat gun violence as a matter of civil rights, proponents of gun-violence prevention must affirmatively take account of the alarming racial disparities in law enforcement. Indeed, “Because enforcement of the criminal law can damage communities in myriad ways . . . it is critical for those designing public safety strategies . . . to involve other parts of government in implementing policies that prevent violence, with the goal of making criminal law the strategy of last rather than first resort.”<sup>399</sup> Like gun violence itself, police brutality is itself a form of violence that undermines public safety. An antistatutory Second Amendment therefore requires decarceral approaches of addressing gun violence. In doing so, we can follow in the community-oriented traditions and interventions of the 1990s civil-rights mobilization against gun violence. Community-based approaches can avoid the subordinating and status-enforcing impact of total reliance on direct police intervention; they can also represent an intrinsically valuable form of collective resistance.

Emerging “community violence intervention” programs—which are proliferating across the country<sup>400</sup>—offer one such starting point. These programs de-

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399. Blocher & Siegel, *supra* note 344, at 457.

400. See, e.g., Richard Gonzales, *To Reduce Gun Violence, Potential Offenders Offered Support and Cash*, NPR (Mar. 28, 2016, 4:00 PM ET), <https://www.npr.org/2016/03/28/472138377/to-reduce-gun-violence-potential-offenders-offered-support-and-cash> [https://perma.cc/8A8J-BBVK] (describing Richmond, California's street-outreach and fellowship programs); Sukey

pend on local workers who provide face-to-face interaction and support to residents in high-violence neighborhoods.<sup>401</sup> Outreach teams try to mediate conflict between individuals and gangs in the community before escalation. They also help “fill in gaps in many neighborhoods where police still have little legitimacy, social safety net programs often fail to reach people, and victims of crime often feel just as unsafe calling the police.”<sup>402</sup> These community-based programs promote public safety, allowing participants “to increase their understanding and effectiveness in behaving and promoting greater peace creation, community well-being and public safety city-wide.”<sup>403</sup>

Community-violence intervention programs are proven to reduce rates of gun violence while avoiding the subordinating effects of carceral interventions.<sup>404</sup> But their reliance on grassroots methods also brings unique liberatory

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Lewis, *Other Cities Emulate Richmond's Innovative Approach to Ending Gun Violence*, KQED (Mar. 9, 2016), <https://www.kqed.org/news/10889015/other-cities-emulate-richmonds-innovative-approach-to-ending-gun-violence> [https://perma.cc/TS9J-9ME8] (stating that Washington, D.C. established a program modeled after Richmond, and how Toledo, OH and Oakland, CA were considering similar programs); *Interventions*, NYC OFF. TO PREVENT GUN VIOLENCE, <https://www1.nyc.gov/site/peacenyc/interventions/crisis-management.page> [https://perma.cc/GHM7-M2G2] (describing New York City's Anti-Gun Violence Employment Program); Champe Barton, *New York to Roll Out Pioneering Violence Prevention Program that Involves Financial Incentives*, TRACE (Aug. 11, 2021), <https://www.thetrace.org/2021/08/new-york-advance-peace-gun-violence-prevention-program> [https://perma.cc/2KG6-LTDH] (same).

401. For an overview of the different forms these programs take, see Nazish Dholakia & Daniela Gilbert, *Community Violence Intervention Programs, Explained*, VERA INST. JUST. (Sept. 1, 2021), <https://www.vera.org/community-violence-intervention-programs-explained> [https://perma.cc/9ZZT-D9XZ].
402. Chip Brownlee, *Activists Push for Community-Led Gun Violence Prevention in a Southern City Scarred by Racist Policing*, TRACE (July 29, 2020), <https://www.thetrace.org/2020/07/gun-violence-prevention-defund-police-birmingham-alabama> [https://perma.cc/ZY28-2L6Y].
403. *More About ONS Strategic Initiatives*, CITY RICHMOND, <http://ca-richmond.civicplus.com/2410/More-about-ONS-Strategic-Initiatives> [https://perma.cc/9DJP-LBUX].
404. See, e.g., Ellicott C. Matthay, Kriszta Farkas, Kara E. Rudolph, Scott Zimmerman, Melissa Barragan, Dana E. Goin & Jennifer Ahem, *Firearm and Nonfirearm Violence After Operation Peacemaker Fellowship in Richmond, California, 1996-2016*, 109 AM. J. PUB. HEALTH 1605, 1607-09 (2019). Public advocates of community intervention programs have articulated their benefits in the language of racial equality. Manhattan District Attorney Alvin Bragg, for example, has characterized these programs as “center[ing] equity and justice,” articulating the relationship between gun violence and racial subordination in the following terms:

Gun violence is a civil rights and equality issue. It is no secret that gun violence disproportionately affects communities of color. Violence and crime are often rooted in a sense of injustice and distrust of the government. The traditional response by law enforcement to crime is greater police presence, crackdowns, and shows of force, which only then serve to reinforce distrust and discontent in the

and egalitarian advantages. Writing about overcoming social injustices faced by the Black ghetto poor, philosopher Tommie Shelby argues that forms of collective resistance on the part of the unjustly disadvantaged can foster forms of political solidarity and self-respect.<sup>405</sup> He asserts that grassroots and community-based interventions help to uplift the “moral and political agency” of the subordinated.<sup>406</sup> Individuals exercise their moral and political agency to secure for themselves—and for their communities—the social conditions of equal public safety by reducing firearm violence and obviating the need for direct carceral intervention.

What does community-violence intervention have to do with constitutional law? These programs are not subject to Second Amendment challenge because they do not directly regulate the ownership of firearms. At the same time, these programs help model how to antisubordinate the Second Amendment in practice. Efforts to promote community-violence intervention as a racial-justice issue contribute to a constitutional politics of antisubordination. They help articulate to the public the relationship between gun-violence prevention and equal public safety. Building these narratives helps to discredit a Second Amendment jurisprudence that pretends that gun violence in communities of color has nothing to do with the Constitution’s guarantee of a right to bear arms.

## CONCLUSION

The *Bruen* Court upended prevailing Second Amendment law, imposing severe limits on longstanding gun-control regimes and expanding the scope of the constitutional right to bear arms beyond the home. This Note has demonstrated that to reach this decisive point in the development of the modern Second Amendment, conservative gun-rights activists have, from the very beginning, leveraged claims about the relationship between gun control and racial subordination. For over half a century, movement actors have asserted that racial justice demands an expansionist Second Amendment that applies in and out of the home. Persistent social-movement mobilization, academic scholarship, and strategic litigation have legitimized these claims in popular and professional fora.

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community. Thousands of lives are shattered by violence or incarceration, further weakening the community socially and economically, continuing the spiral.

*A Real Plan to Stop Gun Violence in Manhattan*, ALVIN BRAGG: MANHATTAN DA-ELECT, <https://www.alvinbragg.com/gun-safety> [<https://perma.cc/9S5Q-ET5E>].

405. See TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM 113-16 (2016).

406. Alana Semuels, *Rethinking America’s ‘Dark Ghettos,’* ATLANTIC (Nov. 22, 2016), <https://www.theatlantic.com/business/archive/2016/11/rethinking-americas-dark-ghettos/508400> [<https://perma.cc/C2G3-HGR9>].

This Note has urged that progressive advocates of gun regulation must develop and promote their own account of a race-sensitive, antistubordinated Second Amendment – one that acknowledges the limits of carceral tools while centering the value of equal public safety in countering the racialized harms of gun violence. This competing account starts by recognizing that the *Bruen* Court's expansionist Second Amendment is subordinated, not liberatory. It is entirely indifferent to the interests of communities of color. It renders those communities less safe. And its narrow focus on history and tradition to justify gun deregulation dishonors those communities.

Antistubordinating the Second Amendment is not only a matter of changing how courts interpret the Second Amendment. The theory is expansive, democratic, and, above all, actionable. It calls on lawmakers, academics, and advocates to use this opportunity to imagine new forms of gun-violence prevention and to take concrete steps to address the subjugating effects of gun violence on communities of color.