

COMMENTS

***HELLER* AS POPULAR CONSTITUTIONALISM? THE OVERLOOKED NARRATIVE OF ARMED BLACK SELF-DEFENSE**

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INTRODUCTION

On July 6, 2016, Diamond “Lavish” Reynolds live streamed a video on Facebook that was seen by millions of people in the days that followed.¹ This video depicts the final moments of Philando Castile, Reynolds’ thirty-two-year-old, black boyfriend, who had just been shot by Jeronimo Yanez, a Saint Anthony, Minnesota police officer.² Viewers observe Castile leaning unnaturally towards the back seat breathing laboriously as his shirt becomes soaked in blood. They see Yanez’s gun trained on the fatally wounded Castile. Reynolds explains that Yanez shot Castile multiple times after pulling them over for a broken taillight. Reynolds reports that Castile informed Yanez that he was licensed to carry a firearm and had one in his possession, then Castile began reaching for his identification when Yanez shot him four or five times. Repeatedly, Reynolds asserts to Yanez, “You told him to get [his identification], sir.”³

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¹ Facebook has since taken down Reynolds’ video. For access to what appears to be the video Reynolds streamed, see Right Now News, *Raw Footage: Philando Castile Shot **Full Video***, YOUTUBE (July 7, 2016), https://www.youtube.com/watch?v=K_J3sYIgvUE. For a side-by-side comparison of the video live streamed by Reynolds and the dash-cam video eventually released by the police, see Chao Xiong & Andy Mannix, *Case File in Philando Castile Shooting Released, Dashcam Video Shows Shooting*, STAR TRIB. (June 21, 2017), <http://www.startribune.com/case-file-in-philando-castile-shooting-to-be-made-public-today/429659263/>. See also T. Rees Shapiro, Lindsey Bever, Wesley Lowery & Michael E. Miller, *Police Group: Minn. Governor ‘Exploited What Was Already a Horrible and Tragic Situation’*, WASH. POST (July 9, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/07/07/minn-cop-fatally-shoots-man-during-traffic-stop-aftermath-broadcast-on-facebook/?tid=a_inl&utm_term=.139d25f8e2dc (noting that Reynolds’s video had been viewed by millions).

² Shapiro et al., *supra* note 1.

³ Right Now News, *supra* note 1.

Philando Castile's death was one of many resultant from altercations between police and black men in recent years.⁴ Castile's death also occurred during a particularly tumultuous few days.⁵ Castile died the day after Alton Sterling, another black man, was killed by police in Baton Rouge, Louisiana.⁶ The night after Castile's death, five police officers were killed and seven others were injured by sniper fire when a lone gunman disrupted a Black Lives Matter protest in Dallas, Texas.⁷

In response to these events, many public figures and organizations spoke out. President Obama called for all Americans "to confront the racial disparities in law enforcement while acknowledging the dangers that officers face."⁸ Minnesota Governor Mark Dayton asserted that Castile's race seemed to be a clear factor in his death and called for the Department of Justice to conduct an investigation.⁹ The Black Lives Matter Network issued a statement condemning the actions of the officers involved in the deaths of Sterling and Castile and of the Dallas gunman.¹⁰ Yet, one organization,

⁴ See Christina Capecchi & Mitch Smith, *Officer Who Shot Philando Castile Is Charged with Manslaughter*, N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/2016/11/17/us/philando-castile-shooting-minnesota.html> (noting that "Castile's death is among . . . countless police interactions with black men that have roiled the country . . . in the last two years"). Inconsistent with other recent police killings of black citizens, however, is the fact that Yanez faced criminal charges for killing Castile. See Chao Xiong, *Trial for Officer Yanez in Philando Castile Case Will Remain in Ramsey County*, STAR TRIB. (Apr. 6, 2017, 9:35 PM), <http://www.startribune.com/trial-for-officer-yanez-in-fatal-shooting-of-philando-castile-will-remain-in-ramsey-county/418565423/> (reporting Yanez was charged with "second-degree manslaughter and two felony counts of dangerous discharge of a firearm"); see also German Lopez, *Philando Castile Minnesota Police Shooting: Officer Cleared of Manslaughter Charge*, VOX (June 16, 2017, 4:15 PM), <http://www.vox.com/2016/7/7/12116288/minnesota-police-shooting-philando-castile-falcon-heights-video> (noting that Yanez was criminally charged, but "[p]olice are very rarely prosecuted for shootings" and "[i]f police are charged, they're very rarely convicted"). But see Steve Osunsami & Emily Shapiro, *Ex-Cop Michael Slager Sentenced to 20 Years for Shooting Death of Walter Scott*, ABC NEWS (Dec. 7, 2017, 1:38 PM), <http://abcnews.go.com/US/cop-michael-slager-faces-19-24-years-prison/story?id=51595376> (reporting that Michael Slager was convicted of second degree murder and obstruction of justice for shooting Walter Scott—an unarmed black man—in the back as Scott ran away and was sentenced to twenty years in prison). After deliberating for five days, the jury acquitted Yanez. See Hannah Covington, *Community Reacts to Not Guilty Verdict in Yanez Trial*, STAR TRIB. (June 17, 2017, 12:26 AM), <http://www.startribune.com/community-reacts-to-not-guilty-verdict-in-yanez-trial/428928603/>. For an overview of deaths of young black citizens at the hands of police in the 2010s, see generally WESLEY LOWERY, *THEY CAN'T KILL US ALL* (2016).

⁵ Shapiro et al., *supra* note 1.

⁶ *Id.*

⁷ Tessa Stuart, *Black Gun Owners Speak Out About Facing a Racist Double Standard*, ROLLING STONE (July 14, 2016), <http://www.rollingstone.com/politics/news/black-gun-owners-speak-out-about-facing-a-racist-double-standard-20160714>.

⁸ Matt Furber & Richard Pérez-Peña, *After Philando Castile's Killing, Obama Calls Police Shootings 'an American Issue'*, N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html>.

⁹ Shapiro et al., *supra* note 1.

¹⁰ *The Black Lives Matter Network Advocates for Dignity, Justice, and Respect*, BLACK LIVES MATTER NETWORK (July 9, 2016), <http://blacklivesmatter.com/the-black-lives-matter-network-advocates->

known for commenting on public events related to gun violence, was slow to respond—the National Rifle Association.¹¹

Given that Castile was killed, largely, because he was licensed to carry a firearm¹² and went beyond his legal duty by informing Yanez that he had a weapon in his possession,¹³ many expected the NRA to speak up decisively in defense of gun owners’ rights.¹⁴ However, the organization waited almost two days before issuing the following statement:

As the nation’s largest and oldest civil rights organization, the NRA proudly supports the right of law-abiding Americans to carry firearms for defense of themselves and others regardless of race, religion or sexual orientation.

The reports from Minnesota are troubling and must be thoroughly investigated. In the meantime, it is important for the NRA not to comment while the investigation is ongoing.

Rest assured, the NRA will have more to say once all the facts are known.¹⁵

Critics pointed out that this statement failed to mention Castile by name and to take a definite stance against what had occurred. They also drew a sharp comparison between this statement, issued a day and a half after Castile’s death, and the NRA’s statement in response to the Dallas shootings, issued mere hours after the attack.¹⁶ Some opined that race seemed to be a key motivator in the NRA’s less than satisfactory response, and others have noted

for-dignity-justice-and-respect/ (lamenting the deaths of Sterling, Castile, and those killed in Dallas, and asserting that black activists call for the end of violence).

- 11 See Brian Fung, *The NRA’s Internal Split over Philando Castile*, WASH. POST (July 9, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/07/09/the-nras-internal-revolt-over-philando-castile/> (commenting that the NRA “appeared to drag its feet” before publicly addressing Castile’s death).
- 12 David Chanen, *Philando Castile Had Permit to Carry Gun*, STAR TRIB. (July 9, 2016, 4:17 PM), <http://www.startribune.com/philando-castile-had-permit-to-carry-gun/386054481/>.
- 13 See MINN. STAT. § 624.714 subdiv. 1b. (2016); see also 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/> (noting Castile volunteered that he had his firearm on him, and that Minnesota concealed carry permit holders only need to declare their weapon when asked).
- 14 See Fung, *supra* note 11.
- 15 NRA Inst. for Legislative Action, FACEBOOK (July 8, 2016), <https://www.facebook.com/NationalRifleAssociation/photos/a.10150117108031833.307969.22561081832/10154483218346833/?type=3&theater>.
- 16 See Fung, *supra* note 11; see also Emily C. Singer, *NRA Responds to Dallas Police Sniper Shootings, but Completely Ignores Philando Castile*, MIC (July 8, 2016), <https://mic.com/articles/148204/nra-responds-to-dallas-police-sniper-shootings-but-completely-ignores-philando-castile#.3BW1ExwaP>; Amber Randall, *Gun Owners Aren’t Happy About the NRA’s Statement on Philando Castile’s Death*, DAILY CALLER (July 12, 2016, 2:49 AM), <http://dailycaller.com/2016/07/11/gun-owners-arent-happy-about-the-nras-statement-on-philando-castiles-death/>.

that the deaths of Castile and Sterling are the latest indicators that black citizens enjoy less protection than whites under the Second Amendment.¹⁷

This latter observation—that black citizens receive less Second Amendment¹⁸ protection than other citizens—begs the question: What *does* the Second Amendment protect? The Supreme Court resolved this question in the seminal case *District of Columbia v. Heller*, in which it held that the District of Columbia could not institute an “absolute prohibition of handguns held and used for self-defense in the home” because the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”¹⁹ The Court’s decision in *Heller* received a considerable amount of attention from legal scholars.²⁰ Notably, Professor Reva Siegel’s article, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*,²¹ received wide readership.²² In this article, Siegel looks at the social and political history of the half-century leading up to *Heller* to argue that Justice Scalia’s originalist argument in *Heller* “enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism.”²³ Yet, in light of Castile’s death and the claims that black citizens enjoy less Second Amendment protection than whites, the history presented by Siegel deserves reconsideration.

17 See, e.g., Jelani Cobb, *Old Questions but No New Answers in the Philando Castile Verdict*, NEW YORKER (June 22, 2017), [https://www.newyorker.com/news/daily-comment/old-questions-but-no-new-answers-in-the-philando-castile-verdict?mbid=nl_daily&CNDID=25328340&mbid=nl_TNY%20Template%20-%20With%20Photo%20\(185\)&CNDID=25328340&spMailingID=11329828&spUserID=MTMzMTgyNjcyOTg5S0&spJobID=1182027154&spReportId=MTE4MjAyNzE1NAS2](https://www.newyorker.com/news/daily-comment/old-questions-but-no-new-answers-in-the-philando-castile-verdict?mbid=nl_daily&CNDID=25328340&mbid=nl_TNY%20Template%20-%20With%20Photo%20(185)&CNDID=25328340&spMailingID=11329828&spUserID=MTMzMTgyNjcyOTg5S0&spJobID=1182027154&spReportId=MTE4MjAyNzE1NAS2) (stating that the decision to acquit Yanez “highlighted a kind of divided heart of Second Amendment conservatism, at least with regard to race”); Graham, *supra* note 13; Dustin Rochkes, Comment to *NRA Inst. for Legislative Action*, FACEBOOK (July 8, 2016, 12:33 PM), <https://www.facebook.com/NationalRifleAssociation/photos/a.10150117108031833.307969.22561081832/10154483218346833/?type=3&theater> (comparing the responses and asserting “[n]o wonder liberals accuse the NRA of being racist”).

18 U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

19 *District of Columbia v. Heller*, 554 U.S. 570, 592, 636 (2008). The Court later incorporated the Second Amendment, as articulated in *Heller*, against the States. *McDonald v. City of Chi.*, 561 U.S. 742, 748–49 (2010).

20 See, e.g., Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399 (2009); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008); Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551 (2009).

21 Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

22 As of March 28, 2018, HeinOnline indicates that Siegel’s article, *id.*, has been cited by 193 articles and 3 cases, and GoogleScholar indicates that it has been cited 316 times. Importantly, Siegel’s critique of *Heller* is cited in Justice Breyer’s dissent in *McDonald*. *McDonald*, 561 U.S. at 920 (Breyer, J., dissenting) (citing Siegel, *supra* note 21, at 201–46).

23 Siegel, *supra* note 21, at 192.

This Comment argues that the history discussed by Professor Siegel is strikingly incomplete due to its failure to examine views of the Second Amendment as they developed in the black community. In Part I, I briefly summarize the Court’s decision in *Heller*, then I proceed to summarize the argument made by Siegel in her *Dead or Alive* analysis. Part II then considers the historic discourse within the black community surrounding the Second Amendment. Through this, I offer some indication that Siegel’s claim—that the belief that the Second Amendment protects an individual right is a relatively new understanding that emerged in the post-Civil Rights Movement era, propelled by the NRA and Presidents Nixon and Reagan—is incorrect. Instead, the belief that the Second Amendment represents an individual’s right to use firearms for self-defense has a long history within the black community,²⁴ and, if anything, this perspective was co-opted by conservatives during the period that Siegel explores.

I. *HELLER*’S ORIGINALISM AS POPULAR CONSTITUTIONALISM

Heller was the first case since the 1930s when the Supreme Court squarely considered the meaning and scope of the Second Amendment.²⁵ Prior to *Heller*, the Court’s most seminal Second Amendment case was *United States v. Miller*.²⁶ Leading up to *Heller*, most scholars and judges read *Miller* to hold that the Second Amendment “protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons.”²⁷ *Heller* upended that understanding.

²⁴ That is not to say that this belief was uniform within the black community. I merely suggest that some members of the black community held this view and that there is more diversity of thought within that community than is often attributed.

²⁵ ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 30–33 (4th ed. 2008) (providing a general overview of the Supreme Court’s Second Amendment jurisprudence).

²⁶ 307 U.S. 174 (1939).

²⁷ *District of Columbia v. Heller*, 554 U.S. 570, 637–38 (2008) (Stevens, J., dissenting) (stating that “hundreds of judges have relied” upon that reading of *Miller*); see also SPITZER, *supra* note 25, at 32–34 (describing a similar reading of *Miller*); ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 24–25 (2011) (explaining that the Court’s decision in *Miller* inspired the “militia theory”: the notion that the Second Amendment was only intended to protect “the right of states to form militias” and not the individual right to bear arms).

A. District of Columbia v. Heller

In *Heller*, the Supreme Court considered a challenge to a Washington, D.C. law which banned carrying unregistered handguns, banned the practice of registering lay citizens' handguns, and required those who legally possessed other firearms to store them in a securely disengaged manner.²⁸ The Court, with Justice Scalia writing for the majority, affirmed the court below and struck down the D.C. law as violative of the Second Amendment.²⁹ Before commencing his analysis, Justice Scalia notes that those on either side of the case have contrasting views on what the Second Amendment means. The Petitioner and dissenting Justices viewed the Amendment as only protecting a collective right to possess firearms for military service, and the Respondent—with whom the Court eventually sided—articulated that the Second Amendment enshrines “an individual right to possess a firearm . . . for traditionally lawful purposes, such as self-defense within the home.”³⁰ Scalia determines that the latter interpretation is correct, because it would have been the understanding of “ordinary citizens in the founding generation.”³¹

First, Scalia conducts an in-depth textual analysis of the language of the Second Amendment,³² which he divides into a Prefatory Clause—“A well regulated Militia, being necessary to the security of a free State”³³—and an Operative Clause—“the right of the people to keep and bear Arms, shall not be infringed.”³⁴ Scalia indicates that the Prefatory Clause should be construed as a statement of purpose of the Amendment that does not limit the Operative Clause.³⁵ Scalia then establishes that, under its original meaning, the Operative Clause “guarantee[d] the individual right to possess and carry weapons in case of confrontation.”³⁶ He also explains that the Prefatory Clause meant, broadly, that there were governmental interests in all able-bodied men being properly trained in the use of arms.³⁷ In other words, Scalia asserted the Second Amendment should be read to say:

²⁸ D.C. CODE §§ 7-2501.01–09.11 (2001), *invalidated in part by* *Heller v. District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015); *Heller*, 554 U.S. at 574–75.

²⁹ *Heller*, 554 U.S. at 635–36.

³⁰ *Id.* at 577. Despite the lack of an established orthodoxy in the literature, the view held by the Respondent is commonly referred to as the “standard model” of the Second Amendment” by those taking an individual rights based approach to the Second Amendment. WINKLER, *supra* note 27, at 95–96.

³¹ *Heller*, 554 U.S. at 577, 595, 598.

³² *Id.* at 576–600.

³³ *Id.* at 595 (quoting U.S. CONST. amend. II).

³⁴ *Id.* at 579, 581 (quoting U.S. CONST. amend. II).

³⁵ *Id.* at 577–78, 599.

³⁶ *Id.* at 592.

³⁷ *Id.* at 595–98.

“Because there are governmental interests in all able-bodied men being trained in the use of arms, individuals have the right to possess and carry weapons in case of confrontation.”

Justice Scalia does not stop after his textual argument. He continues to explore how his interpretation comports with state constitutions that were adopted during the same time period, with the drafting history of the Amendment, with how the Amendment was interpreted throughout the nineteenth century, and with the Court’s own precedent.³⁸ Most intriguingly for our purposes, Scalia explores this history in relation to the history of race in America.³⁹ He notes that prior to the Civil War, Virginia refused to apply the state and federal constitutions equally to white citizens and free black citizens in order to prevent free blacks from possessing guns for any purpose—military or otherwise.⁴⁰ Scalia documents how racial tension concerning the right to bear arms played a key role in the discussions leading up to the Freedmen’s Bureau Act of 1866, the Civil Rights Act of 1871, and the Fourteenth Amendment.⁴¹ Proponents of these legal measures emphasized that they would secure the ability of newly freed blacks to use guns in self-defense.⁴² However, Scalia does indicate that because these legislative discussions occurred substantially after the Amendment was ratified they “do not provide as much insight into its original meaning as earlier sources.”⁴³ Taking all of this into consideration, Scalia notes that this supplementary analysis supports his textual finding; thus, he notes, the Second Amendment should be read to protect an individual’s right to possess a firearm for self-defense.⁴⁴ This deviation from the prior post-*Miller* understanding—that the Second Amendment protected the use of arms only for military service—was a shock to many and led to much scholarly debate.

B. Siegel’s *Heller* as Popular Constitutionalism Argument

Among the legal scholars that have critiqued the Court’s decision in *Heller*, Professor Siegel’s *Dead or Alive: Originalism as Popular Constitutionalism in Heller* has been particularly influential.⁴⁵ As a preliminary matter, Popular Constitutionalism is a moniker for a theory of understanding how

³⁸ *Id.* at 600–26.

³⁹ *See, e.g., id.* at 600 (“That is why the first Militia Act’s requirement that only whites enroll caused States to amend their militia laws to exclude free blacks.”); *id.* at 609 (“Antislavery advocates routinely invoked the right to bear arms for self-defense.”); *id.* at 611–12 (discussing Virginian restrictions on free blacks’ access to guns).

⁴⁰ *Id.* at 611–12.

⁴¹ *Id.* at 614–16.

⁴² *Id.*

⁴³ *Id.* at 614.

⁴⁴ *Id.* at 616.

⁴⁵ Siegel, *supra* note 21; *see also supra* note 22 (noting the number of times Siegel’s article has been cited).

constitutional law develops over time.⁴⁶ As Siegel defines it, the essence of this theory is that the Supreme Court acts under its own authority in making decisions about what the Constitution means, and the Court is responsive to “beliefs and values of living Americans who identify with the commitments and traditions of their forbears.”⁴⁷ Further, Siegel explains that under a theory of Popular Constitutionalism, passionate public debates and mobilizations surrounding the meaning of the Constitution “endow courts with authority to change the way they interpret its provisions.”⁴⁸ Siegel argues that Scalia’s argument about the original understanding of the Second Amendment in *Heller* masks his Popular Constitutionalism.

Siegel explains that, because there are a number of “temporal oddities” in the sources Scalia used to ground his textualist attempt to discern the original meaning of the Second Amendment, Scalia’s argument actually relies heavily on the later part of the opinion where he presents the post-ratification perceptions of the Amendment.⁴⁹ Siegel asserts that perhaps the Court’s proposed original meaning of the Amendment is accurate, but that it is equally—if not more—plausible to conclude that “the majority is presenting *as* the original public meaning an understanding of the amendment that emerged in common law-like fashion in the decades after the amendment was ratified.”⁵⁰ The most damning evidence Siegel marshals to show how more recent history heavily influenced Scalia’s opinion is found in footnote 24 of the majority opinion.⁵¹ Therein, Scalia states that the beliefs of judges that the Second Amendment protected only the ability to possess weapons for militia use after *Miller* “cannot nullify the reliance of millions of Americans . . . upon the true meaning of the right to keep and bear arms.”⁵² Here, according to Siegel, Justice Scalia clearly enters the fray of public opinion and invites critics to consider how national debate leading up to *Heller* influenced the Court’s decision.⁵³

Then, Siegel discusses how the gun rights debate developed in popular culture in the second half of the twentieth century. She frames the modern

⁴⁶ The term “Popular Constitutionalism” originated in LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004), which argued that the general public could protect individual rights and that the Framers expected that lay people—through jury participation, political activism, and voting—would be able to interpret and influence the understanding of the Constitution. See Jeffrey Rosen, *Popular Constitutionalism*, N.Y. TIMES MAG. (Dec. 12, 2004), <http://www.nytimes.com/2004/12/12/magazine/popular-constitutionalism.html> (describing Kramer’s argument about Popular Constitutionalism).

⁴⁷ Siegel, *supra* note 21, at 192.

⁴⁸ *Id.* at 192–93.

⁴⁹ *Id.* at 195–201.

⁵⁰ *Id.* at 198.

⁵¹ *Id.* at 200–01 & n.41.

⁵² *District of Columbia v. Heller*, 554 U.S. 570, 624 n.24 (2008).

⁵³ Siegel, *supra* note 21, at 201.

gun control versus gun rights debates as a recent phenomenon that arose in the aftermath of *Brown v. Board of Education*.⁵⁴ Siegel notes that during the 1950s and 1960s guns were popular but that there was also significant support for gun control, which increased dramatically in the wake of the deaths of President Kennedy, Senator Robert Kennedy, and Martin Luther King, Jr.⁵⁵ Siegel indicates that the growing urgency for gun control was inspired by many events which made the gun debates racially charged.⁵⁶ Throughout the remainder of the article, Siegel indicates that on the two sides of this debate were (1) liberals and civil rights leaders who supported gun control and (2) conservatives, the NRA, and the Nixon and Reagan Administrations which supported gun rights.⁵⁷

Siegel notes that President Johnson's publicity campaign in support of the Gun Control Act of 1968⁵⁸ reflected unmistakable civil rights concerns, yet the bill that was passed was "larded" with amendments that restricted civil rights and weakened gun restrictions.⁵⁹ After the passage of the Gun Control Act of 1968, according to Siegel, there was a shift in the political discourse that resulted in the breakup of an "uneasy coalition of law and order conservatives and civil rights leadership," which had supported the gun control initiatives in the early 1970s.⁶⁰ Instead, conservatives, relying on a law-and-order narrative that good citizens needed to be able to use guns to protect themselves from lawless criminals, pivoted towards hard stances

54 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Siegel, *supra* note 21, at 202.

55 Siegel, *supra* note 21, at 202–03.

56 *Id.* at 203.

57 *Compare id.* at 204 ("The civil rights concerns of the [gun control] bill's proponents were unmistakable."), *and id.* at 205–06 (discussing gun control legislation passed by Democratic President Lyndon Johnson as being "encumbered with civil rights restrictions he opposed"), *with id.* at 207–12 (discussing the NRA's radicalization to opposing "even moderate forms of gun control"), *and id.* at 215 (noting that the election of President Ronald Reagan led many to believe the view of the Second Amendment as protecting an individual right to possess a gun would become law). This type of framing—liberals versus conservatives, Democrats versus Republicans—tends to be misleading in racialized contexts. *Cf.* NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 8, 12–19 (2014) (arguing that liberals and Democrats are just as responsible for the creation of the current carceral state as conservative, "law-and-order" Republicans and emphasizing that failing to address this discounts the significance of racial power). However, it should be noted that Professor Murakawa, who supports broad decriminalization to combat the carceral state, supports gun control. *See* Princeton AAS, *The First Civil Right – Naomi Murakawa & Eddie Glaude*, YOUTUBE 46:19–47:30 (Aug. 5, 2015), <https://www.youtube.com/watch?v=2Jj8TBpxubI> (featuring a conversation with Professor Murakawa in which she calls gun control initiatives "very important").

58 Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended in scattered sections of 26 U.S.C.).

59 Siegel, *supra* note 21, at 204–07.

60 *Id.* at 207–09 (footnotes omitted) (citing KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* 166–67 (2006)).

against any gun control measure.⁶¹ Siegel credits President Nixon for buoying this narrative through law-and-order rhetoric that failed to distinguish between street crimes and political unrest and activism.⁶² She also credits an article written by President Reagan, then Governor of California, in 1975 in *Guns & Ammo* magazine as being among the first to translate the need to use guns in self-defense into a constitutionally protected right.⁶³

She explains that in 1977, the NRA, led by Harlon Carter, also pivoted from a begrudging support of moderate gun control provisions to an entrenched opposition to any form of gun control.⁶⁴ The NRA grounded its position in the Second Amendment and disseminated the view that the Amendment protected gun ownership for self-defense purposes in its direct mail campaigns and its magazine *American Rifleman*.⁶⁵

Siegel then turns to the Reagan Administration in the 1980s and the rise of originalism, which would later become the bedrock of the Court's opinion in *Heller*. She explains how the Reagan Administration focused on changing the law through the judiciary, where he was able to appoint almost half the judges on the lower courts and three Supreme Court Justices.⁶⁶ Further, the Reagan Administration carefully vetted its nominees, ensuring that his appointees shared constitutional convictions similar to those held by the administration—chief amongst which was a heavy emphasis on the original meaning of the Constitution.⁶⁷ The article then details the development in the gun rights versus gun control debates in the 1990s, including the passage of the Brady Bill in 1993⁶⁸ and the 1994 Assault Weapons Ban,⁶⁹ which provoked significant counter-movements including an uprising of a number of militia organizations, from which the NRA was slow to distance itself.⁷⁰ During this period, the leaders of the NRA continued to employ blatantly racial language.⁷¹ Siegel concludes that these developments—the emergence of the belief that the Second Amendment constitutionally protected the right to bear arms in self-defense and the emphasis on originalism that arose in the 1980s—“imbued the amendment with compelling contemporary social meaning” that

61 *Id.*

62 *Id.* at 207.

63 *Id.* at 209–12, 209 n.81.

64 *Id.* at 210–11.

65 *Id.* at 211, 213–14.

66 *Id.* at 217.

67 *Id.* at 217–23.

68 Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 921–22).

69 Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 16, 18, 26, 31, and 42 U.S.C.)

70 Siegel, *supra* note 21, at 226–231.

71 *Id.* at 232–35.

Justice Scalia retroactively read back into the Founders' understandings.⁷²

This explanation of the Court's *Heller* opinion is persuasive. It draws from details that are easily overlooked—temporal issues in sources—to point out a significant flaw in Justice Scalia's reasoning. Then, it compellingly traces the developments in popular debates surrounding the Second Amendment to show how our constitutional culture influenced the Court's decision. However, Siegel misses one significant point: views of gun ownership within the black community were not monolithic. Siegel's only mention of the black community's views of the Second Amendment, beyond generalized mentions of "civil rights leaders," is confined to a footnote.⁷³ Therein, Siegel mentions that some early attempts at gun control were targeted at disarming black people, notes briefly that the Black Panther Party originally relied on the Second Amendment to maintain that blacks should arm themselves in self-defense, and posits that this view was not a focal point of black activism and did not become "entrenched . . . in the African-American community."⁷⁴ To support this final claim, Siegel points to the Black Panther's revised 1972 party platform, which omits a reference to the Second Amendment; a 2008 Pew research survey showing African-Americans currently favor gun control; and a 1999 *New York Times* article about a case the NAACP filed against gun manufacturers.⁷⁵

To some degree, Siegel seems to fall into the same trap that she alleges Justice Scalia fell into—relying on sources that present "temporal oddities."⁷⁶ While the change in the Black Panther's platform is temporally relevant, that source only represents *one* organization and is not sufficient to assert that, as a whole, the African-American community did not view the Second Amendment as protecting the right to use guns in self-defense. Further, the later sources do not reflect the views within the black community either prior to or during the 1950s through 1990s—the key period of Siegel's analysis. Instead, the following analysis suggests that the Reagan-NRA view that the Second Amendment protected the right to own a gun in self-defense was actually co-opted by the conservative movement from a belief that was widespread amongst black citizens.

⁷² *Id.* at 240.

⁷³ *Id.* at 203 n.52.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See supra* note 49 and accompanying text.

II. THE SECOND AMENDMENT AS THE RIGHT TO ARMED SELF-DEFENSE WITHIN THE BLACK COMMUNITY

Today, black citizens are nine times more likely than white citizens to die of gun violence, and some speculate that this may be a reason why black citizens are typically more supportive of gun control efforts than whites.⁷⁷ However, black citizens have not always been such clear proponents of gun control. The clear racialized discourse that surrounds the Second Amendment, as seen in Siegel's description of the late twentieth century, is neither a recent nor accidental phenomenon. This Part first provides a surface-level overview of the history of gun use for self-defense within the black community from the colonial era through the post-Civil War period. This is important because Justice Scalia alludes to this history in *Heller* before indicating that it is not necessarily indicative of the beliefs of the founding generation. Moreover, Scalia's reference to this history should have indicated to Siegel the need to explore the potential for support of a personal gun right interpretation of the Second Amendment within the black community.

Then, this Part examines three different bases to believe that many black citizens during the period that Siegel analyzes believed that the Second Amendment protected the individual right to bear arms in self-defense. The first basis of this is the often overlooked use of guns for self-defense to complement the nonviolent civil rights movement of the 1960s and beyond. The second basis examined in this Part is the Black Panther Party itself, through which I challenge Siegel's assumption that the change in the Black Panther Party's platform is sufficient to indicate the group no longer viewed the Second Amendment as protecting a right to use firearms in self-defense. The third indication that black citizens may have viewed the Amendment as protecting a personal right to use guns in self-defense is a content analysis of two prominent black newspapers—*The Chicago Defender* and the *Pittsburgh Courier*. Coverage in these papers suggests that there were divergent views within the black community about both the meaning of the Second Amendment and whether or not gun control legislation would be beneficial. This analysis shows that, while Siegel may be right that popular debates surrounding the Second Amendment post-ratification had a significant influence on what the Court ultimately concludes was the “original meaning” of the text, she overlooks a significant part of these debates.

⁷⁷ THOMAS GABOR, CONFRONTING GUN VIOLENCE IN AMERICA 9, 205–06 (2016).

A. *An Overview of the History of Black Armed Self-Defense*

From the days that African slaves were first brought to the shores of the colonies, there was concern about slaves and free blacks obtaining firearms, and laws were written to limit their access to guns.⁷⁸ The history of black armed self-defense traces back from slaves attempting to protect themselves to conductors of the Underground Railroad, such as Harriett Tubman who was known to often carry a firearm.⁷⁹

At least one abolitionist, deliberating the proper response to slave catchers, framed armed self-defense as constitutionally protected: “The Constitution contemplates no such submission, on the part of the people, to the usurpations of the government, or to the lawless violence of its officers. On the contrary, it provides that ‘the right of the people to keep and bear arms shall not be infringed.’”⁸⁰ This abolitionist’s mention of a constitutional right to use arms against “usurpations of the government, or to the lawless violence of its officers” indicates that he understood the Constitution created a right to use arms for self-defense against law breakers or the government itself. This reference to the Second Amendment as creating a right for black people to use guns in self-defense predates President Reagan’s endorsement of that view in 1975 by almost one hundred and twenty-five years.

After the Civil War, white concerns about armed freed blacks were exacerbated.⁸¹ As a result, many former Confederate states and local municipalities instituted laws, referred to as Black Codes.⁸² Black Codes restricted newly freed blacks in an attempt to negate their free status, and restrictions on black gun ownership within the Black Codes were ubiquitous.⁸³ As indicated in *Heller*,⁸⁴ Congress responded to Black Codes by passing the Civil Rights Act of 1866 and the Second Freedmen’s Bureau Act

⁷⁸ NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS 40–41 (2014); WINKLER, *supra* note 27, at 131–32.

⁷⁹ JOHNSON, *supra* note 78, at 41, 44–45.

⁸⁰ *Id.* at 50 (quoting Lysander Spooner, *The Fugitive Slave Bill*, LIBERATOR, Jan. 3, 1851, at 1). To provide further context, some states had laws that banned the practice of slave catching within their borders. Those who defied those laws seem to be the government usurpers Spooner had in mind. By contrast, where slave catching was permissible, Spooner’s “lawless violence of its officers” is the relevant phrase. *Id.*; see also WINKLER, *supra* note 27, at 138 (describing Lysander Spooner as an “antislavery advocate[.]” who “argued that blacks had a natural right to use guns to defend themselves from southern outrages”). Justice Scalia also cited Mr. Spooner in *Heller* as one who invoked the Second Amendment to argue against slavery. 554 U.S. 570, 609 (2008) (citing LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 116 (1845)).

⁸¹ See JOHNSON, *supra* note 78, at 78–79.

⁸² *Id.* at 78, 80.

⁸³ See ALEXANDER DECONDE, GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL 72 (2001) (“Virtually all of the codes forbade blacks to possess or carry guns.”).

⁸⁴ See *supra* notes 41–42 and accompanying text.

over the veto of President Johnson.⁸⁵ When the Supreme Court ruled the Civil Rights Act unconstitutional, Congress drafted the Fourteenth Amendment and made readmission to the Union conditional on its ratification.⁸⁶ The legislative record leading up to the passage of these hallmarks of the Reconstruction Era, again as Justice Scalia indicated in *Heller*,⁸⁷ framed protecting black gun ownership in constitutional terms. While expressing the importance of extending citizenship to newly freed blacks, New York Representative Henry Raymond stated that doing so would extend to black people all the rights guaranteed in the Constitution, which Raymond considered to include “a right to defend himself and his wife and children; a right to bear arms.”⁸⁸ Similarly, when proposing the Fourteenth Amendment, Senator Howard noted that it would ultimately force states to respect the rights of all citizens that were “[s]ecured by the first eight amendments to the Constitution [including] the right to keep and bear arms.”⁸⁹ While the Reconstruction Congress was debating the Fourteenth Amendment, it concurrently “abolish[ed] the Southern state militias,” in part because they “had been used to disarm the freedmen.”⁹⁰ The contradiction between abolishing the southern state militias while simultaneously debating how best to preserve newly freed black citizens’ ability to maintain and possess arms strongly indicates that members of the Reconstruction Congress believed the Second Amendment established an individual right to possess firearms for self-defense.

⁸⁵ DECONDE, *supra* note 83, at 72–73.

⁸⁶ *Id.* at 73.

⁸⁷ See *supra* notes 41–42 and accompanying text.

⁸⁸ DECONDE, *supra* note 83, at 72; see also JOHNSON, *supra* note 78, at 82 (describing Raymond’s views during a debate over the Civil Rights Act that the constitutional right to bear arms should extend to the black community).

⁸⁹ JOHNSON, *supra* note 78, at 82.

⁹⁰ *Id.*

Unfortunately, much of the promise of these laws was never brought to bear as the Reconstruction Period came to an end in the late 1870s and the Southern Redemption period began.⁹¹ From 1877 to 1950, 4075 black American citizens were the victims of lynch mobs and lynch violence.⁹² During this time, Jim Crow laws, designed to ensure the subjugation of blacks through regulations which separated blacks and whites in all aspects of life, became the law of the land throughout the South.⁹³ This oppression did not lead to blacks turning away from guns; instead, black citizens often turned to guns to defend themselves.

The story of Steve Green, a black sharecropper in Jericho, Arkansas, is instructive. Green barely avoided a confrontation with a lynch mob after killing William Sidle on March 2, 1910. According to Green, Sidle accosted and shot Green three times after he found Green working on a different plantation. Green contended that after Sidle shot him, he retreated into his cabin, where he was able to return fire and kill Sidle. Green escaped to Chicago where an effort by the local black community, Ida B. Wells, and attorney Edward H. Wright kept him from being returned to Arkansas.⁹⁴ Consider also, the lynching of Robert Charles in New Orleans on July 23, 1900. Charles was involved in an altercation which resulted in Charles and a companion killing two police officers. Thereafter, police burnt the house that he was hiding in to the ground, and he was shot and lynched after fleeing the burning house. As Ida B. Wells recounted the story, Charles did not go down without a fight. Instead, he courageously returned fire from within the house and emerged from it, rifle in hand, to face the mob.⁹⁵ Clearly, the threat of lynching did not drive the black community away from using guns in self-defense, and the tales about blacks who fought back against lynch mobs glorified this practice.⁹⁶ This does not indicate if blacks of the Redemption period saw their ability to turn to armed self-defense as rooted in the Constitution. However, it does reflect that the black community has

⁹¹ See KARLOS K. HILL, *BEYOND THE ROPE: THE IMPACT OF LYNCHING ON BLACK CULTURE AND MEMORY* 16–18 (2016) (noting that “congressional Reconstruction was overturned in the [Mississippi] Delta region during the late 1870s,” and that black vigilantism in the post-Reconstruction period was largely a response to white juries’ failure to convict where the victim of a crime was black). *But see* GLENDA ELIZABETH GILMORE, *GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896–1920*, at 78–89 (1996) (describing the Redemption period as not taking root in North Carolina until the late 1890s, specifically after 1896 when Democrats responded to their loss of many statewide offices by stoking racial tension).

⁹² EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 40 (2d ed. 2015).

⁹³ *Id.* at 26 (“Under Jim Crow rule, all aspects of life were governed by a strict color line . . .”).

⁹⁴ HILL, *supra* note 91, at 40–49.

⁹⁵ *Id.* at 71–73.

⁹⁶ *Id.* at 120 (explaining how black-authored narratives about lynch victims who fought back served to empower the black community).

a long relied on resorting to armed self-defense when necessary.

This history reflects, as Justice Scalia flagged, that there is a long history in the United States of race-based notions surrounding the use of guns. Siegel is right to say, and Scalia seemingly acknowledges, that this does not actually indicate how the founding generation viewed the Second Amendment. Nonetheless, the abolitionist's comment and the discussions in the Reconstruction Congress leading up to its hallmark legislation indicate that the Second Amendment was publicly viewed as protecting a right to self-defense as early as the mid-nineteenth century. This also establishes a foundational understanding that access to guns to use for self-defense was cherished within the black community and vital to it as individuals faced constant oppressive violence.

B. Armed Self-Defense in the Nonviolent Civil Rights Movement

One of the reasons why Siegel overlooks the black tradition of armed self-defense in her analysis of the period preceding *Heller* is likely the dominant public narrative surrounding the nonviolent civil rights movement of the mid-twentieth century.⁹⁷ Under the dominant narrative, the heart of the Civil Rights Movement were the strictly nonviolent protests and marches led by charismatic leaders, chiefly Martin Luther King, Jr. This narrative creates a dichotomy between the peaceful protests of this movement and the use of guns. However, this dichotomization is inaccurate.⁹⁸

The National Association for the Advancement of Colored People (“NAACP”), with its focus on advancement through legal avenues, is an organization that can be thought of as nothing but nonviolent.⁹⁹ In 1954, Medgar Evers, one of many black World War II veterans who were active in the civil rights struggle,¹⁰⁰ became the first NAACP Field Secretary in Mississippi.¹⁰¹ In this position, Evers helped to increase the number of black registered voters in Mississippi, and eventually—to the chagrin of the national office—became a key contact for other organizations looking to

⁹⁷ See JOHNSON, *supra* note 78, at 13 (“The black tradition of arms has been submerged because it seems hard to reconcile with the dominant narrative of nonviolence in the modern civil-rights movement.”).

⁹⁸ See CHARLES E. COBB, JR., *THIS NONVIOLENT STUFF’LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE*, at xvii (2d prtg. 2016) (noting that the dominant narrative of the civil rights movement overemphasized charismatic leaders and created a dichotomy “between guns and nonviolent civil rights struggle”).

⁹⁹ See generally MEGAN MING FRANCIS, *CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE* (2014) (chronicling the efforts of the NAACP to improve conditions for black citizens through litigation and lobbying to change all three branches of the federal government).

¹⁰⁰ COBB, *supra* note 98, at 84–86.

¹⁰¹ CHARLES M. PAYNE, *I’VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* 51 (2007).

become more active in Mississippi a decade later.¹⁰² While Evers furthered the nonviolent mission of the NAACP, he did not eschew guns. To the contrary, Evers regularly traveled with a gun in the trunk of his car and had many weapons in his house.¹⁰³ Moreover, the national office of the NAACP did not object to Evers carrying weapons in self-defense.¹⁰⁴

On the opposite end of the spectrum, Robert Williams became President of the Monroe County, North Carolina NAACP in 1955 and rebuilt that chapter in the years that followed.¹⁰⁵ Unlike the typically more bourgeois NAACP branches, William's chapter was filled with veterans and working-class black people.¹⁰⁶ Compared to Evers' decision to travel armed and have weapons at this home, Williams, who visibly wore a Colt .45 automatic pistol wherever he went, was much more militant.¹⁰⁷

The Monroe NAACP organized self-defense networks and often responded to Klan violence with militarily structured defensive maneuvers.¹⁰⁸ After the trial of a white man who allegedly raped a black woman failed to result in a conviction, Williams made a public statement that became infamous. He asserted that black citizens could not rely on the courts to protect them, so they should be ready and willing to take justice into their own hands when necessary.¹⁰⁹ In the aftermath of this statement, Williams was suspended and subsequently dismissed from the NAACP at its 1959 convention. That same year, the NAACP national convention passed a resolution affirming the right of black citizens to act in self-defense.¹¹⁰

¹⁰² *Id.* at 60–61.

¹⁰³ *Id.* at 51, 287.

¹⁰⁴ COBB, *supra* note 98, at 129.

¹⁰⁵ *Id.* at 110; see TIMOTHY B. TYSON, RADIO FREE DIXIE: ROBERT F. WILLIAMS & THE ROOTS OF BLACK POWER 90 (1999) [hereinafter TYSON, RADIO FREE DIXIE] (discussing Robert Williams and the Monroe NAACP).

¹⁰⁶ TYSON, RADIO FREE DIXIE, *supra* note 105, at 81 (reporting on Williams's attempts to invite new members to join the Monroe NAACP at "pool halls, beauty parlors, street corners, and tenant farms" which resulted in the chapter being "unique in the whole NAACP because of a working class composition and a leadership that was not middle class" (internal quotation marks omitted) (second quote quoting Robert Williams)); see also Timothy B. Tyson, *Robert F. Williams, "Black Power," and the Roots of the African American Freedom Struggle*, 85 J. AM. HIST. 540, 550 (1998) [hereinafter Tyson, *Roots of the African American Freedom Struggle*].

¹⁰⁷ TYSON, RADIO FREE DIXIE, *supra* note 105, at 86 (noting that Williams wore his .45 with him on errands).

¹⁰⁸ *Id.* at 88 (explaining how, in response to death threats against one of the branch's leaders, members set up an armed guard of the threatened member's home and the chapter began digging foxholes at the house, training, building their own rifle range, and collecting ammunition); see also Tyson, *Roots of the African American Freedom Struggle*, *supra* note 106, at 551 (describing how Williams and his affiliates organized self-defense networks which included women acting as intelligence-gatherers).

¹⁰⁹ JOHNSON, *supra* note 78, at 26.

¹¹⁰ *Id.* at 26–27.

These seemingly contradictory, simultaneous actions by the NAACP reflect the pervasive tension between the nonviolent civil rights movement and the use of arms. Professor Nicholas Johnson argues that the difference between political violence—that is violence as a means to a political end—and the use of arms in self-defense explains this contradiction. He claims that Williams’s statement, though broadly supported by many members within the organization, was viewed by some as crossing a line from self-defense into the realm of political violence—an untenable position for the NAACP. Because this shift caused the organization to lose support of most liberal leaning whites, Williams had to be removed, but the principal of armed self-defense could remain.¹¹¹ Professor Charles Cobb, himself a former Student Nonviolent Coordinating Committee (“SNCC”) organizer, explains these contradictory actions in terms of a growing chasm between national organizations and local affiliates. He notes that during the late 1950s national organizations were concerned about the optics and political strategies needed to make the movement effective while field organizers, who worked with everyday citizens, were more preoccupied with the ever-present danger of white violence.¹¹²

Evers and Williams were not the only leaders within the broader nonviolent civil rights movement to possess or use firearms in self-defense. Fannie Lou Hamer, who became well known through SNCC’s nonviolence work in Mississippi, kept arms in her home.¹¹³ Martin Luther King, Jr., the quintessential figure of the nonviolent movement, had himself applied for a concealed carry permit and had “an arsenal” at his home for self-defense.¹¹⁴ Field organizers for SNCC and the Congress on Racial Equality (“CORE”) were often the benefactors of the armed defense those they were organizing used.¹¹⁵ At times, some of the young activists took up arms in self-defense themselves, despite requests from their national affiliates not to do so.¹¹⁶

Finally, the story of Joe McDonald, a seventy-six-year-old black man who lived in Ruleville, Mississippi, indicates that at least some activists within the nonviolent civil rights movement understood that the Second Amendment endowed citizens with a right to a gun for non-military use. On September 10, 1962, a group of “night riders” drove through the black section of Ruleville and shot into the homes of a number of black families, targeting those who had attempted to help a busload of black citizens register to

¹¹¹ *Id.* at 26–29.

¹¹² COBB, *supra* note 98, at 113.

¹¹³ *Id.* at 124.

¹¹⁴ *Id.* at 7 (internal quotation marks omitted).

¹¹⁵ *Id.* at 140, 158, 182.

¹¹⁶ *Id.* at 140–41 (recounting the story of Hollis Watkins, who regularly took night watch shifts with his host family despite requests from SNCC Executive Director Jim Forman not to do so).

vote.¹¹⁷ Joe and Rebecca McDonald were hosting Charles Cobb and two other SNCC activists who had helped to plan the voting registration excursion, and their home was among those targeted. The McDonalds and their houseguests were unharmed, but two girls in their neighbors' home were injured. Cobb rushed to the hospital to check on the young ladies and was arrested for asking too many questions.¹¹⁸

Upon returning to the McDonalds' house, Cobb discovered that Ruleville mayor, Charles Dorrough, had confiscated Mr. McDonald's shotgun under the pretext of Cobb's arrest. McDonald was worried because he needed the gun for self-defense and to put food on the family's table.¹¹⁹ Cobb and his fellow SNCC organizers told McDonald that he had a right to his gun, pointing to the Second Amendment in an on-hand textbook. McDonald, who could neither read nor write, asked Cobb to mark the page, proceeded to town hall, and mandated that his gun be returned.¹²⁰ Much to the organizers' surprise, Mayor Dorrough, who Cobb describes as "an inveterate racist," gave McDonald back his shotgun.¹²¹ Cobb states, "[M]ost black people were not organizing paramilitary units or much self-defense beyond that which protected their own homes and immediate community, which helps explain why the mayor of Ruleville returned McDonald's shotgun to him."¹²²

The story of Joe McDonald is instructive in many ways. First, Mayor Dorrough's attempt to disarm McDonald reflects the willingness of white politicians to attempt to disarm black people. Next, Cobb and his fellow SNCC organizers' immediate response that McDonald's right to possess his gun was protected by the Second Amendment reflects that some in the nonviolent movement believed the Second Amendment protected a personal right to bear arms. Then, Mayor Dorrough's act of returning the gun to McDonald suggests that whites also viewed the Second Amendment as protecting citizens'—even black citizens'—individual right to possess a gun. Finally, Cobb's belief that it was helpful that blacks were not organizing paramilitary units and, instead, relying on guns for self-defense counsels against an interpretation that the public viewed the Second Amendment as protecting militia type collective action. Most striking here is that this incident occurred in 1962, over ten years before the 1975 article that President Reagan penned and to which Siegel attributed great influence.

Recognizing that political nonviolence did not render civil rights activists unable to defend themselves with guns reveals that current broad support for gun control within the black community was not inevitable. The widespread

¹¹⁷ COBB, *supra* note 98, at 19–22, 122.

¹¹⁸ *Id.* at 22–23.

¹¹⁹ *Id.* at 23–24, 116.

¹²⁰ *Id.* at 23, 122.

¹²¹ *Id.* at 24–25.

¹²² *Id.* at 125.

use of guns for self-defense by civil rights activists indicates the high value that access to guns had within the black community during the period that Siegel examines. Moreover, the story of Joe McDonald's successful recovery of his shotgun from the racist Ruleville mayor suggests that at least some within this movement believed that the Second Amendment protected their individual access to guns.

C. The Black Panther Party and the Second Amendment

Professor Siegel briefly addresses the Black Panther Party as part of the public discourse surrounding the Second Amendment preceding *Heller*. She asserts that a change in the Panther's platform in 1972 and more recent polling data is sufficient to show that the right to bear arms was not "entrenched" in the black community.¹²³ However, this cursory mention deserves a closer look. I suggest that the change in the Black Panther Party's platform that Siegel flags may be interpreted, not as a change in their views of the Second Amendment, but as part of a bigger transition within the Panthers away from guns and self-defense towards community service.

In early 1967, Huey Newton and Bobby Seale, the founders of the Black Panther Party for Self-Defense, and Bobby Hutton embarked upon one of their first attempts to monitor the police in Oakland, California.¹²⁴ The Panthers sat in their car, visibly armed, and followed a police car. As they passed the police car, the officer saw their guns, pursued them, and pulled them over. The officer demanded that the three Panthers explain why they had the weapons and grabbed a shotgun. Huey Newton responded by aggressively repelling the officer and exiting the vehicle. Newton alleged that the officer was trying to take his property in violation of the Due Process Clause of the Fourteenth Amendment, and he asserted that he had the right to his gun pursuant to the Second Amendment and a slew of local ordinances. The officers decided that there were not sufficient grounds to arrest any of the men, and they departed after giving them a ticket for an improperly affixed license plate.¹²⁵ Some credit Robert Williams with inspiring the Panthers to take such aggressive measures¹²⁶ and Malcolm X with inspiring them to

¹²³ See *supra* notes 74–75 and accompanying text.

¹²⁴ For a narrative of Newton and Seale's story, see JOSHUA BLOOM & WALDO E. MARTIN, JR., *BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY* 45–47 (2016 ed. 2016).

¹²⁵ *Id.*

¹²⁶ See Tyson, *Roots of the African American Freedom Struggle*, *supra* note 106, at 565–66 (describing Robert Williams's as a "senior spokesman" for self-defensive measures among the African-American community, whose influence touched many advocacy groups including the Congress for Racial Equality ("CORE"), the Deacons for Defense and Justice, and the Black Panthers).

understand the right to bear arms as constitutionally protected.¹²⁷

In response to these tactics, the California Assembly moved to adopt a bill that would outlaw the carrying of loaded firearms in public in April of 1967. Assemblyman Mulford, the proponent of the bill, was specifically motivated to undermine the Black Panthers.¹²⁸ Upon hearing about the proposed bill, the Panthers decided to march on the state capitol.¹²⁹ A company of armed Panthers made their way onto the assembly floor, walking by Governor Reagan as they did so. The general public is not allowed on the assembly floor, so the Panthers were confronted by guards, one of whom seized a Panther's gun.¹³⁰ The Panthers followed this officer off the floor and back into the hallway. There, the guards determined there were no grounds upon which the group could be arrested and returned their guns to them. Bobby Seale made a number of statements to the press, and the Panthers went on their way. Assemblyman Mulford, however, wasted no time and used the Panthers' armed appearance to usher the bill through.¹³¹ Shortly thereafter, Governor Reagan—later the staunchly pro-Second Amendment President—signed the bill. It was his position that there was “no reason why on the street today a citizen should be carrying loaded weapons” and that this law “would work no hardship on the honest citizen.”¹³² Just eight years later, Reagan wrote the article that Siegel credits as one of the first modern efforts to frame gun rights as protected by the Second Amendment.

After the passage of the Mulford Act, the Panthers transitioned from focusing on police monitoring to community programs, and they had become a leading organization for the black community by the fall of 1968. From 1969 through 1970, the Panthers introduced a plethora of community programs. During that time they began their Free Breakfast for Children Program, opened free medical clinics, founded their Sickle Cell Anemia Research Foundation, conducted Sickle Cell testing, ran a program to combat drug

¹²⁷ See TYSON, RADIO FREE DIXIE, *supra* note 105, at 298 (noting that historian Clayborne Carson has claimed the “two central influences” on the Black Panthers were Robert Williams and Malcom X); WINKLER, *supra* note 27, at 233 (noting that the Black Panther's characterization of the right to use guns for self-defense as constitutionally protected by the Second Amendment was inspired by “their hero,” Malcom X); Adam Winkler, *The Secret History of Guns*, ATLANTIC (Sept. 2011), <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/> [hereinafter Winkler, *The Secret History of Guns*] (“Inspired by the teachings of Malcolm X, Newton and Seale decided to fight back. . . . ‘Article number two of the constitutional amendments,’ Malcolm X argued, ‘provides you and me the right to own a rifle or a shotgun.’”).

¹²⁸ WINKLER, *supra* note 27, at 239; *see also* Winkler, *The Secret History of Guns* (“Don Mulford, a conservative Republican state assemblyman from Alameda County, which includes Oakland, was determined to end the Panthers' police patrols.”).

¹²⁹ BLOOM & MARTIN, *supra* note 124, at 58.

¹³⁰ *Id.* at 58–59.

¹³¹ *Id.* at 59.

¹³² WINKLER, *The Secret History of Guns*, *supra* note 127.

addiction, and ran free food, clothes, and shoes distribution programs.¹³³ In 1971, the Panthers were running their own ambulance and bussing operations, focusing on unjust incarceration, and running schools and libraries.¹³⁴ These community programs were instrumental in increasing their membership by serving as consistent outreach programs.¹³⁵ They also epitomized the self-determination the Panthers advocated for and showed how inadequately the government was assisting poor and working class black citizens.¹³⁶

In the midst of implementing these community programs, the Panthers were besieged by government opposition to their initiatives. By July of 1969, J. Edgar Hoover was referring to the Panthers as “the greatest threat to the internal security of the country.”¹³⁷ Panther offices across the nation were being raided under various pretexts, during which Panthers were arrested and papers and guns were seized.¹³⁸ It is broadly accepted that government action against the Black Panthers was part of a “systematic pattern of political repression.”¹³⁹ Professor Johnson attributes the government’s decision to aggressively pursue the Panthers to the fact that they clearly crossed the line from gun use in self-defense to using guns for political violence.¹⁴⁰

As the Panther organization was shrinking under these pressures, Seale and Newton decided to rewrite the founding documents.¹⁴¹ To improve discipline among members, the Panthers revised their structural rules, adding a rule that members not accidentally or unnecessarily use or point guns and deleting a rule that had mandated all members be properly trained on how to use a gun.¹⁴² Presumably, both of these rule changes would lead to Panthers being less involved with guns. At the same time, the Panthers removed the language about the Second Amendment from their platform, but retained language reflecting that it was a “right . . . [of] oppressed people [to] be armed for self-defense.”¹⁴³

¹³³ BLOOM & MARTIN, *supra* note 124, at 181–82, 187–89.

¹³⁴ *Id.* at 190–92.

¹³⁵ *Id.* at 195.

¹³⁶ *Id.* at 195, 197.

¹³⁷ *Id.* at 210.

¹³⁸ *Id.* at 212–15.

¹³⁹ Charles E. Jones, *The Political Repression of the Black Panther Party 1966-1971: The Case of the Oakland Bay Area*, 18 J. BLACK STUD. 415, 416 (1988); *see also* WINKLER, *supra* note 27, at 246–47 (noting that the FBI “sought to disarm” the Panthers through the use of unlawful tactics and through its counterintelligence program, COINTELPRO, the FBI “infiltrated the Panthers, promoted dissension among the members, conducted warrantless searches, and planted false information about them and other groups to create destructive rivalries”).

¹⁴⁰ *See* JOHNSON, *supra* note 78, at 287.

¹⁴¹ *See* ROBYN C. SPENCER, *THE REVOLUTION HAS COME: BLACK POWER, GENDER, AND THE BLACK PANTHER PARTY IN OAKLAND* 114, 139 (2016) (describing how Seale and Newton reassessed Panthers’ organizational documents in light of their new “vision for the future”).

¹⁴² *Id.* at 139.

¹⁴³ *Id.* at 141 (internal quotation marks and citation omitted).

At this time, the Panthers also made a number of changes that reflected a change in institutional priorities. For example, some racially charged phrases were replaced with racially neutral language that tied the organization more closely to generalized communism principles, free healthcare for all became a more clearly articulated policy objective, a call to end all wars was included in the new policy platform, and the new platform argued that people of color should be released from prison because they failed to receive fair and impartial trials.¹⁴⁴ After publishing this policy change in 1972, the Panthers shifted their focus towards electoral politics, and by 1973 the Panthers were in the process of coalition building to support their local political prospects.¹⁴⁵ In removing explicit language about the Second Amendment from their policy platform, the Panthers were responding to the debilitating backlash from the government that had made their gun politics untenable and reflecting the organization's pivot towards pursuing local political power.¹⁴⁶

Even this surface-level look at the Black Panther Party helps to refute Siegel's claim that "[a] black nationalist right to bear arms did not become the focal point of organizing in the African-American community."¹⁴⁷ This change within the Black Panther Party did not mean the organization no longer understood the Amendment in this light; instead, it reflects that it was no longer politically possible for the Panthers to rely on gun rights to mobilize their supporters. The Panthers were not the first group to resort to guns in self-defense within the black community, but they were among the first to do so publicly as a method to draw support. Consequently, they learned that mobilization that explicitly focused on guns could not be "a focal point of organizing" because it "launched the Panthers into an unwinnable war with the state that destroyed their outside support."¹⁴⁸

¹⁴⁴ *Id.* at 140–41.

¹⁴⁵ *Id.* at 148 ("Unlike their 1968 electoral foray, the Panthers were not running for office [in 1972] to politicize the electorate and draw attention to their cause; this time they were playing to win."); *id.* at 153–54 (noting the Panthers' attempts to build support among middle-class whites, the Spanish-speaking community, and the LGBT community).

¹⁴⁶ See JOHNSON, *supra* note 78, at 287–88 (noting the period of governmental backlash against the use of political violence was critical in causing the Panthers to reassess their strategy).

¹⁴⁷ Siegel, *supra* note 21, at 203 n.52.

¹⁴⁸ JOHNSON, *supra* note 78, at 287; Siegel, *supra* note 21, at 203 n.52.

D. Survey of Historically Black Newspaper Reporting Reflects Mixed Views of Gun Control and the Second Amendment

Beyond looking at historical accounts from scholars and anecdotal evidence, the reporting from two historically prominent black newspapers, *The Chicago Defender* and the *Pittsburgh Courier*,¹⁴⁹ reflect mixed views of the NRA, gun control, and the Second Amendment within the black community. A content analysis of *The Chicago Defender* reflects that from 1960 to 1975 there were forty pieces published that mentioned the NRA and eight pieces that mentioned the Second Amendment. During the same period, the *Pittsburgh Courier* only published four pieces mentioning the NRA and two pieces that mentioned the Second Amendment.¹⁵⁰ This sample of articles reflects that the current widespread support for gun control regulations within the black community¹⁵¹ was not inevitable, and it was surely not the only perspective leading up to and during the period that Siegel analyzes.¹⁵² Despite Siegel's contention that the support for gun control in the early 1970s was comprised of "an uneasy coalition of law and order conservatives and civil rights leadership,"¹⁵³—seemingly implying support from the black community—the reporting in these papers reflect division over gun related issues within the black community.

¹⁴⁹ See Femi Lewis, *The Power of the Press: African American News Publications in the Jim Crow Era*, THOUGHTCO., <https://www.thoughtco.com/african-american-news-publications-45389> (last updated Jan. 22, 2018) (noting that *The Chicago Defender* was one of "the most prominent papers during the Jim Crow Era"); see also Kim Gallon, *Researching the History of Black Press Circulation*, BLACK PRESS RESEARCH COLLECTIVE (Jan. 10, 2014), <http://blackpressresearchcollective.org/2014/01/10/black-press-circulation/> (referring to the *Pittsburgh Courier* and *The Chicago Defender* as two of "biggest and best selling weekly national Black newspapers").

¹⁵⁰ Dataset on file with Author. Searches were conducted using the ProQuest Historical Newspaper database for both the *Pittsburgh Courier* and *The Chicago Defender*. With reference to the NRA, searches were run on February 13, 2017 for the terms ["National Rifle Association" OR "rifle association" OR "NRA"] and results were restricted to [Article, Banner, Display Ad, Editorial, Editorial Cartoon, Front Page Article, Letter to Editor, Other, Standalone, Review] for results between 1/1/1960 and 12/31/1975. With reference to the Second Amendment, searches were run on January 7, 2018 for the terms ["Second Amendment" OR "2nd Amendment" OR "Second Amend." OR "2nd Amend." OR "second amend" OR "2nd amend"] and results were restricted to [Article, Banner, Display Ad, Editorial, Editorial Cartoon, Front Page Article, Letter to Editor, Other, Standalone, Review] for results between 1/1/1960 and 12/31/1975. All resultant articles were then read to eliminate false positives and code for a perceived valance on the issue of the Second Amendment, Gun Control, and the NRA. These queries were done on different days as a result of this Comment's thesis changing over the course of my research, but there is no reason to believe the results of the content analysis were impacted in any way.

¹⁵¹ See *supra* note 77 and accompanying text.

¹⁵² See *supra* Part I.B.

¹⁵³ Siegel, *supra* note 21, at 207 (footnotes omitted) (citing KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* 166–67 (2006)).

This coverage reflects mixed views within the black community of the NRA. For example, *The Chicago Defender* ran announcements for various community events sponsored by the NRA, suggesting that some within the black community had positive views of the NRA and were interested in attending their events.¹⁵⁴ In August of 1965, a black politician ran a campaign ad that reflected he was a member of the NRA.¹⁵⁵ Because this detail was being used to solicit votes, it suggests that there was some support within the black community for the NRA. As late as February 19, 1966, *The Chicago Defender* referred to the NRA as “a most patriotic and respectable organization.”¹⁵⁶ But, other pieces in both papers expressed frustration at the NRA and its often racist lobbying tactics.¹⁵⁷ For example in January of 1968, *The Chicago Defender* ran an article lamenting the failure of Congress to yield to the will of the people to pass gun control legislation. The article blamed this failure on the efforts of the NRA.¹⁵⁸ By January of 1975, the *Pittsburgh Courier* published a piece calling for better regulations of lobbyists and noting that black citizens were disadvantaged due to unfair lobbying regulations that provide loopholes for groups like the NRA.¹⁵⁹ The coverage in these two papers reflects increased skepticism and distaste for the NRA over time.

Beyond the NRA, the coverage in these papers reflects both support and skepticism within the black community regarding gun control. Some articles imply support for access to guns within the black community and opposition to gun control legislation.¹⁶⁰ For example, in July of 1968, the *Pittsburgh Courier* ran an article reflecting the opinion of Roy Innis of the Congress of Racial Equality on gun control.¹⁶¹ Innis opposed the passage of gun control legislation, claiming that such regulations would be enforced in a racialized

¹⁵⁴ See, e.g., *Sighting-In to be Held for Hunters*, CHI. DEF., Sep. 20, 1967, at 14 (announcing a sighting-in hosted as a part of NRA outreach); *Community Events Calendar*, CHI. DEF., Mar. 31, 1966, at 7 (reporting on a local NRA convention); *Chicagoan to Compete*, CHI. DEF., Aug. 7, 1963, at 11 (reporting on local participant in an NRA-sponsored rifle championship).

¹⁵⁵ *Clifford P. Kelley*, CHI. DEF., Aug. 14, 1965, at 20 (advertising that a black political candidate was an NRA member).

¹⁵⁶ Harry Ferguson, *Crime Spurt Raises Query Why Not Disarm Criminals?*, CHI. DEF., Feb. 10, 1966, at 5.

¹⁵⁷ See, e.g., Ernest Boynton, *Thinking It Over: Too Many Guns?*, PITTSBURGH COURIER, Dec. 23, 1967, at 15 (lamenting the NRA's resistance to gun control measures and asserting that the organization is the legacy of the tradition of vigilantism); see also Ernest Boynton, *Thinking: Bang-Bang is Threat to Nation*, CHI. DEF., Dec. 16, 1967, at 26–27 (criticizing the NRA for “[e]ncouraging the small arms build up in America”).

¹⁵⁸ Henry Cathcart, *Inside Washington: Congress Often Defies Electorate*, CHI. DEF., June 27, 1968, at 21.

¹⁵⁹ John W. Lewis, Jr., *Says Lobbying Laws Needed to Protect Black Consumers*, PITTSBURGH COURIER, Jan. 18, 1975, at 2.

¹⁶⁰ See, e.g., *Riots and Gun Control*, CHI. DEF., Sept. 9, 1968, at 10 (commenting that black citizens also acquired guns in response to the NRA's advocacy that whites obtain guns and use them in response to race riots); *Inquiring Photographer*, CHI. DEF., July 3, 1968, at 19 (reporting that four black men, responding to a question posed by a reporter, were opposed to a ban on sales and shipment of shotguns and rifles).

¹⁶¹ *CORE Against Gun Law; Say It Would Aid Whites*, PITTSBURGH COURIER, July 27, 1968, at 3.

manner that would result in blacks and minorities being disarmed while white citizens would be able to retain their guns.¹⁶² Similarly, an opinion column run in both papers lamented that gun control legislation, especially that which was targeted at inner cities, would be ineffective at reducing crime because it failed to impact the root causes of crime—poverty, poor housing, and unemployment.¹⁶³ However, a number of pieces reflect support for gun control measures. In 1963, *The Chicago Defender* published a letter to the editor which voiced clear support for gun control regulations, including bans on the mailing of guns.¹⁶⁴ Later, the *Defender* also ran two editorials expressly advocating for gun control legislation as a response to increasing gun violence.¹⁶⁵ A 1975 article also recounted the efforts of The Committee for Handgun Control, Inc., which had actively lobbied to ban the sale of handgun bullets.¹⁶⁶ On the whole, this coverage reflects that there were mixed views about the legitimacy of gun control regulations within the black community.

Further, the coverage of the Second Amendment in these newspapers indicates that views of the Amendment changed over time and may have been different amongst the black elite and working class. In February of 1962, the *Pittsburgh Courier* published an article critical of the lack of opportunity for black citizens in the National Guard. Amongst other arguments, the piece cited the lack of any mention of race in the Second Amendment as a basis for viewing this practice as unconstitutional.¹⁶⁷ This reflects some inclination that the Second Amendment was to be interpreted in the context of the military use of arms. Similarly, on December 15, 1962, *The Chicago Defender* ran an article to celebrate the Bill of Rights. This article explains that the Second Amendment was passed to protect “the right to bear arms for militia service,” and places the amendment within the context of protections against historic tyrannical practices of disbanding local militias.¹⁶⁸ However, just a year and a half later, *The Chicago Defender* printed a Letter to the Editor, which disparaged the paper’s perceived support of gun control laws and specifically cited the Second Amendment as a part of its critique.¹⁶⁹ The fact that a reader offered this criticism of the paper’s perceived support of gun control indicates

¹⁶² *Id.*

¹⁶³ Ethel L. Payne, *From Where I Sit: President Ford’s Crime Prescription*, CHI. DEF., June 28, 1975, at 8; Ethel L. Payne, *From Where I Sit: President Ford’s Crime Prescription*, PITTSBURGH COURIER, July 12, 1975, at 6.

¹⁶⁴ Thomas P. Breen, Jr., Letter to Editor, *Urges Stronger Law on Firearm Sales*, CHI. DEF., Dec. 24, 1963, at 11.

¹⁶⁵ *More Gunplay*, CHI. DEF., Jan. 29, 1975, at 9; *More Gunplay*, CHI. DEF., Aug. 31, 1972, at 17.

¹⁶⁶ Joy Darrow, *Biting the Bullet of Crime – Chicago Style*, CHI. DEF., Apr. 7, 1975, at 11.

¹⁶⁷ George S. Schuyler, *The National Guard Disgrace*, PITTSBURGH COURIER, Feb. 10, 1962, at 3A.

¹⁶⁸ *Bill of Rights Celebration Reminds of American Freedom*, CHI. DEF., Dec. 15, 1962, at 19.

¹⁶⁹ Leslie J. Passmore, Letter to the Editor, *Disagrees with Press View on Arms Laws*, CHI. DEF., May 1, 1965, at 9.

that there was a gap between the paper's coverage and at least some of its readers on the issue of whether or not the Second Amendment is implicated by gun control legislation outside of a military context.

By February of 1966, *The Chicago Defender* cited the Second Amendment as an impediment to the passage of gun control regulations, but it voiced in the same article that the Framers had intended the provision to ensure "an armed and ever-ready militia."¹⁷⁰ Later, *The Chicago Defender* printed an article summarizing an Illinois Bar Association pamphlet that explored the Second Amendment. In that publication, the Illinois Bar Association articulated that public opinion and the democratic process—not the Second Amendment—was what truly protected the right to possess arms, despite the common argument that individual ownership of firearms was necessary to allow for an effective militia.¹⁷¹ This reporting indicates that while the legal elite may have understood the Second Amendment to only apply in military contexts, many in the black community perceived the amendment to protect individual ownership of arms.

By the early 1970s, there was a clear indication that some within the black community viewed the Second Amendment as directly conflicting with gun control legislation. In both newspapers, proponents of gun control regulations advocated for the repeal or amendment of the Second Amendment in order to pass proposed gun control regulations.¹⁷² That these advocates lobbied for the Second Amendment to be repealed or amended in order for these laws to pass necessarily implies that either they or their opponents believed that the Second Amendment restricted the ability to pass any such regulations. Finally, a full-page ad by Search for Truth, Inc. was run in *The Chicago Defender* in April of 1975. This ad aimed to motivate people to write to Congressman John Conyers¹⁷³ and ask that he oppose "any and

¹⁷⁰ Ferguson, *supra* note 156.

¹⁷¹ *Individual's Right to Bear Arms Probed in New*, CHI. DEF., Jan. 24, 1968, at 14.

¹⁷² *Anti Busing Plan Rejected*, PITTSBURGH COURIER, Dec. 25, 1971, at 17 (reporting that a proposal by Detroit Mayor Roman Gribbs to change the Second Amendment was defeated in a meeting of the Congress of the National League of Cities); Robert A. King, Letter to the Editor, *Clear the Jungle*, CHI. DEF., Sept. 4, 1975, at 17 (arguing for a repeal of the Second Amendment and the forced confiscation of guns, knives, and razors).

¹⁷³ Representative Conyers (D-Mich.) was then the Chairman of the House Judiciary Committee on Crime and was planning to hold public hearings in Chicago. "Gun Control" is Race Control and People Control *Not* Crime Control, CHI. DEF., Apr. 14, 1975, at 23. Representative Conyers resigned from Congress in 2017 in the midst of a sexual harassment investigation after representing Detroit for fifty-two years. Elise Viebeck & David Weigel, *Rep. John Conyers Jr. Resigns over Sexual Harassment Allegations After a Half-Century in Congress*, WASH. POST (Dec. 5, 2017), https://www.washingtonpost.com/powerpost/conyers-wont-see-reelection-following-harassment-allegations-report-says/2017/12/05/17057ea0-d9bb-11e7-a841-2066faf731ef_story.html?noredirect=on&utm_term=.61aff5f3a00f.

all antigun legislation.”¹⁷⁴ As part of a larger argument that gun control laws are unconstitutional and would be enforced in a racialized manner, Search for Truth specifically relied on the Second Amendment. It claimed that the Second Amendment protects the right “to defend yourself against criminal aggression” and is abrogated by the passage of any gun control regulations.¹⁷⁵ This coverage reflects that the view that the Second Amendment protected an individual’s right to own a fire arm for self-defense was not exclusive to the conservative movement. Instead, this understanding of the Second Amendment had at least some support within the black community.

The coverage of the NRA, gun control, and the Second Amendment in *The Chicago Defender* and the *Pittsburgh Courier* indicates that there were diverse views within the black community on issues relating to guns during the key period that Siegel analyzes. While this coverage does not indicate the extent to which those in the black community opposed gun control or viewed the Second Amendment as protecting an individual’s right to own a firearm, it does show that there were at least some adherents to those positions.

CONCLUSION

Members of the black community have resorted to arms to defend themselves from race-based violence since colonial times. Yet, this history is often underemphasized,¹⁷⁶ as it was by Professor Siegel. Instead, the dominant narrative is that nonviolence was the most useful and common tool in the civil rights movements of the 1950s and 1960s, overshadowing the very real need for blacks to use guns to defend themselves. Current widespread support for gun control within the black community leads some to believe that this has always been the case. However, the analysis presented here suggests otherwise.

Instead, this history reflects that Philando Castile’s death and the NRA’s subsequent delay in speaking up on his behalf is emblematic of the racial tensions that have long surrounded the Second Amendment. Since at least the 1850s, those working to improve the conditions of black life in America saw the importance of ensuring black people’s access to guns. Black citizens have often resorted to using guns to defend themselves, as seen in the resort to using guns to resist lynch mobs up through the use of guns to protect field organizers during the nonviolent civil rights movement. This history also reflects a belief that the Second Amendment functioned to ensure that blacks would be guaranteed the ability to protect

¹⁷⁴ “Gun Control” is Race Control and People Control *Nat. Crime Control*, *supra* note 173.

¹⁷⁵ *Id.*

¹⁷⁶ However, recent popular culture discussions of the evolution of the Second Amendment are increasingly including commentary about the Black Panthers being the harbinger of a view that the Second Amendment protects an individual’s right to own a gun in self-defense. See, e.g., *More Perfect: The Gun Show*, WNYC STUDIOS (Oct. 12, 2017), <https://www.wnycstudios.org/story/gun-show/>.

themselves. A reliance on the Second Amendment to ensure access to guns may have been most prominently advocated for in the early years of the Black Panther Party, but as explained here, this was not original to them. The Panther's subsequent reduced emphasis on the Second Amendment cannot be viewed in a vacuum. This organization decided to decrease their reliance on the Amendment in the context of oppression from the federal government and during and institutional shift towards establishing community programs and focusing on local politics. Finally, the news coverage in *The Chicago Defender* and the *Pittsburgh Courier* from 1960 to 1975—the years leading up to the critical period of Siegel's analysis—reflects that the black community was divided on the issue of gun control. These papers also reflect that as early as 1965 some within the black community framed access to guns in constitutional terms.

This history presents a compelling rebuttal to the notion that the “right to bear arms did not become the focal point of organizing in the African-American community.”¹⁷⁷ However, it does not fully contradict Siegel's analysis. Instead, it provides nuance to the time period leading up to the crux of her argument. The analysis presented here suggests that the conservative movement did not develop the view that the Second Amendment protects an individual's access to guns on their own. Instead, they may have co-opted this perspective from a group that is often seen as being on the opposite end of the political spectrum. There was at least some portion of the black community that believed the Second Amendment protected an individual's right to bear arms for self-defense, but it is not necessarily apparent that this was the dominant view within the black community nor the broader American public. This analysis seems to link up with Professor Siegel's argument that this view became more mainstream after the civil rights era through the advocacy of the conservative movement. The promotion of this understanding of the Second Amendment by the conservative movement—not often viewed as aligning with racial minorities—allowed this perspective to reach the critical mass of the American public. The broader acceptance of this view of the Second Amendment may have been what “endow[ed the Court] with authority to change” the way it interprets the Second Amendment, sixty-nine years after *Miller*.¹⁷⁸

This expansion on Siegel's analysis is crucial because, if Popular Constitutionals are correct—that the Supreme Court is responsive to changing public understandings of the Constitution—then, the only way to truly understand the meaning of the Second Amendment is to clearly understand how public views of the Amendment have changed over time. Finally, current advocates in the gun control debate should thoughtfully

¹⁷⁷ Siegel, *supra* note 21, at 203 n.52.

¹⁷⁸ Siegel, *supra* note 21, at 192–93.

examine the constitutional views of other groups they may not be aligned with to determine if alternative narratives of the meaning of the Second Amendment could be an effective component of their activism.¹⁷⁹

¹⁷⁹ Recently, it seems that some gun control advocates have started to take this position. See, e.g., *Pod Save America: "The Worst Cirque du Soleil Ever."* (Live from Las Vegas), CROOKED MEDIA 35:00–37:40 (Feb. 12, 2018), <https://crooked.com/podcast/worst-cirque-du-soleil-ever-live-las-vegas/> (commenting Democrats should argue against the Supreme Court's definition of the Second Amendment in *Heller*). Taking an even more stark position, Justice Stevens—author of one of the dissents in *District of Columbia v. Heller*, 554 U.S. 570, 636–80 (2008) (Stevens, J., dissenting)—has advocated for a blanket repeal of the Second Amendment. John Paul Stevens, Opinion, *John Paul Stevens: Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html>.