

University of Miami International and Comparative Law Review

Volume 28
Issue 2 Spring 2021

Article 7

5-21-2021

Circumscribing the Right to Bear Arms: the Second Amendment, Gun Violence, and Gun Control in California and Mississippi

Fahim A. Gulamali

Follow this and additional works at: <https://repository.law.miami.edu/umiclr>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

Fahim A. Gulamali, *Circumscribing the Right to Bear Arms: the Second Amendment, Gun Violence, and Gun Control in California and Mississippi*, 28 U. Miami Int'l & Comp. L. Rev. 405 (2021)
Available at: <https://repository.law.miami.edu/umiclr/vol28/iss2/7>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

CIRCUMSCRIBING THE RIGHT TO BEAR ARMS: THE SECOND AMENDMENT, GUN VIOLENCE, AND GUN CONTROL IN CALIFORNIA AND MISSISSIPPI

*By Fahim A. Gulamali**

ABSTRACT

The United States occupies a unique position amongst countries around the world when it comes to gun rights. While the United States is one of three countries that provides its people the constitutional right to bear arms, it is the only country that has more guns per capita than residents. Further, because of the saturation of guns in the United States, the country significantly leads in the amount of gun-related homicides than any other developed nation. Nevertheless, state legislatures have circumscribed gun rights within the bounds of the Second Amendment to the United States Constitution to curb gun violence. This note weighs California and Mississippi's gun control laws against rates of gun violence in the respective states. Using critical race theory, the paper concludes that while there is a direct correlation between stricter gun control laws and lower gun violence, gun violence disproportionately affects Black Americans. These findings are grounded in social, historical, political, and constitutional analyses.

* J.D. Candidate, Class of 2021, University of Miami School of Law; B.A. 2014, Wake Forest University. A special thank you to my family for supporting me in all my endeavors. This is Note is particularly dedicated to individuals who have directly and indirectly been affected by gun violence.

I. INTRODUCTION.....	406
A. DRAFTING THE SECOND AMENDMENT	407
B. GUN LAWS IN EARLY UNITED STATES HISTORY: PART I.....	409
C. GUN LAWS IN EARLY UNITED STATES HISTORY: PART II	410
D. MODERN GUN LAWS IN THE UNITED STATES: PART I....	412
E. MODERN GUN LAWS IN THE UNITED STATES: PART II...	413
F. CIVIL RIGHTS AND GUN VIOLENCE.....	415
G. SECOND AMENDMENT REVISIONISM.....	417
H. SECOND AMENDMENT REVISIONIST ADVOCACY: THE NRA.....	418
I. MODERN GUN LAWS: DISTRICT OF COLUMBIA V. HELLER	420
II. CALIFORNIA	422
A. HISTORY OF GUN CONTROL IN CALIFORNIA	422
B. MODERN GUN LAWS IN CALIFORNIA	426
III. MISSISSIPPI	428
A. HISTORY OF GUN CONTROL IN MISSISSIPPI.....	428
B. MODERN GUN LAWS IN MISSISSIPPI	430
IV. ANALYSIS	431
A. GUN VIOLENCE & GUN SAFETY LAWS.....	431
B. RACE & GUN VIOLENCE	432
C. WHERE DO WE GO FROM HERE?	435

I. INTRODUCTION

“O. I had forgot, the right of the people to bear Arms.”¹
 -James Madison

March 1, 1792 marked a significant shift in the young United States of America after the states ratified the Constitution’s first ten amendments.² The amendments were decided after “a fierce debate over government’s role and the rights of the people, one that unfolded since the start of the American Revolution.”³ The rights of the people were codified into the Bill of Rights, which includes the Second

¹ MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 62 (2019).

² MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* xi (2014).

³ *Id.*

Amendment. It reads: “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.”⁴ While the Second Amendment appears short, it is far from simple to interpret.

Nevertheless, states took on the task of interpreting the Second Amendment, advocating for either broad or limited protections for an individual’s right to bear arms. For example, Mississippi has the most relaxed gun safety laws in the country.⁵ In 2016, Mississippi passed a permitless carry law that allows people to carry concealed, loaded weapons without a gun permit.⁶ On the other hand, California is leading in the United States when it comes to strict gun safety legislation.⁷ In 2019 alone, California Governor Gavin Newsom signed 15 gun safety bills in response to gun violence within the state.⁸ Given the stark contrast between California and Mississippi’s gun safety legislation, this note compares California and Mississippi’s gun safety laws to conclude that the stricter the gun safety law, the less overall gun violence the state experiences. It further examines the racist foundation of the Second Amendment, and how as a result, Black Americans face disproportionate instances of gun violence despite the strength of gun safety legislation. Part I traces the history of the Second Amendment; Part II examines the development of gun safety laws in California; Part III examines the development of gun safety laws in Mississippi; and Part IV provides an analysis based on the gun safety laws in the respective states.

A. DRAFTING THE SECOND AMENDMENT

For the first two hundred years of the United States’ history, judges concluded that “the amendment authorized states to form

⁴ U.S. CONST. amend. II.

⁵ *State of Gun Violence: 50 State Factsheets*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE (Jan. 2019), <https://giffords.org/wp-content/uploads/2019/08/Giffords-State-of-Gun-Violence-50-State-Factsheets.pdf>.

⁶ WALDMAN, *supra* note 2, at xi.

⁷ Patrick McGreevy, *After Mass Shootings, California Sets New Limits on Gun Buyers and Expands Firearm Seizure*, L.A. TIMES (Oct. 11, 2019, 4:14 PM), <https://www.latimes.com/california/story/2019-10-11/california-approves-gun-control-red-flag-laws>.

⁸ *Id.*

militias,”⁹ known today as the National Guard.¹⁰ This interpretation, that the amendment sanctioned states’ rights to create militias, was rooted in the expectation that “ordinary citizens were expected to bear arms for the community.”¹¹ The connection between ordinary citizens and militias is grounded in the definition of “militia,” which “were military forces drawn from the citizenry – largely the yeoman farmers who owned their own property and worked their own land.”¹² While the custom of forming militias was adopted from the British, in “England, the most dependable people were culled into a select militia . . . [i]n the colonies, militia service was for . . . white men”¹³ Militia service and gun ownership was limited to white men because the Founders adopted England’s legislation prohibiting women, native people, and slaves from owning guns.¹⁴ The Founders enacted the militia system “as a way to ensure civic participation in the security of the United States and to prevent the need for a permanent standing army that would create the risk of military despotism.”¹⁵ By limiting civic participation to white men, the Founders sent a message to individuals that fell outside this group: that their voices did not matter in the public sphere.

After the Second Amendment’s enactment, Congress passed the Uniform Militia Act of 1792.¹⁶ This Act required “each and every free able-bodied white male citizen between eighteen and forty-five to enroll in a state militia . . . [and] required them all to buy a gun.”¹⁷ Nevertheless, the law was ignored and caused the militia system to falter.¹⁸ The militia system’s demise could be attributed to the

⁹ WALDMAN, *supra* note 2, at xii.

¹⁰ *Id.*

¹¹ *Id.* at 6.

¹² *Id.*

¹³ *Id.* at 7.

¹⁴ Nathan Wuertenberg, *Gun Rights are About Keeping White Men on Top*, WASH. POST (Mar. 9, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/03/09/gun-rights-are-about-keeping-white-men-on-top/>.

¹⁵ Jennifer Tucker, *How the NRA Hijacked History*, WASH. POST (Sept. 9, 2019), <https://www.washingtonpost.com/outlook/2019/09/09/why-accurate-history-must-guide-coming-debate-about-guns-second-amendment/>.

¹⁶ WALDMAN, *supra* note 2, at 65.

¹⁷ *Id.*

¹⁸ *Id.* at 66-7.

country's rapidly changing landscape, growing "more dramatic and more rambunctiously individualist,"¹⁹ rendering the "duty-bound concept of militia service" obsolete.²⁰ Although the militia system deteriorated, arms continued to play a part in everyday American life.

B. GUN LAWS IN EARLY UNITED STATES HISTORY: PART I

Gun violence erupted during President Jackson's tenure.²¹ In this time, Americans "dueled, drank, brandished weapons, and took ready offense."²² To respond to an increase in gun violence, states passed today's iteration of gun safety legislation.²³ For the first time in American history, gun owners argued that "the right to bear arms' protected individual gun ownership."²⁴ States incorporated this perspective into their laws, writing that "[e]very citizen has a right to bear arms, in defence [sic] of *himself* and the State."²⁵ Nevertheless, courts maintained that "the right to keep and bear arms' referred to militias, not an individual right."²⁶ Therefore during Andrew Jackson's presidency two schools of thought on the right to bear arms emerged: a collectivist interpretation and an individualist one.²⁷ For nearly two hundred years, however, the former interpretation of the right was prevalent; the highest court in Arkansas, for example, held that its version of the Second Amendment "was modeled on the English Bill of Rights and the Second Amendment," and therefore "[t]he object . . . for which the right of keeping and bearing arms is secured in the defence [sic] of the public"²⁸

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² WALDMAN, *supra* note 2, at 66-7.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 68 (emphasis in original).

²⁶ *Id.*

²⁷ *Id.*

²⁸ WALDMAN, *supra* note 2, at 68 (quoting *Aymette v. State*, 21 Tenn. 154, 158 (Tenn. 1840)).

C. GUN LAWS IN EARLY UNITED STATES HISTORY: PART II

The next wave of gun control laws were in response to the post-Civil War, Reconstruction era. During Reconstruction, the Republican-led Congress reimagined the Constitution by passing new Civil Rights legislation and amendments to enforce newly created civil rights.²⁹ Nevertheless, Southern Democrat whites, holding onto “the idea of racial domination,”³⁰ could not grapple with the immediate aftermath of the Civil War, in particular with the reality of armed Black Southerners:

Whole cities – Atlanta, Charleston, Richmond were destroyed. Farms lost their entire livestock, which were loaned out to war efforts. [White] Southerners suffered. And white ex-Confederates, humiliated by defeat and disgraced by poverty, were forced to live alongside their former slaves. Hundreds of thousands of African Americans had served in the Union Army, and many now returned home (often armed).³¹

Southern whites responded to armed Black Southerners by passing “Black Codes,” which “disarmed African Americans but let whites retain their guns.”³² In other words, Southern whites sought to maintain the Founder’s vision for the Second Amendment – that only white men deserved the right to bear arms. In their eyes, it was impossible to envision a Second Amendment that included groups other than themselves – “[t]he spectacle of black soldiers with guns and the authority of uniforms grated hard on defeated Confederates.”³³ As a result, Southern Blacks passed gun control laws to maintain the pre-Reconstruction status quo – gun laws were “perpetrated by local police, white state militias, and Klan-type organizations that rose during Reconstruction to wage war of

²⁹ Michael Weaver, “Let Our Ballots Secure What Our Ballots Have Won:” Unions Veterans and Voting for Radical Reconstruction and Black Suffrage (2018) (unpublished thesis, University of British Columbia).

³⁰ WALDMAN, *supra* note 2, at 72.

³¹ *Id.*

³² *Id.*

³³ Nicholas Johnson, *The Arming and Disarming of Black America*, SLATE (Feb. 10, 2018), <https://slate.com/human-interest/2018/02/what-reconstruction-and-its-end-meant-for-black-americans-who-had-fought-for-the-right-to-keep-and-bear-arms.html>.

Southern ‘redemptions.’”³⁴ Mississippi and South Carolina, especially, were accused of “trying to restore slavery . . . [and a] special congressional committee investigated whether . . . Reconstruction should be allowed to continue” if the laws were going to continue marginalizing Black Americans.³⁵ The federal government responded to the inequitable treatment of Black Americans by passing the Fourteenth Amendment, which provided “a broad foundation for the protection of a range of liberties essential to the rise of the freedmen, including the right to keep and bear arms.”³⁶ In addition to the Fourteenth Amendment, Congress enacted the Civil Rights Act of 1866, arguing that “the right to keep and bear arms by the newly freed slaves was of vital importance, since . . . [n]early all of the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of this militia,’ meaning the white state militia.”³⁷

Nearly a decade after the Civil Rights Act of 1866 and the Fourteenth Amendment were passed, the South saw racist backlash. In 1872, Louisiana witnessed a contentious governor race.³⁸ The election resulted with “Republicans and Democrats each [swearing] in a governor.”³⁹ Nevertheless, a federal court determined that the Republican governor was the actual victor.⁴⁰ To honor and defend the election results, “[t]he black militia took over the local courthouse and installed Republican officeholders.”⁴¹ Nevertheless, Democrats refused to accept Republican victory, and subsequently called the paramilitary “White League” to respond.⁴² The White League massacred one hundred freedmen on Easter Sunday, murdering surrendered victims “two by two.”⁴³ The white defendants were

³⁴ *Id.*

³⁵ *Southern Black Codes*, Constitutional Rights Foundation, <https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html>.

³⁶ Johnson, *supra* note 33.

³⁷ Stefan B. Tahmassebi, *Gun Control and Racism*, 2 *Geo. Mason U. C.R. L. J.* 67, 72 (1991).

³⁸ Henry Louis Gates Jr., *What was the Colfax Massacre?*, THE ROOT (July 29, 2013), <https://www.theroot.com/what-was-the-colfax-massacre-1790897517>.

³⁹ WALDMAN, *supra* note 2, at 76.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

charged with “violating the civil rights of the freedmen, including the right to bear arms.”⁴⁴ After only three of the defendants were convicted, they appealed.⁴⁵

In what is seen as “an ugly episode in a morally debased time,”⁴⁶ the Supreme Court, in *United States v. Cruikshank*, held that “[t]he Second Amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress.”⁴⁷ In other words, states were “free to do as they wished,”⁴⁸ because according to the opinion, the Second Amendment only applied to Congress.⁴⁹ *Cruikshank* resulted in abolishing Congress’s ability to enforce Civil Rights legislation that it had passed only a decade before, giving States the ability to limit Reconstruction’s reach.⁵⁰ Southern white men succeeded in maintaining and limiting the Second Amendment to themselves, leaving other groups out.

D. MODERN GUN LAWS IN THE UNITED STATES: PART I

At the turn of the twentieth century, the United States saw a new iteration of gun laws due to American westward expansion and the industrial revolution.⁵¹ The new gun laws were a result of the United States encroaching on the lands of already displaced Indigenous peoples in the west.⁵² As they moved west, Americans “had guns to protect themselves, to kill for food, to hunt (and on occasion to rob each other).”⁵³ Additionally, the industrial revolution

⁴⁴ *Id.*

⁴⁵ WALDMAN, *supra* note 2, at 76.

⁴⁶ *Id.* at 77.

⁴⁷ *Id.* (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Jeffrey Rosen, *The Fourth Battle for the Constitution*, THE ATLANTIC (Sept. 25, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/constitutions-future-hanging-balance/598636/>; See Stephen Gottlieb, *Blame the Supreme Court for America’s Sharp Political Divide*, THE HILL (Aug. 24, 2017), <https://thehill.com/blogs/pundits-blog/the-judiciary/347771-blame-the-supreme-court-for-our-nations-sharp-political>.

⁵¹ WALDMAN, *supra* note 2, at 78.

⁵² *Id.*

⁵³ *Id.*

increased the population in eastern cities,⁵⁴ and therefore, “[t]he crowded cities of the East were less hospitable for an armed population.”⁵⁵ Crowded cities meant an increase in conflicts amongst different classes.⁵⁶ States responded by passing gun safety measures, similar to today’s gun safety laws.⁵⁷ In New York, for example, the State Senate passed a gun safety law, requiring gun owners to obtain a license, approved by a sheriff or police.⁵⁸ Further, the law criminalized carrying concealed weapons outside the home.⁵⁹ West Virginia, New Jersey, Michigan, Indiana, Oregon, California, New Hampshire, North Dakota, and Connecticut followed in New York’s footsteps by passing similar gun safety legislation.⁶⁰

E. MODERN GUN LAWS IN THE UNITED STATES: PART II

As the Great Depression grasped the nation after the industrial revolution, Americans turned to the federal government for remedies to social and economic problems.⁶¹ The result was President Roosevelt’s New Deal, which created national laws that shaped American life more than it had ever before.⁶² Under the New Deal, the American government shifted to current form, with “the alphabet soup” of federal agencies expanding the government’s ability to directly affect American households.⁶³ One product of New Deal legislation was the National Firearms Act of 1934, imposing taxes on weapons that were predominantly used by gangs.⁶⁴ For example, the law required machine guns and sawed off shot guns to be registered.⁶⁵ The weapons were also restricted from being transported across states.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ WALDMAN, *supra* note 2, at 79.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 80.

⁶¹ *Id.*

⁶² *Id.* at 81.

⁶³ WALDMAN, *supra* note 2, at 81.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ The Roosevelt Administration passed another law in 1938, that “banned interstate trafficking in guns without a license.”⁶⁷ The laws were passed in response to an attempt on then President-elect Roosevelt’s life and mass shootings fueled by Tommy guns, which could fire 600 rounds of bullets per minute.⁶⁸

Notably, the National Rifle Association (NRA) gave its qualified support to the new gun laws.⁶⁹ “I do not believe in the general promiscuous toting of guns . . .,” testified then-NRA president Karl Frederick.⁷⁰ On the other hand, Frederick opined that “the useful results that can be accomplished by firearms legislation are extremely limited,” disagreeing with the gun law to the extent that it taxed pistols and revolvers.⁷¹ Nevertheless, when it came to laws that limited machine guns and sawed-off shotguns, the NRA provided its full support.⁷²

In 1939, however, two individuals—Jack Miller and Frank Layton—charged with violating the National Firearms Act, challenged the legislation’s constitutionality under the Second Amendment.⁷³ Miller and Layton argued that the Act directly conflicted with the Second Amendment, and was thus unconstitutional.⁷⁴ The Supreme Court, in *United States v. Miller*, began its opinion with a historical analysis “trac[ing] the history of the militia, and the centrality of the debate over the perils of a standing army to the purpose of the Second Amendment.”⁷⁵ After its analysis, the Court concluded that the purpose of the Second Amendment was to ensure “the continuation and render possible the effectiveness of such forces . . .”⁷⁶ Specifically,

⁶⁶ *Id.*

⁶⁷ *Id.* at 82.

⁶⁸ Ronald G. Shafer, *They Were Killers with Submachine Guns. Then the President Went After Their Weapons*, WASH. POST (Aug. 9, 2019), <https://www.washingtonpost.com/history/2019/08/09/they-were-killers-with-machine-guns-then-president-went-after-their-weapons/>.

⁶⁹ WALDMAN, *supra* note 2, at 82.

⁷⁰ Shafer, *supra* note 68.

⁷¹ *Id.*

⁷² *Id.*

⁷³ WALDMAN, *supra* note 2, at 82.

⁷⁴ *United States v. Miller*, 307 U.S. 174, 176 (1939).

⁷⁵ WALDMAN, *supra* note 2, at 83.

⁷⁶ *Miller*, 307 U.S. at 179.

the forces that the *Miller* Court explained referred to the Militia, “which the States were expected to maintain and train,” in contrast to the “[t]roops which [the States] were forbidden to keep without the consent of Congress.”⁷⁷ The *Miller* court reinforced the notion that the Second Amendment was limited to laws that encroached a state’s power over its militias.⁷⁸ The Court framed the Second Amendment as a collective right, which “asserts that citizens do not have an individual right to possess guns and that local, state, and federal legislative bodies therefore possess the authority to regulate firearms without implicating a constitutional right.”⁷⁹

F. CIVIL RIGHTS AND GUN VIOLENCE

“The thought of a Black male with a weapon scares America.”⁸⁰

The 1950s and 1960s were another significant time for gun-related legislation. During this time, white supremacists increased their efforts to stop Black Americans from acquiring social and political change.⁸¹ To protect themselves, Black Americans “organized for armed self-defense on an unprecedented level to confront racist violence”⁸² due to the federal government’s “reluctance to provide protection against the Ku Klux Klan and other white terrorists.”⁸³ Along with the need for self-defense, Black Americans also advocated for arms “as a part of its multi-layered ideology of black liberation, which revolved around black pride, black nationalism, Pan-

⁷⁷ *Id.* at 178-79.

⁷⁸ David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 589 (2000).

⁷⁹ *Second Amendment*, Cornell Law Sch. Legal Info. Inst., https://www.law.cornell.edu/wex/second_amendment.

⁸⁰ Simon Wendt & Rebecca Rössling, *The thought of a black male with a weapon scares America: African Americans, the Second Amendment, and the racial politics of armed self-defense in the civil rights era and beyond*, in *THE SECOND AMENDMENT AND GUN CONTROL: FREEDOM, FEAR, AND THE AMERICAN CONSTITUTION* 65, 65 (2018) (quoting John Eligon & Frances Robles, *Police Shootings Highlight Unease Among Black Gun Owners*, N.Y. TIMES, July 8, 2016).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Africanism, radical internationalism, and black political power.⁸⁴ Black Power organizations used arms as a symbol for resistance against police brutality and as a recruiting tool.⁸⁵

The growing racial tensions between white and Black Americans resulted in hundreds of race riots between 1964 and 1968.⁸⁶ While “the type of revolutionary violence that many Black Power activists envisioned was rare,”⁸⁷ armed governmental entities, such as the Federal Bureau of Investigation, provoked Black Americans under the guise of eliminating “what they deemed a threat to national security.”⁸⁸ In response to escalating racial tensions, white pundits and politicians wanted to limit Black Americans’ right to bear arms.⁸⁹ Advocates of gun rights for Black Americans immediately rejected such debate by arguing that gun control was only meant to take arms away from Black Americans to prevent them from defending themselves against racial attacks.⁹⁰

In addition to gun violence as a result of racial tensions in the United States, the nation experienced the high-profile assassinations of prominent leaders such as Martin Luther King, Jr. and Robert F. Kennedy.⁹¹ Gun violence during the Civil Rights Era thus sparked discussion on stricter gun control.⁹² The Gun Control Act of 1968 was proposed and passed, which “established a federal licensing system for gun dealers and banned the importation of military-style weapons.”⁹³ Further, the legislation prohibited felons, fugitives, and dishonorably charged military members from owning or purchasing guns.⁹⁴

The next two decades saw a tightening of gun laws. In 1981, President Ronald Reagan’s press secretary, James Brady, was shot in

⁸⁴ *Id.* at 71.

⁸⁵ *Id.* at 72.

⁸⁶ Wendt & Rössling, *supra* note 80, at 73.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 75.

⁹⁰ *Id.*

⁹¹ WALDMAN, *supra* note 2, at 83.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

an attempted assassination of the President.⁹⁵ After his miraculous recovery, Brady became a leader and advocate of gun safety legislation.⁹⁶ In 1987, he introduced the bill into Congress, that President Clinton signed as the Brady Bill.⁹⁷ The Brady Bill required potential gun owners to participate in a background check and waiting period before permitting them to purchase guns.⁹⁸ The following year, President Clinton proceeded to ban assault weapons.⁹⁹ Significantly, only the legislative and executive branches grappled with gun laws, leaving the courts out of the conversation.¹⁰⁰

G. SECOND AMENDMENT REVISIONISM

For nearly two centuries, the Supreme Court dismissed challenges to gun safety legislation, strictly reading the Second Amendment to apply only to laws that impeded state militias' right to bear arms.¹⁰¹ Most recently, the Supreme Court maintained this interpretation in *United States v. Miller*.¹⁰² A new understanding of the Second Amendment was introduced in the 1980s, however, known as Second Amendment revisionism.¹⁰³ Revisionists brushed aside the *Miller* court's "judicial orthodoxy,"¹⁰⁴ and instead argued that the Amendment protects the individual's right to bear arms.¹⁰⁵ Revisionists argue that the Second Amendment "limits legislators' ability to regulate guns to a much greater extent than judges and scholars theretofore had acknowledged."¹⁰⁶ While Revisionists claim that their ideas are rooted in the history of the Second Amendment, they actually rely on "the insurrectionary ideas of Daniel Shays and

⁹⁵ *Brady Bill Signed into Law*, HISTORY (Nov. 25, 2019), <https://www.history.com/this-day-in-history/brady-bill-signed-into-law>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ WALDMAN, *supra* note 2, at 84.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Yassky, *supra* note 78, at 589.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 590.

¹⁰⁵ *Id.* (quoting *United States v. Emerson*, 46 F. Supp. 598, 600 (N.D. Tex. 1999)).

¹⁰⁶ *Id.* at 591.

those who rose up against the government in Massachusetts in 1786 and 1787.”¹⁰⁷

Shays’ Rebellion was a “protest of 4,000 outraged citizens . . . against high taxes, foreclosures, and bankruptcy proceedings.”¹⁰⁸ Significantly, the protestors were unarmed, but marched “toward the armory in Springfield – to get guns – when the state militia subdued the rebellion.”¹⁰⁹ Even more significantly, the foundation for Second Amendment revisionism was primarily laid by the leading gun rights group in the United States today: the NRA.

H. SECOND AMENDMENT REVISIONIST ADVOCACY: THE NRA

The NRA was founded in 1871 by Colonel William C. Church and General George Wingate to “promote and encourage rifle shooting on a scientific basis.”¹¹⁰ Col. Church and Gen. Wingate established this mission because of their concern of the “lack of marksmanship shown by their troops.”¹¹¹ For nearly a century, the NRA focused their efforts on this mission.

In 1975, however, the NRA established its political and advocacy arm, naming it the NRA Institute for Legislative Action.¹¹² Establishing the political and advocacy arm was the first step in laying the foundation for what the NRA is known for today; the second step was the NRA’s 1977 annual meeting, referred to today as the “Revolt at Cincinnati.”¹¹³ The year before, the NRA moved its headquarters to Colorado Spring, Colorado, “signaling a retreat from politics.”¹¹⁴ As a result of moving away from politics, angry gun owners came to the

¹⁰⁷ Saul Cornell, *Gun-Rights Activists Should Fear History of the Second Amendment*, THE DAILY BEAST, Dec. 18, 2012, <https://www.thedailybeast.com/gun-rights-advocates-should-fear-history-of-second-amendment>.

¹⁰⁸ Ed Asner, *Sorry, NRA: The U.S. Was Actually Founded on Gun Control*, SALON (Dec. 16, 2017), <https://www.salon.com/2017/12/16/sorry-nra-the-u-s-was-actually-founded-on-gun-control/>.

¹⁰⁹ *Id.*

¹¹⁰ *A Brief History of the NRA*, NAT’L RIFLE ASSOC., <https://explore.nra.org/interests/history/>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ WALDMAN, *supra* note 2, at 90.

¹¹⁴ *Id.*

1977 annual meeting and replaced the organization's leadership.¹¹⁵ The meeting created a window of opportunity for groups such as the Second Amendment Foundation and the Citizens Committee for the Right to Keep and Bear Arms to take control of the NRA.¹¹⁶ This was the first time in the NRA's history that it "embraced the idea that the sacred Second Amendment – not just the interests of hunters or even homeowners – was at the heart of its concerns."¹¹⁷ Even further, the NRA embraced rightwing extremist ideology, which was "devoted to 'Second Amendment absolutism,' and 'interpreted the Constitution as an unfettered right to gun ownership.'"¹¹⁸ To protect their absolutist ideology, the NRA grew more political.¹¹⁹ A major turning point for the organization was endorsing a presidential nominee – Ronald Reagan.¹²⁰ Notably, after the endorsement, Reagan supported the NRA's commitment to unfettered gun ownership during his presidency. This commitment stood in direct contrast with his time as California's governor, when he passed one of the strictest gun safety laws at the time.¹²¹

By the 1980s, the NRA and other gun rights groups began publishing studies in legal journals, arguing that "the original language of the Second Amendment was intended to protect hunters and sports shooters against any restrictions on their use of firearms."¹²² Through its magazines, scholarship, films, and museums, the NRA "convinced many people – including law professors and judges – that the individualist interpretation was the 'standard model' of American gun history."¹²³ Their advocacy eventually influenced the Supreme Court – for example, in *Printz v. United States*, Justice Thomas proposed that the Second Amendment created a "personal right to 'keep and bear arms.'"¹²⁴

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ FRANKS, *supra* note 1, at 58.

¹¹⁹ Adam Winkler, *The Secret History of Guns*, THE ATLANTIC, Sept. 2011, <https://theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Tucker, *supra* note 15.

¹²³ *Id.*

¹²⁴ *Printz v. United States*, 521 U.S. 898, 938 (1997) (Thomas, J., concurring).

i. MODERN GUN LAWS: DISTRICT OF COLUMBIA V. HELLER

The revisionist interpretation of the Second Amendment was adopted in *District of Columbia v. Heller*, in which Justice Scalia, writing for the majority, grappled with whether the Second Amendment “protects an individual right to keep and bear arms for the purpose of self-defense.”¹²⁵ To distinguish the seemingly contrasting *Miller* opinion, the majority stated that because *Miller* “simply limit[ed] Second Amendment protections to certain types of weapons,”¹²⁶ that it was not helpful to “definitively answer[] the questions presented in *Heller*.”¹²⁷

The majority, written by Justice Scalia, revisited historical sources, from “England, the Founding Era, post-ratification, pre-civil war, and state analogues”¹²⁸ to ultimately conclude that the Second Amendment imparted individuals the right to carry weapons for self-defense.¹²⁹ Opponents to his opinion argued that Justice Scalia’s interpretation “wiped out the Court’s prior Second Amendment decisions.”¹³⁰

In his *Heller* dissent, Justice Stevens conducted a similar historical analysis to conclude that “the protection granted by the Amendment was ‘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.’”¹³¹ Further, Justice Stevens disagreed with the majority’s interpretation of *Miller*, stating that *Miller* did indeed conduct a historical analysis of the

¹²⁵ Nelson Lund, *The Proper Role of History and Tradition in Second Amendment Jurisprudence*, U. FLA. J.L. & PUB. POL’Y (forthcoming).

¹²⁶ Yassky, *supra* note 78, at 192 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008)).

¹²⁷ *Id.*

¹²⁸ Michael R. Ulrich, *Revisionist History? Responding to Gun Violence Under Historical Limitations*, 45 AM. J. OF L. & MED. 188, 191 (2019).

¹²⁹ *Id.*

¹³⁰ Ian Millhiser, *The Biggest Second Amendment Case to Reach the Supreme Court in Nearly a Decade, Explained*, VOX, Sept. 27, 2019, <https://www.vox.com/policy-and-politics/2019/9/27/20879906/second-amendment-guns-supreme-court-new-york-moot-brett-kavanaugh-nra>.

¹³¹ Ulrich, *supra* note 128, at 191 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 637 (2008)).

Second Amendment, and that the *Heller* majority dismissed the *Miller* Court's analysis because it "simply does not approve of the conclusion the *Miller* Court reached."¹³²

While Justice Scalia relied on the history of the Second Amendment to discern the Second Amendment's original meaning, when it came to D.C.'s ban on handguns, Justice Scalia specifically made "no reference to or citation to history, instead [supporting] his argument with justifications for why many might choose a handgun for defense in the home."¹³³ He used these arguments to bolster his conclusion that D.C.'s handgun ban was unconstitutional.¹³⁴ Justice Breyer responded to Justice Scalia's argument by "analogiz[ing] historical laws that restrict the use of firearms to determine not simply what the Amendment protects, but what the Amendment allows in terms of restricting the right,"¹³⁵ and concluded that "even if there is an individual right [to gun ownership], that does not necessarily prevent the regulation in question from being upheld."¹³⁶

While *Heller* expanded the Second Amendment's reach, it was not a complete victory for gun rights' advocates.¹³⁷ Justice Scalia highlighted that the bounds of the Second Amendment are not unlimited.¹³⁸ Again, without referencing historical text or data,¹³⁹ Justice Scalia outlined that "traditional limitations on Second Amendment rights included 'laws forbidding the carrying of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'"¹⁴⁰

In 2010, the Supreme Court granted certiorari to hear *McDonald v. City of Chicago*, a case that challenged a Chicago handgun

¹³² *Id.* at 192 (quoting *Heller*, 554 U.S. at 679).

¹³³ *Id.* at 193 (quoting *Heller*, 554 U.S. at 628-29).

¹³⁴ *Id.* (citing *Heller*, 554 U.S. at 626-29).

¹³⁵ *Id.*

¹³⁶ Ulrich, *supra* note 128, at 191 (citing *District of Columbia v. Heller*, 554 U.S. 570, 687 (2008) (Breyer, J., dissenting)).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* (quoting *Heller*, 554 U.S. at 627 n.26).

ban, similar to the ban outlined in *Heller*.¹⁴¹ The Supreme Court held in *McDonald* that the Second Amendment “applies to state and local governments in addition to the federal government.”¹⁴² While the *McDonald* decision expanded *Heller* to include state and local governments,¹⁴³ notably, the *McDonald* court emphasized that *Heller*, “while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not a ‘right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’”¹⁴⁴

II. CALIFORNIA

A. HISTORY OF GUN CONTROL IN CALIFORNIA

The mid-1960s saw a culmination of tension between racial minority communities and the police.¹⁴⁵ Thus, after President Johnson prevailed in the 1964 Presidential Election, he created the “President’s Commission on Law Enforcement and Administration of Justice” in July 1965 to signal to the American public that it could rely on the federal government to solve the rise in crime and violence.¹⁴⁶ The Commission drafted a report in 1967, concluding that “to achieve more effective and fairer law enforcement, especially with the poor, minority groups and juveniles, there had to be a radical revision of police personnel practice.”¹⁴⁷

¹⁴¹ *The Supreme Court and the Second Amendment*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/the-second-amendment/the-supreme-court-the-second-amendment/>.

¹⁴² *Id.*

¹⁴³ Mark Joseph Stern, *The Supreme Court’s Second Amendment Revolution May Have to Wait*, SLATE, Dec. 2, 2019, <https://slate.com/news-and-politics/2019/12/new-york-scotus-gun-control-oral-arguments.html>.

¹⁴⁴ Giffords, *supra* note 141 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008))).

¹⁴⁵ *Race as a Factor*, HUMAN RIGHTS WATCH, <https://www.hrw.org/legacy/reports98/police/uspo17.htm>.

¹⁴⁶ DONALD J. CAMPBELL, *AMERICA’S GUN WARS* 66 (2019).

¹⁴⁷ Cheryl Corley, *President Johnson’s Crime Commission Report, 50 Years Later*, NPR (Oct. 6, 2017), <https://www.npr.org/2017/10/06/542487124/president-johnson-s-crime-commission-report-50-years-later>.

In the meantime, however, tensions between the Black community and law enforcement escalated. Just days after the Commission was created, on August 11, 1965, Los Angeles experienced the beginning of weeks of “a revolt, a rebellion, an uprising—a violent but justified leap into a future of black self-empowerment.”¹⁴⁸ The rebellion, coined as Watts Rebellion, was sparked when Marquette Frye, a driver that lived in the predominantly black Watts neighborhood, was arrested for driving under the influence.¹⁴⁹ Upon his arrest, Frye’s mother stepped in to intervene, which caused a crowd to gather, and subsequently, “the arrest became a flashpoint for anger against the police.”¹⁵⁰ Nevertheless, the root causes of the rebellion were growing tensions in the Black community against policies perpetuating, amongst other issues, racial discrimination.¹⁵¹

Further, in November 1964, California had passed Proposition 14, “overturn[ing] the Rumford Fair Housing Act, which established equality of opportunity for black home buyers.”¹⁵² Over the course of six days, protestors “overturned and burned automobiles and looted and damaged grocery stores, liquor stores, department stores and pawnshops,”¹⁵³ and “over 14,000 California National Guard troops were mobilized in South Los Angeles and a curfew zone encompassing over forty-five miles was established in an attempt to restore public order.”¹⁵⁴ Official investigations, prompted by Governor Pat Brown, revealed that the rebellion was in fact a result of Watts residents’ justified frustration with “high unemployment rates, substandard housing, and inadequate schools.”¹⁵⁵ Nevertheless, public officials

¹⁴⁸ Valerie Reitman and Mitchell Landsberg, *Watts Riots, 40 Years Later*, L.A. TIMES, (Aug. 11, 2005), <https://www.latimes.com/archives/la-xpm-2005-aug-11-la-me-watts-11aug11-story.html>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Watts Riots, CIVIL RIGHTS DIGITAL LIBRARY, http://crdl.usg.edu/events/watts_riots/?Welcome (last visited Feb. 5, 2020).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

failed “to implement measures to improve the social and economic conditions of African Americans living in the Watts neighborhood.”¹⁵⁶

California saw the rise of a new form of civil rights after the Watts Rebellion. When public officials failed to address these social and economic concerns, “local activism blossomed in Watts, including reformed street gang members who joined the Black Panther Party to rebuild and monitor police excesses.”¹⁵⁷ Black activists called attention to “police violence and the suffocating conditions of West Coast cities,”¹⁵⁸ recognizing that “the tactics of nonviolent passive resistance”¹⁵⁹ rooted in the southern civil rights movement were not working in California, and the “radicalization of the southern civil rights movement provided a new language and conception for black struggle across the country,”¹⁶⁰ and in California. This new language, framed as a movement for “black power,”¹⁶¹ sparked the formation of the Black Panther Party for Self Defense (“Black Panther Party”), based in Oakland, CA.¹⁶² The Black Panther Party was an opportunity for activists in California to organize for “self-defense and community service”¹⁶³ and spread all across California, including “the Black Panther Party of Northern California [and] the Black Panther Political Party of Watts.”¹⁶⁴

For the Black Panther party, self-defense and community service went hand-in-hand. For example, Huey P. Newton, one of the founders of the Black Panther party, “searched for a medium ‘to capture the imagination’ of Oakland’s black community.”¹⁶⁵ In doing so, he turned to the California penal code, and “soon discovered an old

¹⁵⁶ *Id.*

¹⁵⁷ Watts Rebellion, HISTORY, <https://www.history.com/topics/1960s/watts-riots> (last updated June 24, 2020).

¹⁵⁸ Donna Murch, *Watts, Lowndes County, Oakland: The Founding of the Black Panther Party for Self Defense*, VERSO (Oct. 15, 2016), <https://www.versobooks.com/blogs/2882-watts-lowndes-county-oakland-the-founding-of-the-black-panther-party-for-self-defense>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Murch, *supra* note 158.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

statute that legalized carrying unconcealed weapons.”¹⁶⁶ His discovery led to the creation of the “Black Panther Party and Program,”¹⁶⁷ which was loosely based on the Ten Point Program outlined by the Nation of Islam.¹⁶⁸ The Black Panther Party and Program insisted on “the right to bear arms.”¹⁶⁹

Aiming to respond to racial injustice, the Black Panther Party fueled efforts to responsibly arm the Black community.¹⁷⁰ First, the Black Panther Party collected arms, including “machine guns, rifles, and handguns.”¹⁷¹ As new members joined the Party, they were required “to learn how to wield, clean and shoot guns, in addition to understanding their right to carry firearms and how to communicate that to police in California.”¹⁷² Soon enough, Black Panther Party members began efforts to address racial injustice within their legal right to bear arms, “follow[ing] police cars and dispens[ing] legal advice to African-Americans who were stopped by the police while legally carrying their weapons.”¹⁷³

The Black Panther Party’s insistence on self-defense culminated in a protest on May 2, 1967, when the Black Panther Party walked onto the California Capitol loaded with arms.¹⁷⁴ To “underscore their political statements about the subjugation of African Americans,”¹⁷⁵ thirty Black Panther Party members carried out the protest with “.357 Magnums, 12-gauge shotguns and .45-caliber pistols,”¹⁷⁶ declaring that Americans, especially Black Americans:

[T]ake careful note of the racist California legislature aimed at keeping the black people disarmed and powerless. Black people have

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Murch, *supra* note 158.

¹⁶⁹ *Id.*

¹⁷⁰ Thad Morgan, *The NRA Supported Gun Control When the Black Panthers had the Weapons*, HISTORY (Aug. 30, 2018), <https://www.history.com/news/black-panthers-gun-control-nra-support-mulford-act>.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Ben Christopher, *How California Got Tough on Guns*, CAL. MATTERS (Nov. 14, 2019), <https://calmatters.org/explainers/california-gun-laws-policy-explained/>.

¹⁷⁵ Morgan, *supra* note 170.

¹⁷⁶ Winkler, *supra* note 119.

begged, prayed, petitioned, demonstrated, and everything else to get the racist power structure of America to right the wrongs which have historically been perpetuated against [B]lack people. The time has come for [B]lack people to arm themselves against this terror before it is too late.¹⁷⁷

At the time, California had “few restrictions on carrying loaded weapons in public.”¹⁷⁸ It was after this protest that California State Assembly member Don Mulford proposed legislation “to ban the ‘open carry’ of loaded firearms within California cities and towns.”¹⁷⁹ The proposed legislation was endorsed by the NRA, who “felt especially threatened by the Black Panthers.”¹⁸⁰ The legislation, known as the Mulford Act, was eventually signed into law by then-Governor Ronald Reagan.¹⁸¹

B. MODERN GUN LAWS IN CALIFORNIA

California has passed over 100 laws that delineate time, place, and manner restrictions on wielding guns, including “regulations on dealers and buyers, background check requirements, and possession bans directed at certain ‘high risk’ individuals.”¹⁸² In 2019 alone, the California Legislature considered close to twenty-four gun-related bills, passing some into law.¹⁸³

Although the state has the strongest gun safety laws in the nation, “over 3,000 Californians are killed by a gun each year.”¹⁸⁴ Notably, gun violence disproportionately impacts urban communities of color. Even more significantly, while “[b]lack men make up less than 4% of California’s population . . . , [they] account for nearly 31% of the

¹⁷⁷ *Id.*

¹⁷⁸ Christopher, *supra* note 174.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *New 2020 California Gun Laws Taking Effect Soon*, PR NEWswire (Nov. 21, 2019), <https://www.pnewswire.com/news-releases/new-2020-california-gun-laws-taking-effect-soon-300963333.html>.

¹⁸⁴ *The State of Gun Violence in California*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE (Jan. 2020), <https://lawcenter.giffords.org/wp-content/uploads/2019/02/Giffords-Law-Center-State-of-Gun-Violence-in-CALIFORNIA.pdf>.

state's gun homicide victims."¹⁸⁵ Further, black men between eighteen and twenty-four "are more than 18 times more likely than white men the same age to be murdered with a gun."¹⁸⁶

Nevertheless, Californian gun owners and advocates have found ways around restrictive gun laws.¹⁸⁷ For example, after California redefined its ban on assault weapons "to include any modern semi-automatic rifle with a detachable magazine,"¹⁸⁸ amongst other features such as a "protruding pistol grip or an adjustable stock,"¹⁸⁹ gun owners came up with a workaround to yield similar guns that fell outside the assault weapon ban.¹⁹⁰ Gun owners installed "a small lock on the magazine that [could] easily be opened with a small tool . . . [so] [l]egally speaking, that tiny bit of hardware would transform the contraband assault weapon with a detachable magazine into a perfectly legal rifle with an ever-so-slightly-less detachable magazine."¹⁹¹ With more innovation has come stricter gun control legislation.¹⁹² Individuals who have found ways to carry innovative guns have perpetuated gun violence, such as a shooting that killed five people at a California elementary school.¹⁹³ These incidents have caused lawmakers to worry about "the spread of unidentifiable 'ghost guns.'"¹⁹⁴ Advocates for gun safety have called on the California legislature to "regulate the sale of dangerous DIY firearm assembly kits."¹⁹⁵

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (emphasis added).

¹⁸⁷ Christopher, *supra* note 174.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Christopher, *supra* note 174.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

III. MISSISSIPPI

A. HISTORY OF GUN CONTROL IN MISSISSIPPI

Like California, early gun control in Mississippi was a product of keeping guns away from Black Americans. After the Civil War, the American South entrenched itself in new methods to keep white and Black Americans segregated.¹⁹⁶ Mississippi enacted similar Black Codes to other Southern States.¹⁹⁷ Southern white Americans were apprehensive of newly free Black men and “[a]ll these economic worries, prejudices and fears, helped produce the first Black Codes of 1865.”¹⁹⁸ The Second Amendment had protected white men from the government’s ability to take arms away from them – their right to bear arms was directly tied to their right to civic participation. Therefore, white men passed Black Codes to maintain their ability to bear arms, while depriving newly freed Black Americans from doing so as well. While the federal government responded to these laws by passing the Fourteenth Amendment and the Civil Rights Act of 1866, Mississippi was among states in the deep South that “[c]ontinued to enforce the pre-emancipation statutes forbidding blacks to possess arms, in violation of the [F]ourteenth [A]mendment” and the Civil Rights Act of 1866.¹⁹⁹ Then-Senator Henry Wilson reported that “[i]n Mississippi . . . rebel State forces, men who were in rebel armies, are traversing the State, visiting freedmen, disarming them, [and] perpetrating murders and outrages upon them . . .”²⁰⁰

Additionally, the Mississippi legislature enacted laws that served as an “indication that the former slaves had not yet joined the ranks of free citizens,” by passing, for example, “legislation prohibiting blacks from carrying firearms without licenses, a

¹⁹⁶ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 34 (2010).

¹⁹⁷ Emily Wagster Pettus, *Gun Ruling Includes Mississippi History Lesson from State Supreme Court Justice*, Clarion Ledger, (June 10, 2018), <https://www.clarionledger.com/story/news/politics/2018/06/11/analysis-gun-ruling-includes-mississippi-history-lesson/687892002/>.

¹⁹⁸ Constitutional Rights Foundation, *supra* note 35.

¹⁹⁹ Tahmassebi, *supra* note 37, at 74.

²⁰⁰ WALDMAN, *supra* note 2, at 74.

requirement to which whites were not subjected.”²⁰¹ Further, Mississippi passed legislation that required “retailers [to] report to local authorities whenever blacks purchased firearms or ammunition,”²⁰² which a sheriff would confiscate and destroy, or alternatively, turn over the arms to the local Klan or a white militia.²⁰³ Further, although Congress attempted to protect black Americans against state legislation that limited their rights, the Supreme Court “moved to maintain much of the structure of prewar federalism.”²⁰⁴ Through the Slaughterhouse cases, for example, the Court “showed a strong concern for maintaining state prerogative and a disinclination to carry out the intent of the framers of the Fourteenth Amendment to make states respect national rights.”²⁰⁵

Despite efforts to suppress their right to bear arms, black Mississippians exercised the right to bear arms in an effort to fend off white supremacy.²⁰⁶ For example, black gunowners followed civil rights workers around to keep the workers safe.²⁰⁷ These efforts “provided a deterrent to white terroristic activity” targeting Blacks.²⁰⁸ Black Americans relied on the Second Amendment because it “provided a practical reason for a right to bear arms: In a world in which the legal system was not to be trusted, perhaps the ability of the system’s victims to resist might convince the system to restrain itself.”²⁰⁹

²⁰¹ Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward and Afro-Americanist Reconsideration*, 7 J. ON FIREARMS & PUB. POL. 75, 91 (1991).

²⁰² Tahmassebi, *supra* note 37, at 75.

²⁰³ *Id.*

²⁰⁴ Cottrol & Diamond, *supra* note 201, at 91.

²⁰⁵ *Id.* at 92.

²⁰⁶ *Id.* at 96.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Cottrol & Diamond, *supra* note 201, at 97.

B. MODERN GUN LAWS IN MISSISSIPPI

Unlike California, which is known for the strictest gun safety laws, Mississippi has the weakest gun safety laws in the nation.²¹⁰ Mississippi does not:

[r]equire a background check prior to the transfer of a firearm between private parties; [p]rohibit the transfer or possession of assault weapons, 50 caliber rifles, or large capacity ammunition magazines; [l]icense or significantly regulate firearms dealers; [l]imit the number of firearms that may be purchased at one time; [r]egulate unsafe handguns; [a]fford local law enforcement discretion in issuing concealed carry licenses; [r]equire the licensing of gun owners; or [i]mpose registration requirements on firearms.²¹¹

Mississippi's relaxed gun laws have had a direct impact on the state's gun death rate—in 2017, for example, Mississippi had “the fifth highest gun death rate among the states.”²¹²

While California and Mississippi differ in how broad their gun safety laws are, gun violence impacts urban communities of color in the same way.²¹³ Like in California, “[g]un violence has a disproportionate impact on urban communities of color”²¹⁴ in Mississippi. Further, while “[b]lack men make up less than 18% of Mississippi's population . . . , [they] account for nearly 66% of the state's homicide victims.” Finally, black men in Mississippi ages eighteen to twenty-four “are nearly 13 times more likely than white men the same age to be murdered with a gun.”²¹⁵

²¹⁰ *Annual Gun Law Score Card*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/scorecard/#MS>.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *State of Gun Violence in Mississippi*, *supra* note 5.

²¹⁴ *Id.*

²¹⁵ *Id.*

IV. ANALYSIS

A. GUN VIOLENCE & GUN SAFETY LAWS

Multiple factors beyond gun safety laws can contribute to the reduction of gun violence in the United States.²¹⁶ While weak gun laws facilitate gun ownership, social and economic issues escalate the degree of gun violence a community faces.²¹⁷ For example, the amount of gun ownership, poverty, unemployment, lack of educational opportunities, and tension between the police and its community exacerbate the level of gun violence in a community.²¹⁸ Nevertheless, “there is a robust and growing body of research that demonstrates an undeniable correlation between certain strong gun laws and lower rates of gun violence.”²¹⁹ Overall, California experiences fewer gun-related deaths than Mississippi. The Giffords Law Center to Prevent Gun Violence grades each state on the strength of their gun laws and has found that the stronger the gun laws, the lower the gun death rate in the respective state.²²⁰ Further, gun safety law advocates point to

²¹⁶ Chelsea Parsons & Eugenio Weigend Vargas, *America Under Fire: An Analysis of Gun Violence in the United States and the Link to Weak Gun Laws*, CTR. FOR AM. PROGRESS, (Oct. 11, 2016), <https://www.americanprogress.org/issues/guns-crime/reports/2016/10/11/145830/america-under-fire/>.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* (“A 2013 study by a group of public health researchers examined the relationship between the overall strength of a state’s gun laws and rates of gun deaths in the state and found that states with stronger gun laws had lower rates of gun deaths than states with weaker gun laws. A 2011 study that analyzed state-level data drew similar conclusions: Firearm-related deaths were significantly lower in states that had enacted laws to ban assault weapons, require trigger locks, and mandate safe storage of guns. Two studies led by Daniel Webster at the Johns Hopkins Bloomberg School of Public Health demonstrated the impact of state laws requiring a permit—and background check—before an individual can purchase a handgun. When Connecticut implemented this requirement, gun-related homicides in the state fell 40 percent; when Missouri eliminated this requirement, gun homicides increased 26 percent. And research conducted by Everytown for Gun Safety, a nonprofit gun violence prevention advocacy group, found that states that require universal background checks for all handgun sales have significantly lower rates of intimate partner gun homicides of women, law enforcement officers killed by handguns, and gun-related suicides.”)

²²⁰ *Gun Law Score Card*, *supra* note 210.

California as a gun safety legislation template for other states to follow.²²¹

B. RACE & GUN VIOLENCE

Gun violence disproportionately affects communities of color—specifically Black Americans. In 2016 alone, 14,415 individuals lost their lives due to gun homicides and Black Americans accounted for 58.5 percent of these deaths, even though they make up only 13 percent of the population.²²² Further, while evidence does show that stronger gun safety laws reduce the amount of gun violence in a state,²²³ it is noteworthy that gun safety laws do not equitably protect individuals across race—specifically Black Americans. California may have the strictest gun safety laws in the United States, but Black men ages eighteen to twenty-four in California are still “more than 18 times more likely than white men the same age to be murdered with a gun.”²²⁴ On the other hand, Black men ages eighteen to twenty-four in Mississippi, which has the most relaxed gun safety laws in the United States, “are nearly 13 times more likely than white men the same age to be murdered with a gun.”²²⁵ Given California’s strict gun safety laws and Mississippi’s relaxed laws, it may come as a surprise that Black men ages eighteen to twenty-four are *5 times more* likely to be murdered with a gun in California than Mississippi. Superficially, individuals may argue that the reason there is a disparity is because gun safety laws are not effective. In the context of the Second Amendment’s racialized history, however, it becomes apparent why Black Americans experience more gun violence than their white counterparts.

The Second Amendment was drafted with the intention of protecting only white gun owners, specifically white men. This intention was made clear after the Civil War, when gun control laws

²²¹ Carsey Leins, *Stronger Gun Laws Linked to Less Gun Violence, Study Finds*, U.S NEWS, (Feb. 8, 2019), <https://www.usnews.com/news/best-states/articles/2019-02-08/stronger-gun-laws-linked-to-less-gun-violence-study-finds>.

²²² AMNESTY INTERNATIONAL, *IN THE LINE OF FIRE: HUMAN RIGHTS AND THE US GUN VIOLENCE CRISIS* 47 (2018).

²²³ *Gun Law Score Card*, *supra* note 210.

²²⁴ *Id.*

²²⁵ *Id.*

were created “to ensure that blacks would be defenseless, that they would remain subordinated, still effectively held in bondage.”²²⁶ Original gun control laws were created to maintain the status quo—to leave gun ownership to white men. Further, hate groups, such as the Ku Klux Klan, organized to ensure that early gun control laws kept Black Americans powerless because they knew that “the black letter of the law is one thing and de facto power relations are quite another.”²²⁷ Creating a sense of fear that black citizens needed to be disarmed is what made these gun control laws effective. While advocates for stricter gun safety laws are not attempting to disarm black citizens today, gun safety measures are not protecting Black Americans from gun violence.

Scholars have used critical race theory in order to understand why gun violence disproportionately affects Black men.²²⁸ Under critical race theory, “researchers try to understand how victims of systemic racism are affected by cultural perceptions of race.”²²⁹ Researchers then leverage their understanding of systemic racism to determine effective strategies to counter racial prejudice.²³⁰

Applying critical race theory to the gun violence epidemic reveals the effects of gun violence on racial minorities—specifically, the Black community.²³¹ It reveals that Black Americans are not being considered when gun safety laws are drafted.²³² For example, while young Black men are particularly vulnerable to firearm homicides, a lack of state support services, discriminatory policing practices, easy access to firearms, drug crimes and gang violence are not being addressed to the degree required to curb gun violence in communities

²²⁶ David S. D’Amato, *Actually, Gun Restrictions Will Target the Black Community*, THE HILL, (Aug. 5, 2019), <https://thehill.com/opinion/criminal-justice/456243-actually-gun-restrictions-will-target-the-black-community>.

²²⁷ *Id.*

²²⁸ Yolanda T. Mitchell and Tiffany L. Bromfield, *Gun Violence and the Minority Experience*, NCFR (Jan. 10, 2019), <https://www.ncfr.org/ncfr-report/winter-2018/gun-violence-and-minority-experience>.

²²⁹ *Id.*

²³⁰ *Critical Race Theory*, PURDUE ONLINE WRITING LAB, https://owl.purdue.edu/owl/subject_specific_writing/writing_in_literature/literary_theory_and_schools_of_criticism/critical_race_theory.html.

²³¹ Mitchell & Bromfield, *supra* note 228.

²³² *Id.*

of color.²³³ Further, the media rarely covers stories addressing these issues, even though Black Americans are victims of gun violence more often than any other racial community in the United States.²³⁴ The impact of these stories not being covered is that while Black Americans face the most gun violence in the United States, they alone are responsible to redress their plight.²³⁵ Black Americans are being othered because they are not considered in the gun safety discussion.

The impact of othering Black people when pushing gun safety legislation is that while gun safety laws address *some* issues facing the American public, they don't address issues directly impacting gun violence in Black communities. For instance, California's gun safety laws passed in 2019 increased gun purchasing processing fees, expanded "red flag" and gun storage laws, placed a cap on the number of guns an individual may purchase, and raised the legal age to purchase guns.²³⁶ These laws, however, fail to address institutional racism and its impact across multiple generations.²³⁷ For example, while "red flag" laws allow police to temporarily confiscate firearms from individuals who may be a danger to themselves or others around them,²³⁸ these laws neglect to address the lack of trust between law enforcement and Black Americans.²³⁹ They also fail to address a history of excessive police brutality and racial profiling.²⁴⁰ Based on a present lack of trust towards police officers and a history of systemic racism, "red flag" laws, as they currently stand, would not help curb gun violence in Black communities.

Relaxed gun safety laws also disparately affect Black Americans. United States history reveals that the country has always

²³³ AMNESTY INT'L, *supra* note 222, at 49.

²³⁴ Wanda Parham-Payne, *The Role of the Media in the Disparate Response to Gun Violence in America*, 45 J. BLACK STUD. 752, 756 (2014).

²³⁵ *Id.*

²³⁶ Ryan Sabalow, *New Gun Restrictions Coming to California in 2020. Here's What Lawmakers Passed this Year*, THE SACRAMENTO BEE (Dec. 27, 2019), <https://www.sacbee.com/news/politics-government/capitol-alert/article238673638.html>.

²³⁷ AMNESTY INT'L, *supra* note 222, at 50.

²³⁸ Timothy Williams, *What are "Red Flag" Gun Laws, and How do they Work?*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/red-flag-laws.html>.

²³⁹ AMNESTY INT'L, *supra* note 222, at 50.

²⁴⁰ *Id.*

been apprehensive of Black gun ownership.²⁴¹ As a result, Black gun owners are not able to exercise their gun rights in the same way that their white counterparts can. For example, while open carry laws are meant to protect all Americans, white gun owners “can walk into Walmart or they can go buy coffee or go to Starbucks, but when black open carry advocates walk into Walmart, they get tackled or arrested or shot.”²⁴² The disparate treatment of white gun advocates and Black gun advocates is rooted in the civil-rights era of the 1950s and 1960s, when “exaggerated representation of black men with guns mobilized significant response in mainstream white America.”²⁴³

C. WHERE DO WE GO FROM HERE?

Gun lobbies have preyed on the fear of American gun owners, arguing that “the only answer to bad gun violence is good gun violence.”²⁴⁴ Gun lobbyists leverage rampage-killings, like the 2019 White Settlement Church shooting incidents, where an attacker was shot and killed by an armed security guard, to advocate for broad Second Amendment protections by emphasizing that “good guys with guns” are what stop gun violence.²⁴⁵ What gun lobbyists neglect to emphasize, however, are statistics. For example, according to the Violence Policy Center, “for every justifiable homicide in the United States—for every lethal shooting in defense of life or property—guns are used to commit 34 murders and 78 suicides, and are the cause of two accidental deaths.”²⁴⁶ What they neglect to emphasize is that

²⁴¹ John Metta, *Racism and the Black Hole of Gun Control in the United States*, AL JAZEERA (Nov. 23, 2019), <https://www.aljazeera.com/indepth/features/racism-black-hole-gun-control-191121115131565.html>.

²⁴² Why is this Happening?, *Dying of Whiteness with Jonathan Metzl: Podcast & Transcript*, NBC NEWS (Mar. 26, 2019), <https://www.nbcnews.com/think/opinion/dying-whiteness-jonathan-metzl-podcast-transcript-ncna987671>.

²⁴³ Jonathan Metzl, *The NRA and Black People*, THE GRIO (Mar. 6, 2013), <https://thegrio.com/2013/03/06/colion-noir-the-nras-urban-gun-enthusiast-is-off-target/#51050433>.

²⁴⁴ FRANKS, *supra* note 1, at 81.

²⁴⁵ Joan E. Greve, *Texas Shooting Details Supercharge NRA's 'Good Guy with Gun' Defense*, (Dec. 30, 2019), <https://www.theguardian.com/us-news/2019/dec/30/texas-shooting-white-settlement-nra-guns>.

²⁴⁶ FRANKS, *supra* note 1, at 81-82.

[R]ampage killings are not the typical face of gun violence in America. Each day, some 30 people are victims of gun homicides, slain by rival gang members, drug dealers, trigger-happy robbers, drunken men after bar fights, frenzied family members or abusive partners. An additional 40 people a day kill themselves with guns.²⁴⁷

What they neglect to emphasize is that while guns may be used for defense, that only 4 percent of gun violence is related to defensive firearm use.²⁴⁸ Gun lobbyists deemphasize statistics which show that more guns will lead to more deaths and overemphasize the stories of defensive firearm use that are, in reality, few and far between.²⁴⁹ The answer to gun violence in the United States, therefore, cannot be that America needs more “good guys with guns.”

While there is no simple answer to curbing gun violence, the United States must begin by acknowledging that gun-related death and injuries disproportionately affect Black Americans. By centering Black communities, race-conscious gun laws will not only address firearm violence, but also the impact of gun violence on Black communities, such as post-traumatic stress disorder, depression, poor academic performance, and substance abuse.²⁵⁰ Further, race-conscious gun safety laws will reveal that the effect of gun violence contributes to the challenging reality that poverty and violence is an inescapable reality for Black Americans.²⁵¹

²⁴⁷ *Id.* at 84.

²⁴⁸ Greve, *supra* note 245.

²⁴⁹ FRANKS, *supra* note 1, at 84.

²⁵⁰ Richard V. Reeves & Sarah E. Holmes, *Guns and Race: The Different Worlds of Black and White Americans*, BROOKINGS (Dec. 15, 2015), <https://www.brookings.edu/blog/social-mobility-memos/2015/12/15/guns-and-race-the-different-worlds-of-black-and-white-americans/>.

²⁵¹ *Id.*