

NYSRPA v. Bruen: Weaponizing Race

Daniel S. Harawa*

INTRODUCTION

I steeled myself as I prepared to read *New York State Rifle & Pistol Association v. Bruen*.¹ Not because I was unsure of how the Supreme Court would rule—it seemed clear that the Court would hold that New York’s concealed handgun permitting regime violated the Second Amendment. Rather, I worried because if past is prologue, the Court was going to weaponize race in reaching its decision.

Bruen did not disappoint. In its modern Second Amendment jurisprudence, the Court—with its most conservative members writing—has consistently appropriated a racial justice angle in its efforts to reshape the scope of Second Amendment rights.² *Bruen* continued this trend.

While the Court has weaponized race—particularly America’s history of anti-Black racism—to expand the reach of the Second Amendment, it has not sought to ensure Black people have equal access to the right to bear arms now that the right is broader than ever before. More pointedly, the Court has not seemed keen on revisiting its Fourth Amendment policing doctrines that make public carry for Black people particularly precarious.³ For instance, the Supreme Court has not curbed police officers’ practically boundless ability to stop and frisk people on the street.⁴ Nor has the Court rethought the standard governing police use of force, even though it largely inoculates police violence from any meaningful scrutiny.⁵ And the public carry of firearms, particularly by Black people, will likely both exacerbate the number of stop-and-frisks they face, and increase the risk that police will use deadly force against them. In short, while expanding the scope of the Second Amendment right

* Associate Professor of Law, Washington University in St. Louis. Many thanks to Joseph Blocher, Jake Charles, Brandon Hasbrouck, Alexis Hoag-Fordjour, Darrell Miller, and Leila Sadat for their helpful comments and conversations. Mistakes are my own.

¹ 142 S. Ct. 2111 (2022).

² See, e.g., Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537, 546 (2022) (“Justice Alito has been one jurist who has shown more sensitivity to racism in gun laws than to racist motivations elsewhere in the law.”); Melissa Murray, *Thomas and Alito are Appropriating Racial Justice to Push a Radical Agenda*, MOTHER JONES (June 28, 2022), <https://www.motherjones.com/politics/2022/06/thomas-and-alito-are-appropriating-racial-justice-to-push-a-radical-agenda/> [<https://perma.cc/A3DD-KH5K>].

³ See, e.g., Nirej Sekhon, *The Second Amendment in the Street*, 112 NW. U. L. REV. ONLINE 271, 280 (2018) (“Second Amendment advocates should . . . include police reform and racial justice in their core agenda.”).

⁴ See *Terry v. Ohio*, 392 U.S. 1 (1968).

⁵ See *Graham v. Connor*, 490 U.S. 386 (1989).

to bear arms, the Court has shown no appetite to address related jurisprudence that makes the bearing of arms more dangerous for Black people.⁶

Moreover, while the Court cherry-picked from America's racist history of disarming Black people as one reason to refashion Second Amendment rights, the Court has never acknowledged that gun control was also historically used to disarm *white people* prone to racial violence. It would have been nice for the Court to at least give a head nod to this history in light of the recent mass-killings of people of color by white supremacists, showing that the threat of racialized violence is not just historical, it's evergreen.⁷ And besides providing an incomplete historical picture,⁸ the Court has also refused to grapple with what expanding Second Amendment rights portends for Black people *today*.

As this essay explains, itinerant invocations of racial justice are inadequate and potentially harmful. While, as some argued,⁹ the total elimination of gun licensing regimes may result in the reduced prosecution of Black people for simple handgun possession (although it's important to note that Black people are disproportionately prosecuted for violating other gun laws),¹⁰ it also creates a whole new racial justice

⁶ Professors Joseph Blocher and Reva Siegel also point out that the Court has not revisited its equal protection jurisprudence, which makes it exceedingly difficult to hold officials accountable for the disparate policing of Black people. See Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449, 451–52 (2022).

⁷ Nicquel Terry Ellis, 'Traumatizing' Buffalo Massacre Strikes a Chord with Families Who Have Lost Loved Ones to Racist Mass Shootings, CNN (May 22, 2022), <https://www.cnn.com/2022/05/22/us/buffalo-shooting-reaction-other-racist-shootings/index.html> [<https://perma.cc/N8T3-WGSL>] (detailing a number of recent mass shootings by white supremacists).

⁸ The Court's historical analysis in *Bruen* has already taken a lot of heat. See, e.g., Jill Lepore, *The Supreme Court's Selective Memory*, NEW YORKER (June 24, 2022), <https://www.newyorker.com/news/daily-comment/the-supreme-courts-selective-memory-on-gun-rights> [<https://perma.cc/DDZ7-B9B8>]; Saul Cornell, *Clarence Thomas' Latest Guns Decision is Ahistorical and Anti-Originalist*, SLATE (June 24, 2022, 9:26 AM), <https://slate.com/news-and-politics/2022/06/clarence-thomas-gun-decision-bruen-anti-originalist.html> [<https://perma.cc/8FN8-MML9>]; Jake Charles, *Bruen, Analogies, and the Quest for Goldilocks History*, DUKE CTR. FOR FIREARMS L. (June 28, 2022), <https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history/> [<https://perma.cc/3BS8-G5UH>]; Joseph Blocher & Darrell A.H. Miller, *Opinion, A Supreme Court Head-Scratcher: Is a Colonial Musket 'Analogous' to an AR-15?*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/opinion/guns-supreme-court.html> [<https://perma.cc/U9RE-M8ZU>].

⁹ See, e.g., Damon Root, *Gun Control Scheme Harms Black and Hispanic New Yorkers, Public Defenders Tell Supreme Court*, REASON (July 26, 2021, 2:18 PM), <https://reason.com/2021/07/26/gun-control-scheme-harms-black-and-hispanic-new-yorkers-public-defenders-tell-supreme-court/> [<https://perma.cc/CT3Z-6REH>].

¹⁰ See, e.g., Daniel S. Harawa, *The Racial Justice Gambit*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 5, 2022), <https://firearmslaw.duke.edu/2022/01/the-racial-justice-gambit> [<https://perma.cc/GMY6-FK34>] ("[I]n 2020, 55.8 percent of those prosecuted for violating the federal felon in possession of a firearm statute were Black.").

threat *from law enforcement*. Without serious revisions to Fourth Amendment policing doctrines,¹¹ along with a *real* reckoning with the anti-Blackness endemic to America (but not only to America), Black people will never bear arms the same as white people. Or put differently, if a Black person *does* decide to carry a gun as freely as a white person, it will be at their peril. *Bruen* invokes racial justice without considering the full picture of America's racial *injustice*.

In many ways, the modern Second Amendment landscape is just another vignette in the elusive quest of Black people trying to fully realize their equal citizenship. After *Bruen*, the struggle gets more complicated.

I. THE ITINERANT INVOCATION OF RACE

In its modern Second Amendment jurisprudence, the Court has weaponized race in its effort to radically shift the understanding of Second Amendment rights.

Start with *District of Columbia v. Heller*,¹² which constitutionalized the right to lawfully keep arms in the home. In uncovering this constitutional right, the Court pointed to historical sources that purportedly demonstrated an individual right to bear arms in self-defense.¹³ As Justice Scalia explained when writing for the majority, “early-19th century state cases indicated that the Second Amendment right to bear arms was an individual right unconnected with militia service.”¹⁴ But Justice Scalia did not stop there. He made sure to note that one historical “restriction” on this right was that it often “did not extend to free” Black people in America during the times of slavery (it definitely did not extend to enslaved Black people).¹⁵ Justice Scalia then fast-forwarded nearly a century and noted that Black people were also “routinely disarmed by Southern States after the Civil War,” leaving them unable to “defend their homes, families or themselves” from white violence.¹⁶ Justice Scalia made a point to locate the right to bear arms within America's history of anti-Black racism by showcasing how this right, which was granted to white people, was denied to Black people.

Turn to *McDonald v. City of Chicago*.¹⁷ The question there was whether the Fourteenth Amendment incorporates the Second Amendment right to bear arms against the states. In holding that it does, Justice Alito devoted *pages* to detailing the

¹¹ *United States v. Williams*, 731 F.3d 678, 694 (7th Cir. 2013) (Hamilton, J., concurring) (“After *Heller* and *McDonald*, all of us involved in law enforcement, including judges, prosecutors, defense attorneys, and police officers, will need to reevaluate our thinking about these Fourth Amendment issues and how private possession of firearms figures into our thinking.”).

¹² 554 U.S. 570 (2008).

¹³ *See, e.g., id.* at 584–588.

¹⁴ *Id.* at 611.

¹⁵ *Id.*

¹⁶ *Id.* at 614–15 (quotation marks omitted).

¹⁷ 561 U.S. 742 (2010).

“systematic efforts to disarm” Black people after the Civil War.¹⁸ Justice Alito recounted some laws recalcitrant Southern States passed to prohibit Black people from possessing firearms.¹⁹ And he recalled the violence Black people faced (though not providing vivid detail) at the hands of white people intent on forcibly disarming them.²⁰ As Justice Alito told it, one key reason for the Fourteenth Amendment was to guarantee Black people the right to arm themselves so that they had protection from white southerners determined to maintain a pre-Civil War racial hierarchy.²¹

Now at this point you may say that this historical discussion of race was critical to the Court’s resolution of the questions presented. But even if you agree that one must look to history to understand the modern meaning of a constitutional right, what history “counts” when deciding the scope of constitutional rights is not at all clear.²² This methodological slipperiness leaves the Court much room to decide what history matters.²³ And the Court likely could have resolved both *Heller* and *McDonald* without waxing at length about the racist history of gun control.²⁴

By spending so much time discussing race, *Heller* and *McDonald* sent an unmistakable message: in Second Amendment cases, race matters. And implicitly: America’s history of gun control is racist, and thus we must be skeptical of efforts to regulate guns today.²⁵ If you look at the briefing in *Bruen*, this message was received loud and clear. The parties and their amici tried mightily to explain why New

¹⁸ *Id.* at 771–78.

¹⁹ *Id.* at 771.

²⁰ *Id.* at 772.

²¹ *Id.* at 772–73. Justice Thomas made similar points in a protracted concurrence. *See, e.g., id.* at 845–48 (Thomas, J., concurring).

²² As Justice Barrett explained in her concurrence, there is debate over whether “postratification practice may bear on the original meaning of the Constitution,” and there are “unsettled questions” on the permissible uses of history, which the Court did not resolve. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring).

²³ *See, e.g.,* Blocher & Miller, *supra* note 8 (explaining that the test announced in *Bruen* “[e]nlarges rather than reduces judicial power” and that “the fate of gun laws will depend more than ever on the whims of federal judges”).

²⁴ The Court has resolved many incorporation cases without discussing race. *See* Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court’s Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 701 (2022) (providing examples of where the Court has ignored race when conducting incorporation analyses).

²⁵ To be clear, I am not discounting the fact that gun regulation has been used as a tool of racial subjugation. *See, e.g.,* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 338, 344 (1991) (“As further indication that the former slaves had not yet joined the ranks of free citizens, southern states passed legislation prohibiting [Black people] from carrying firearms without licenses, a requirement to which [white people] were not subjected.”). *See generally* CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* (2021) (discussing how the Second Amendment was specifically intended to oppress Black people).

York's concealed carry licensing scheme was or was not consonant with racial justice.²⁶

The briefs took dueling views of history. Briefs in support of New York State Rifle and Pistol Association (NYSRPA) made sure to tie New York's licensing scheme to America's racist history of gun regulation, arguing that the law "is within a similar legacy as the Black Codes and Jim Crow regimes that prohibited the carrying of firearms by African Americans."²⁷ While briefs in support of New York pointed out that gun control laws like New York's were necessary to protect Black people after the Civil War, explaining that "[r]adical Republican governors in the Reconstruction-era South passed laws prohibiting public carry precisely because they were seen as protecting Black freedman from racist violence."²⁸

The briefs also took competing views of the effects of modern-day gun regulation on people of color. Some argued that jettisoning New York's gun licensing scheme would benefit people of color given that "virtually all of [the people] whom New York prosecutes for exercising their Second Amendment rights are Black or Hispanic."²⁹ On the other side, briefs pointed out that Black Americans are far more likely to die from gun violence, and more guns on the streets would lead to more gun violence, including racialized violence.³⁰

Briefs on both sides advocated in good faith³¹ that the racialized history of gun control in America cut in their favor. Briefs on both sides also argued that ruling in their favor would redound to the benefit of Black people today. Thus, the *Bruen* briefing gave the Court plenty of material to work with if it wanted to continue its trend of invoking race in its Second Amendment cases.

The *Bruen* Court seized the opportunity. In canvassing Anglo-American history

²⁶ See Harawa, *The Racial Justice Gambit*, *supra* note 10.

²⁷ Brief for Nat'l Afr. Am. Gun Ass'n, Inc. as Amicus Curiae Supporting Petitioners at *4, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843), 2021 WL 3072862.

²⁸ Brief for Everytown for Gun Safety as Amicus Curiae Supporting Respondents at *18, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843), 2021 WL 4355659.

²⁹ Brief for Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae Supporting Petitioners at *5, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843), 2021 WL 4173477;

³⁰ Brief for NAACP Legal Def. & Educ. Fund, Inc. and the Nat'l Urb. League as Amici Curiae Supporting Respondents at *16–19, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843), 2021 WL 4353021; *see also* Brief for Amnesty International USA and the Gun Violence and Human Rights Initiative of the Whitney R. Harris World Law Institute as Amici Curiae Supporting Respondents at *14–18, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843), 2021 WL 4355657. For data on this point, *see* Leila Nadya Sadat & Madaline M. George, *Gun Violence and Human Rights*, 60 WASH. U. J.L. & POL'Y 1, 8–9 (2019).

³¹ Some amici were more cynical in their invocations of racial justice. *See* Darrell A.H. Miller, *Conservatives Sound Like Anti-Racists—When the Cause is Gun Rights*, WASH. POST (Dec. 27, 2021), <https://www.washingtonpost.com/outlook/2021/10/27/gun-rights-anti-racism-bruen-conservative-hypocrisy/> [<https://perma.cc/W7AF-4ZTB>] (discussing the briefs filed by 27 Republican state attorneys general and 176 members of Congress and asserting that the "hypocrisy on display in these briefs is galling").

for firearm regulations that resembled New York’s “proper cause” standard for issuing concealed carry permits, the Court, with Justice Thomas writing, made sure to highlight mid-to-late 19-century history of gun regulation as it related to race. Justice Thomas noted history showing that concealed carry for Black people in the former Confederacy was critical to their self-protection, and that part of the declaration of equal rights during Reconstruction was the right for Black people to bear arms as white people had long been doing.³² He also noted that this “fundamental right” was “systematically thwarted,” rehashing much the same history that was covered in *Heller* and *McDonald*.³³

But the most eyebrow raising aspect of the “let’s discuss race” part of *Bruen* came in the form of a “prologue,” where Justice Thomas invoked *Dred Scott v. Sandford*, the case that held that people of “African descent” could not be American citizens, to support his point that there is a constitutional right to public carry.³⁴ Yes, Justice Thomas invoked the most reviled case in Supreme Court history, a case that had nothing to do with the Second Amendment, to show that there is a constitutional right to carry firearms outside the home.³⁵ What Justice Thomas said cannot be summarized. Here it is in full:

Even before the Civil War commenced in 1861, this Court indirectly affirmed the importance of the right to keep and bear arms in public. Writing for the Court in *Dred Scott v. Sandford*, Chief Justice Taney offered what he thought was a parade of horrors that would result from recognizing that free blacks were citizens of the United States. If blacks were citizens, Taney fretted, they would be entitled to the privileges and immunities of citizens, including the right “to keep and carry arms *wherever they went*.” Thus, even Chief Justice Taney recognized (albeit unenthusiastically in the case of blacks) that public carry was a component of the right to keep and bear arms—a right free blacks were often denied in antebellum America.³⁶

Thus, Justice Thomas revived *Dred Scott* as a sleeper Second Amendment opinion.³⁷

³² See, e.g., *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2151–52 (2022).

³³ *Id.* at 2151.

³⁴ *Id.* at 2150–51 (citing *Dred Scott v. Sandford*, 19 How. 393 (1857)).

³⁵ To be sure, Justice Thomas was not the first judge to invoke *Dred Scott* in a Second Amendment case. See, e.g., *Parker v. Dist. of Columbia*, 478 F.3d 370, 391 (D.C. Cir. 2007) (Silberman, J.); *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc); *United States v. Emerson*, 270 F.3d 203, 228–29 (5th Cir. 2001).

³⁶ *Bruen*, 142 S. Ct. at 2150–51 (internal citations omitted).

³⁷ Professor Jake Charles had this to say about Justice Thomas’s invocation of *Dred Scott*:

It’s very strange to see *Dred Scott*—the paradigmatic anticonstitutional case—cited approvingly. One might wonder why, if its reasoning about the citizenship of Black Americans is so resoundingly rejected today, we should still think it got this other legal issue

To his credit, Justice Thomas *did* discuss a Reconstruction-Era Texas statute that supported New York’s proper-cause requirement.³⁸ But he dismissed the statute as an “outlier.”³⁹ What Justice Thomas failed to engage with in his discussion of the Texas statute, however, outlier or not, was the fact that it was inspired by mass racial violence, and thus *restricting* the public carry of firearms was seen as necessary to protect Black people.⁴⁰ And Texas was not the only Southern jurisdiction that passed “laws regulating public carry to protect Freedmen from the extreme levels of racist violence from groups like the Klu Klux Klan.”⁴¹ These historical omissions are curious except for the fact that they do not support the narrative thread woven through-out the Court’s Second Amendment cases suggesting that gun control is racist.

Moreover, while Justice Thomas journeyed through Anglo-American history to establish the unconstitutionality of New York’s permitting scheme,⁴² he made no effort to explain the racial implications of the Court’s holding for the world today. In fact, *Bruen* explicitly shunned any relevance of modern-day realities when considering the lawfulness of firearm regulations, holding that what matters for Second Amendment purposes is history, and history alone.⁴³

The dissent disagreed with the majority’s refusal to consider present day realities. To emphasize this disagreement, the dissent opened with a stunning synopsis of America’s gun violence epidemic. It recounted that in 2020 alone, “45,222 Americans were killed by firearms,” and since the start of 2022, “there have been 277 reported mass shootings—an average of more than one per day.”⁴⁴ The dissent

correct. But even besides that, the throwaway line in *Dred Scott* is quite clearly *incorrect*, since even Justice Thomas acknowledges that on any understanding of the public carry right, it did *not* grant a right to carry “wherever” someone wants—private property can obviously be off limits, as can the sensitive places that the opinion assured are grounded in historical precedent.

Charles, *supra* note 8.

³⁸ *Bruen*, 142 S. Ct. at 2153.

³⁹ *Id.*

⁴⁰ Mark A. Frassetto, *The Nonracist and Antiracist History of Firearms Public Carry Regulation*, 74 SMU L. REV. F. 169, 175 (2021) (detailing other Southern States that restricted public carry around Reconstruction). And historian Brennan Rivas has challenged the notion that all public carry restrictions in the South were driven by racism, and instead furthered public safety concerns. *See, e.g.*, Brennan Gardner Rivas, *The Problem with Assumptions: Reassessing the Historical Gun Policies of Arkansas and Tennessee*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 20, 2022), <https://firearmslaw.duke.edu/2022/01/the-problem-with-assumptions-reassessing-the-historical-gun-policies-of-arkansas-and-tennessee> [<https://perma.cc/ULM4-Y33B>].

⁴¹ Frassetto, *supra* note 40.

⁴² The dissent questioned how thorough a journey through history this was. *See Bruen*, 142 S. Ct. at 2164 (Breyer, J., dissenting).

⁴³ *See id.* at 2127 (majority opinion).

⁴⁴ *Id.* at 2163 (Breyer, J., dissenting).

pointed out communities of color are disproportionately affected by gun violence.⁴⁵ And the dissent detailed several of the most recent and horrific mass shootings.⁴⁶

The dissent prompted Justice Alito to write separately to respond. In a concurrence that will give you whiplash, Alito, on one hand, painted a dystopian picture of a world where people need to protect themselves (presumably from Black people) as they “traverse dark and dangerous streets” on their way home.⁴⁷ On the other hand, he cited briefs from racial justice groups whose “members feel that they have special reasons to fear attacks,” and highlighted a story from a brief filed by Black public defenders where a client, who had bought a gun out “of fear of victimization,” was “arrested, prosecuted, and incarcerated.”⁴⁸ On yet a third hand, Alito flippantly dismissed a recent white supremacist shooting in Buffalo that left ten Black people dead, saying that the “New York law at issue in [*Bruen*] obviously did not stop that perpetrator.”⁴⁹ And Justice Alito said all this while asserting that *none* of it mattered.

That Justice Alito crammed this all into one concurrence is remarkable. He managed to channel his inner Bernhard Goetz and the need carry to a gun to protect oneself from roving gangs of Black predators.⁵⁰ He also showed, as Professor Melissa Murray put it, some “racial wokeness,”⁵¹ proclaiming that people of color need guns as they feel vulnerable to attack (he does not mention from whom). And at the same time, he displayed incredible callousness to the value of Black lives, shrugging off the fact that a radicalized white man had, *just weeks earlier*, driven to a predominately Black neighborhood and opened fire *in a grocery store in the middle of the day*, massacring ten Black people.⁵²

What work is race doing the Court’s Second Amendment jurisprudence? In many ways, it resembles the worst of what Professor Derrick Bell coined “interest convergence.”⁵³

⁴⁵ *Id.* at 2165.

⁴⁶ *Id.* Another stunning fact about gun violence: “nearly three million children in the United States witness a shooting each year.” Leila Nadya Sadat, *Torture in Our Schools?*, 135 HARV. L. REV. F. 512, 524 (2022).

⁴⁷ *Bruen*, 142 S. Ct. at 2158 (Alito, J., concurring). At oral argument, Justice Alito posited that there are “all these people with illegal guns” on the subway who people need to protect themselves from. See Transcript of Oral Argument at *68–69, *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843), 2021 WL 6051152.

⁴⁸ *Bruen*, 142 S. Ct. at 2159 (Alito, J., concurring).

⁴⁹ *Id.* at 2157.

⁵⁰ See Jonathan Lowy, *Alternate Facts, Dueling Realities, and the Second Amendment: On NYSRPA v. Bruen*, N.Y.U. L. REV. F. (Nov. 15, 2021), <https://www.nyulawreview.org/forum/2021/11/alternate-facts-dueling-realities-and-the-second-amendment-on-nyspra-v-bruen/> [<https://perma.cc/KGT7-VJ6B>].

⁵¹ See Murray, *supra* note 2.

⁵² See Drew Harwell & Will Oremus, *Only 22 Saw the Buffalo Shooting Live. Millions Have Seen it Since*, WASH. POST (May 16, 2022, 6:13 PM), <https://www.washingtonpost.com/technology/2022/05/16/buffalo-shooting-live-stream/> [<https://perma.cc/83JQ-R6RW>].

⁵³ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). Professor Gregory Parks discussed interest convergence in a slightly

In discussing the desegregation of American public schools and the *Brown v. Board of Education* litigation, Bell hypothesized that the “the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”⁵⁴ Bell contended that the issues surrounding school desegregation “cannot be understood without some consideration of the decision’s value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation.”⁵⁵

The Court has consistently justified expanding Second Amendment rights by positing that those rights have always existed, just not for Black people. Thus, America’s history of anti-Black racism has been used to justify the expansion of Second Amendment rights. But Bell’s theory of “interest convergence” is warped in the Second Amendment context. The Court is not aligning the expansion of the Second Amendment with the interests of Black people *today* (although Justice Alito in his concurrence does give a head nod toward the racial justice groups that supported expanding Second Amendment rights in *Bruen*, while ignoring those that did not). Rather, the Court aligns itself with a historical time where Black people were denied rights to suggest it would have been nice if *those* Black people could have armed themselves in the face of racist white southerners’ intent on violently relegating them back to the status of slave.

To be sure, it would be hard for the Court to divine a singular set of interests of Black people today because Black gun ownership is complicated.⁵⁶ Some advocating on behalf of Black people celebrated the outcome of *Bruen*.⁵⁷ Others decried the

different way. Speaking from the perspective of a Black gun owner, Parks argued that Black gun owners “find themselves between a rock and a hard place when it comes to gun ownership” because while “Republicans may support the advancement of Second Amendment rights,” they “too often have regressive views and policies regarding racial progress.” Whereas “Democrats may have more progressive views and policies on race, but their approach on the Second Amendment is quite constrained.” Gregory S. Parks, *When CRT Meets 2A*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 11, 2022), <https://firearmslaw.duke.edu/2022/01/when-crt-meets-2a> [<https://perma.cc/YV8Z-V3US>].

⁵⁴ Bell, Jr., *supra* note 53, at 523.

⁵⁵ *Id.* at 524.

⁵⁶ See, e.g., Elie Mystal, *Why are Public Defenders Backing a Major Assault on Gun Control?*, NATION (July 26, 2021), <https://www.thenation.com/article/society/black-gun-owners-court/> [<https://perma.cc/A2EV-GZPY>] (exploring some of the tensions that arise from Black gun ownership).

⁵⁷ See, e.g., Aimee Carlisle, Christopher Smith & Michael Alexander Thomas, Opinion, *The Supreme Court’s Gun Ruling Was a Victory Over Racist Policing*, WASH. POST (June 28, 2022, 8:11 AM), <https://www.washingtonpost.com/opinions/2022/06/28/supreme-court-new-york-guns-racist-policing/> [<https://perma.cc/D6VS-W4WP>].

decision.⁵⁸ The Court sidesteps this complicated issue, however, by selectively relying on history.⁵⁹ And through this reliance, the Court has spun the meta narrative that gun control is racist without having to worry about the consequences of expanding the Second Amendment for living and breathing Black people, and without thinking about whether Black people today will be able to fully exercise their Second Amendment rights as newly envisioned by the Court. Thus, the Court's methodological choices allowed it to claim a racial justice mantle without delving into the complicated racial dynamics of gun ownership in 21st Century America, including how its other doctrines have made gun ownership particularly perilous for Black people. *Bruen* called itself vindicating the rights of the ancestors without considering what the decision would mean for their progeny.⁶⁰ And the Court did so without acknowledging how, in its other areas of jurisprudence, it has consistently thwarted the Constitution's power and promise of ensuring Black people's equal citizenship.⁶¹

II. A RIGHT FOR THEE BUT NOT FOR ME

Long before the Court redefined the Second Amendment, critical race scholars explored how Fourth Amendment doctrine has contributed to the subordination of Black Americans.⁶² Scholars have been particularly critical of the Court's decision in *Terry v. Ohio*.⁶³ *Terry* created a world where it is constitutional for police to stop someone so long as they have "reasonable suspicion of criminal activity" rather than probable cause—the standard needed to get a warrant.⁶⁴ Then, *Terry* allows police

⁵⁸ See, e.g., NAACP Legal Defense & Educational Fund, Inc., *LDF Statements on Supreme Court Ruling New York State Gun Law Unconstitutional* (June 23, 2022), <https://www.naacpldf.org/press-release/ldf-statements-on-supreme-court-ruling-new-york-state-gun-control-law-unconstitutional/> [https://perma.cc/NEP4-QY2B].

⁵⁹ See Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1098 (2009) (describing "law office history" as "a results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion").

⁶⁰ As Professor Khiara Bridges so clearly put it: In *Bruen*, the Supreme Court "struck down the facially race-neutral licensing scheme at issue in order to, among other things, be able to say that it saved black people from a racist disarmament that began at the end of Reconstruction." Khiara M. Bridges, Foreword, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 31 (2022). Much of Professor Bridges' discussion of *Bruen* in her groundbreaking Foreword is simpatico with the analysis here. Unfortunately, the Foreword came out as this essay was virtually on its way to the printer, and thus I am unable to give it the full treatment it undoubtedly deserves. I commend readers to take the time to read Professor Bridges' discussion of *Bruen*, indeed, the entire Foreword, and meditate on its brilliance. I look forward to engaging with Professor Bridges' Foreword more fully in future work.

⁶¹ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

⁶² See, e.g., Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 969 (2002).

⁶³ 392 U.S. 1, 20–21 (1968).

⁶⁴ See Renée McDonald Hutchins, *Stop Terry: Reasonable Suspicion, Race, and a Proposal to*

to frisk someone if they have reasonable suspicion to believe that they are “armed and dangerous.”⁶⁵ As Professor Devon Carbado argued, *Terry*’s malleable standard makes it easy “for police officers to engage African Americans with little or no evidence of criminal wrong doing.”⁶⁶

Now think about what happens when a malleable stop-and-frisk standard collides with Black people lawfully carrying guns in public. Before *Bruen*, Black people were already stopped and frisked at disproportionately high rates in part because police just *suspected* them of being illegally armed.⁶⁷ For instance, in 2020, New York City reported that 56 percent of people police stopped were Black.⁶⁸ That same year in Philadelphia, Black men accounted for sixty-five percent of police stops.⁶⁹ Over a four-week period in 2019 in Washington, DC, seventy percent of the people police stopped were Black.⁷⁰ Data from across the country also show that once stopped, Black people are far more likely to be searched.⁷¹

What happens in a post-*Bruen* world where it’s easy to get a concealed carry permit? Will police stop targeting people of color out of fear of them being armed? Pre-*Bruen* case law suggests not.

Even in states where it was *legal* to openly carry firearms pre-*Bruen*, police officers justified stopping Black people for having guns because, according to them,

Limit Terry Stops, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 883, 884 (2013) (“Prior to 1968, the Supreme Court consistently held that the Fourth Amendment demanded a substantial showing of probable cause before police could meaningfully interfere with liberty or privacy interests.”).

⁶⁵ 392 U.S. at 27.

⁶⁶ Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio’s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1513 (2017); see also Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1277 (1998) (opining *Terry* “authorized a police practice that was being used to subvert the Fourth Amendment rights of blacks nationwide”).

⁶⁷ See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding that the New York City Police Department’s stop-and-frisk practices were racially discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment, where 84% of those stopped were Black or Latinx, and where despite the stated purpose of the policy of removing guns from the streets, police recovered weapons and contraband only 2% of the time).

⁶⁸ ACLU OF NEW YORK, *Stop-and-Frisk Data*, <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/UDM3-DBEH>].

⁶⁹ Chad Pradelli & Cheryl Mettendorf, *Action News Investigation: Racial Disparity in Philadelphia Police Use of Stop-and-Frisk, Data Shows*, ABC ACTION NEWS (Feb. 3, 2021), <https://6abc.com/stop-and-frisk-philadelphia-data-philly/6413942/> [<https://perma.cc/L4U4-CD46>].

⁷⁰ METROPOLITAN POLICE DEPARTMENT, WASHINGTON, DC, STOP DATA REPORT: SEPTEMBER 2019 12 (Sept. 9, 2019), available at <https://mpdc.dc.gov/publication/stop-data-report-july-22-august-18-2019> [<https://perma.cc/T9U6-YR57>].

⁷¹ Sharad Goel & Cheryl Phillips, *Police Data Suggests Black and Hispanic Drivers are Searched More Often than Whites*, SLATE (June 19, 2017, 12:38 PM), <https://slate.com/technology/2017/06/statistical-analysis-of-data-from-20-states-suggests-evidence-of-racially-biased-policing.html> [<https://perma.cc/7X9Z-TPRB>] (discussing the findings of the Stanford Open Policing Project).

they were not used to seeing Black people exercising their legal right to arm themselves.

Take *United States v. Black* out of North Carolina.⁷² There, police approached a group of Black men and conducted an investigatory stop in part because one of them had a holstered handgun on his hip.⁷³ The officers had a “Rule of Two”—if there’s one gun, “there will most likely be another.”⁷⁴ Open carry was legal in North Carolina.⁷⁵ But the officer testified that he had “never seen anyone” in his patrol area—a predominately Black, “high crime” neighborhood—lawfully carry a firearm.⁷⁶

The Fourth Circuit ultimately held that the officers did not have reasonable suspicion to conduct an investigatory stop, reasoning that “where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention.”⁷⁷ Still, the officers’ reason for stopping Mr. Black and his friends is worth unpacking.

The officers in the case justified stopping a group of Black men because in their “experience,” Black people do not lawfully exercise their Second Amendment rights. This was not just the hunch of a couple of random officers. Apparently, this belief was so widespread in this police department that there was an unofficial “rule” stating that when one (Black) person in this area is carrying a gun (presumed illegally), then at least one other (Black) person in their presence must also be carrying a gun (also presumed illegally). Thus, even in a jurisdiction where open carry was the law, it was still thought that Black people would not comply with the law. And it’s fair to assume that the officers in this police department are not alone in their prejudgment of Black criminality.⁷⁸

Sure, the court in *Black* ultimately vindicated the defendant’s rights by finding a Fourth Amendment violation, but this was only after Mr. Black was convicted at trial and sat in prison while his appeal was pending. For most Black citizens, there will be no court hearing. Once an officer subjects them to the “inconvenience” of a stop and finds nothing amiss, they often will let them go, perhaps showing some “grace” by issuing a warning for some minor infraction that was never the reason

⁷² *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013).

⁷³ *Id.* at 535.

⁷⁴ *Id.* (quotation marks omitted).

⁷⁵ *Id.* at 540.

⁷⁶ *Id.*

⁷⁷ *Id.* For further discussion of *Black*, see Daniel S. Harawa & Brandon Hasbrouck, *Antiracism in Action*, 78 WASH. & LEE L. REV. 1027, 1032–36 (2021).

⁷⁸ See M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 335 (2018) (“[S]tudies have shown that implicit bias causes police officers to interpret ambiguous behavior of African Americans as criminal or dangerous. Police officers are more likely to perceive black and Hispanic men to be ‘large’ and are more likely to stop, frisk, search, and use force against African American and Hispanic men whom they perceive to be tall and heavy-set. On-the-street data suggests that bias influences stop-and-frisk decisions and escalates brief stop-and-frisk procedures into full-blown searches even in the absence of probable cause.”).

for the stop in the first place. And even if an officer now knows that possession of a gun alone cannot justify an investigatory stop, that does not mean that officers will simply ignore a Black person with a gun. Instead, police officers can cobble together facts on top of the presence of a gun—a “high-crime” neighborhood, “furtive” gestures, and so on—to justify their suspicion.

Then, once a police officer stops a Black person lawfully carrying a gun, that Black gun owner surely is at much greater risk of being frisked, just as Black people more generally are at greater risk of being searched after a stop. Indeed, some courts have held that once a person is lawfully stopped, if an officer has reason to believe that the person is carrying a gun, the officer *always* can conduct a frisk. These courts have found it “inconsequential” that the person may have been lawfully permitted to carry the weapon.⁷⁹

Courts holding that the fact a person is lawfully armed is *reason enough* to conduct a frisk portends yet another indignity that Black people will disproportionately bear for exercising their Second Amendment rights. And it is no small indignity. A benign sounding “frisk” entails an officer thoroughly probing a person’s most sensitive areas, including their “waistband, front and back pockets, groin, and buttocks.”⁸⁰

In short, the consequences are this: the Supreme Court’s Fourth Amendment doctrine combined with bloated criminal codes have made it exceedingly easy for police officers to justify an investigatory stop.⁸¹ And police officers wield their vast power to conduct stops against Black people at disproportionately high rates. Then, once a person is stopped, police choose to search Black people at disproportionately high rates. And now, according to some courts, police can frisk a person once they are lawfully stopped if they are armed. Putting it all together, Black people lawfully carrying guns in public increases the chance that they will be stopped and searched. The price of Black people exercising their Second Amendment rights may well be their Fourth Amendment freedoms.

⁷⁹ *United States v. Robinson*, 846 F.3d 694, 696 (4th Cir. 2017) (en banc); *see, e.g., United States v. Pope*, 910 F.3d 413, 416 (8th Cir. 2018) (“We believe that the Supreme Court has already authorized police officers to frisk a suspect reasonably believed to be armed even where it could be that the suspect possesses the arms legally. In *Adams v. Williams*, the Court emphasized that the purpose of a *Terry* frisk is not to discover evidence of a crime ‘but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law.’ 407 U.S. 143, 146 (1972).” (part of citation omitted)).

⁸⁰ Seth W. Stoughton, *Terry v. Ohio and the (Un)Forgettable Frisk*, 15 OHIO ST. J. CRIM. L. 19, 29 (2017).

⁸¹ As proof of how easy it is for police to legally stop someone, Professor Paul Butler tells the story of a “cop friend” who “invented a game” called “Pick a Car,” where he would take “law students on ride-alongs in his squad car” and tell them “to pick *any* car they see on the street.” PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 59 (2017) (emphasis added). The officer would then provide a legal basis to stop the car. *Id.*

But it's not only the inconvenience of a stop and frisk that Black gun owners' face (again, no small inconvenience). Current Fourth Amendment doctrine also increases the risk that the encounter will turn deadly. The Supreme Court has held that when judging an officer's use of force, courts must apply an "objective reasonableness" test, viewing the encounter from the perspective of a "reasonable officer on the scene."⁸² What this has meant in practice is that all "an officer has to say is, 'I feared from my life'" to justify their use of force.⁸³

Studies show that the likelihood of Black "men being killed by the police is more than three times that of white men, despite their much lower prevalence in the population."⁸⁴ Police are also more likely to use nonfatal force against Black people.⁸⁵ The reasons behind this differential use of force are complicated, extending far beyond conscious bias.⁸⁶ That said, one driving factor behind the disproportionately high use of force against Black people is that "white Americans associate African-American men with violence and dangerousness."⁸⁷

When the standard for use of force hinges on an officer's threat perception, then in a world that often associates Blackness with dangerousness it should be of no surprise that a lenient use-of-force standard has led to police using force against Black people at disproportionately high rates. Now add guns to the equation. If Blackness alone is connoted with dangerousness, then Black people carrying guns in public will only amplify the perceived threat level and increase the risk that their presence will be met with deadly force.⁸⁸ The story of Philando Castille, whom police shot and killed during a routine traffic stop after he alerted the officer to the fact

⁸² *Graham v. Connor*, 490 U.S. 386, 388, 398 (1989).

⁸³ David D. Kirkpatrick, *Split-Second Decisions: How a Supreme Court Case Shaped Modern Policing*, N.Y. TIMES (Apr. 25, 2021), <https://www.nytimes.com/2021/04/25/us/police-use-of-force.html> [https://perma.cc/4T5R-V9MR] (quote from Professor Jeffrey Fagan).

⁸⁴ Denise Herd, *Cycles of Threat: Graham v. Connor, Police Violence, and African American Health Inequities*, 100 B.U. L. REV. 1047, 1050 (2020).

⁸⁵ See, e.g., Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210 (2019); see Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. REV. 1465 (2018).

⁸⁶ See Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 161–62 (2016).

⁸⁷ *Id.* at 168; see also Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, in *POLICING THE BLACK MAN* 3, 5 (Angela J. Davis ed., 2017).

⁸⁸ As Professor Adam Winkler explained, "When you have a right to have arms, you have a right to carry around something other people would see as a threat. Generally, we allow police officers to use force when they feel threatened. And merely possessing a gun raises that threat." Lawrence Hurley, Andrew Chung & Andrea Januta, *When Cops and America's Cherished Gun Rights Clash, Cops Win*, REUTERS (Nov. 20, 2020), <https://www.reuters.com/investigates/special-report/usa-police-immunity-guns/> [https://perma.cc/VJ3Z-FXKB]. Professor Alice Ristroph argued that "real progress toward racial equality will likely require a much broader and deeper effort to expose and then reject the naturalized conception of criminality that underpins . . . the new jurisprudence of the Second Amendment." Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203, 237 (2021).

that he was lawfully carrying a gun, painfully proves this point.⁸⁹

The precarity of gun ownership is not lost on Black people. They know that being armed creates an extra layer of risk if police stop them.⁹⁰ They also understand that increased gun ownership among Americans more broadly creates an extra layer of risk given the anti-Black sentiment and rising white nationalism in some segments of society.⁹¹ Not to mention the growing danger of stand-your-ground laws, under which the shooting of Black people is far more likely to be deemed justifiable self-defense.⁹² And yet, in what is a truly African American tale, there are Black people willing to exercise their rights, and even die for their rights, because it *is* their right.⁹³

Even if the Supreme Court one day decided to wake to the modern-day realities of race,⁹⁴ it could never fix the anti-Black bias prevalent in American society. The Court cannot magically disassociate Blackness from criminality in the minds of police officers patrolling the streets. The Court's decisions cannot single-handedly stop a white supremacist from gunning down a group of Black people as they pray at Wednesday Bible Study or shop for Sunday dinner. The Court will not prevent people from "standing their ground" when they perceive a Black person—adult *or child*—as a threat.⁹⁵ But what the Court *did* do is make it easier for people to violently act out their own racial biases while purposefully blinding itself to the fact that these biases exist.

The Supreme Court weaponized America's history of anti-Black racism to expand Second Amendment rights, without bothering to contemplate how its doctrines, along with America's history of anti-Black racism complicate, and ultimately frustrate, Black people's ability to exercise those rights today.

⁸⁹ See Hurley, Chung, & Januta, *supra* note 88. As the killings of Amir Locke and Breonna Taylor show, it is not even clear whether Black people will ever be able to equally exercise their right to arm themselves in their own homes.

⁹⁰ See, e.g., Lela Moore, 'I Am the "Good Guy with a Gun": Black Gun Owners Reject Stereotypes, Demand Respect', N.Y. TIMES (Dec. 8, 2018), <https://www.nytimes.com/2018/12/08/reader-center/gun-rights-black-people.html> [<https://perma.cc/N8JJ-GEQG>].

⁹¹ Alana Wise, *Black Gun Owners Have Mixed Feelings about the Supreme Court's Concealed-Carry Ruling*, NPR (July 13, 2022, 3:16 PM), <https://www.npr.org/2022/07/13/1110570938/black-gun-owners-supreme-court-concealed-carry-new-york> [<https://perma.cc/XF5H-QWUF>].

⁹² See Kami Chavis, *The Dangerous Expansion of Stand-Your-Ground Laws and its Racial Implications*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 18, 2022), <https://firearmslaw.duke.edu/2022/01/the-dangerous-expansion-of-stand-your-ground-laws-and-its-racial-implications> [<https://perma.cc/28BC-ANR4>]; see generally Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639 (2019). For important critiques of stand your ground laws, see Joseph Blocher, Samuel W. Buell, Jacob D. Charles, and Darrell A.H. Miller, *Pointing Guns*, 99 TEX. L. REV. 1173 (2021).

⁹³ See, e.g., Wise, *supra* note 91.

⁹⁴ This seems unlikely. See Blocher & Siegel, *supra* note 6 at 461 (doubting that the Court will "find the cases requiring deference to prosecutorial discretion in the criminal justice system an intolerable threat to equal protection rights").

⁹⁵ See Chavis, *supra* note 92.

CONCLUSION

Before *Bruen* came out, I wrote that no matter what happens, Black people stand to lose.⁹⁶ Here we are. We lose because we have a Court that's invoking race when convenient but ignoring it when not. We lose because, while itinerantly invoking racial justice, the Court is at the same time hurriedly working to dismantle race-conscious protections designed to ensure Black Americans' full and equal citizenship. We lose because the Court has stripped us of our agency, depriving Black people (and all others) of the democratic power to enact laws that best serve our interests.⁹⁷ We lose because whatever the scope of the Second Amendment, the scope will always be more limited for Black people. So much for racial justice.

⁹⁶ See Harawa, *The Racial Justice Gambit*, *supra* note 10.

⁹⁷ See, e.g., Blocher & Siegel, *supra* note 6 at 449 (arguing that "racial justice concerns" animating debates about gun regulations "should be addressed in democratic politics rather than in federal courts").