

From Ballots to Bullets: *District of Columbia v. Heller* and the New Civil Rights

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“The question tonight, as I understand it, is . . . what next? In my little humble way of understanding it, it points toward either the ballot or the bullet.”

Malcolm X¹

I. INTRODUCTION

In the mass of legal documents filed on behalf of the respondent in the recent Second Amendment case *District of Columbia v. Heller*, one stands out.² The Congress of Racial Equality, or CORE,

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1. Malcolm X, Address, The Ballot or the Bullet, Cleveland, Ohio (Apr. 3, 1964), *reprinted in* MALCOLM X SPEAKS 23 (George Breitman ed., 1965).

2. 128 S. Ct. 2783 (2008).

the same organization that orchestrated the freedom rides in 1961 and hosted Malcolm X's "Ballot or the Bullet" speech in Cleveland in 1964, submitted a brief supporting the individual right to bear arms.³ Forty pages in length, the document provided well-substantiated examples of how law had long been used to keep guns from African-Americans, particularly during slavery, Reconstruction, and the early part of the twentieth century.⁴ Then, in a remarkable move, the brief maintained that even current gun control efforts in the twenty-first century are motivated by a basic fear that minorities, particularly African-Americans, "are not to be trusted with firearms."⁵

CORE's claim that gun control is racist raises a variety of questions about the constitutional implications of *Heller*. First, how, if at all, is the regulation of arms racially discriminatory? Second, what rights, if any, do arms regulations infringe? Third, if arms regulations are discriminatory, does this make *Heller* a victory for civil rights?

Borrowing from Derrick Bell's interest convergence thesis, this Article posits that *Heller* is a victory for civil rights, but not in the sense that most activists from the 1960s would recognize.⁶ Rather than a product of mid-century legal liberalism, *Heller* marks the culmination of almost forty years of coalition-based popular constitutionalism aimed at transforming the individual right to bear arms and the common law right to "employ deadly force in self-defense" into *new* civil rights.⁷ Frustrated by legal liberalism's

3. Brief for Congress of Racial Equality as Amicus Curiae Supporting Respondent, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) [hereinafter CORE Brief]. For CORE's role in the freedom rides, see RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* 50-60 (2006). For a general history of CORE, including an account of its turn to the right in the 1960s, see AUGUST MEIER & ELLIOTT RUDWICK, *CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT, 1942-1968* (1973).

4. CORE Brief, *supra* note 3, at 4-24.

5. *Id.* at 24.

6. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

7. The "right of individuals to employ deadly force in self-defense" is a quote directly from the NRA's *Heller* brief. See Brief for the National Rifle Association and the NRA Civil Rights Defense Fund as Amici Curiae Supporting Respondent at 30, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) [hereinafter NRA Brief]. I borrow the term "popular constitutionalism" from Larry Kramer. See *generally* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). While Kramer provides several good examples of non-judicial constitutional interpretation and mobilization in the nineteenth century, I could just as easily rely on the work of Reva Siegel, Robert Post, and William Eskridge to illustrate the role that left-centered social movements have played in

failure to control violent crime, a bi-racial coalition of black and white conservatives adopted the very same rights talk deployed by the NAACP and Martin Luther King, Jr. in the 1950s and 1960s to advance a pro-gun, pro-self-defense agenda in the 1970s and 1980s. Perhaps the biggest proponent of this agenda, the National Rifle Association (NRA) reframed the right to bear arms and the right to self-defense as civil rights that were firmly established at the time of the founding and therefore deserving of constitutional protection.⁸

While much of the campaign to consecrate guns drew from what Jeffrey R. Dudas and others have identified as the “politics of resentment,” a notion that certain minorities, particularly criminal defendants have received special rights, not all of it was animated by anti-minoritarian sentiment.⁹ At least some of the push for guns

constitutional change in the twentieth century. See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001). See also MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (arguing that the Supreme Court rarely enters an area without some degree of political support for its positions, support often mobilized by non-judicial actors).

8. The NRA identifies private gun ownership and the right to use deadly force in self-defense as nothing less than “human,” “civil,” and “constitutional rights.” See NRA Brief, *supra* note 7, at 2. As for self-defense, the NRA notes that the “essential right to self-defense, including defense of the home, has always been engrained in American jurisprudence.” *Id.* at 31.

9. Jeffrey R. Dudas, *In the Name of Equal Rights: “Special” Rights and the Politics of Resentment in Post-Civil Rights America*, 39 LAW & SOC’Y REV. 723, 731 (2005). For earlier exponents of the politics of resentment, see generally DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* (1995); WILLIAM E. CONNOLLY, *IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* (1991); THOMAS B. EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1991); STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH (AND IT’S A GOOD THING TOO)* (1994); GARRY WILLS, *NIXON AGONISTES: THE CRISIS OF THE SELF-MADE MAN* (1970). Just as the NAACP argued that state regulations on interracial contact harmed innocent citizens, for example, so too did groups like CORE, the National Rifle Association, and the Institute for Justice maintain that state regulation of guns caused substantial harm as well. By turning to the hortatory language of rights, conservatives maintained that recognizing a right to bear arms and a right to self-defense were not in conflict with the civil rights movement, but were actually necessary to fulfill its promise.

came from a genuine belief that firearms bolstered civil rights by deterring violent crime without inviting the rights-averse tyranny of a police state.¹⁰ Convinced that they were carrying on the mantle of the civil rights movement by safeguarding liberty, both CORE and the NRA pushed private ownership of firearms as essential to any meaningful “human, civil, or constitutional” rights regime.¹¹

Interestingly, the NRA even challenged the NAACP’s reputation as the nation’s preeminent civil rights group, declaring itself to be the “oldest civil rights organization” in America in its *Heller* brief.¹² While this claim would have certainly rankled veterans of the civil rights movement like former Justice and NAACP lawyer Thurgood Marshall, it did not rile the present Court.¹³ In fact, the Court rejects arguments made by the NAACP in *Heller*, siding instead with the NRA and CORE.¹⁴

What does the anointing of CORE and the NRA as arbiters of civil rights mean? As this Article will show, *Heller* marks the beginning of a new chapter of civil rights constitutionalism animated by a new convergence of white and black interests around the kinds of civil rights that deserve constitutional protection. According to Derrick Bell, interest convergence occurs

10. The NRA emphasizes firearms as deterrents in its brief. NRA Brief, *supra* note 7, at 32. Scalia emphasizes private gun ownership as a defense against the “tyrant.” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801 (2008).

11. NRA Brief, *supra* note 7, at 2.

12. *Id.* at 1.

13. See, e.g., MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994).

14. The NAACP’s argument rests on four basic premises, namely that the Second Amendment does not protect an individual right to keep and bear arms and that finding an individual right to bear arms would disrupt firearms regulations nationwide, prevent states from dealing with gun violence, and fail to address problems of racial justice in criminal law. See Brief for NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Petitioners at 6, 18, 25, 29–30. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) [hereinafter NAACP Brief]. While the Supreme Court does not mention the NAACP’s brief expressly, it rejects its claims that the Second Amendment protects a collective right and that upholding an individual right to bear arms either disrupts state law or prevents states from dealing with gun violence. See *Heller*, 128 S. Ct. at 2788–2805, 2816–22. That the vision of civil rights dominant in the 1960s has declined in national popularity is not a novel claim. Philip A. Klinkner and Rogers M. Smith, two of many prominent scholars of twentieth century race relations, both show that the post-civil rights era was one of resentment and retrenchment on the part of the majority against minority gains. That being said, neither Klinkner nor Smith seem to realize that “resentment” aside, average middle class white voters might have actually believed that their rights, and Americans’ rights generally, were reinforced by guns. See generally PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA (1999).

when even the slightest black interest converges with white interests to produce a civil rights victory.¹⁵ Without such a convergence, argues Bell, there tend not to be civil rights gains, meaning that the NAACP's victory in *Brown v. Board of Education* in 1954 happened not simply because the Court wanted to correct racial injustice, but because there were other interests at stake as well.¹⁶ Perhaps foremost among these was a governmental imperative to improve America's Cold War image.¹⁷

The Cold War, of course, is over. However, *Heller* suggests that a new convergence of interests has occurred, one that unites gun rights enthusiasts, small government conservatives, and a distinct minority of black voters who maintain that the deregulation of arms promotes security and bolsters liberty.¹⁸ This claim, made by several briefs in *Heller*, manifests itself in the articulation of two new civil rights. The first, the individual right to bear arms, empowers the Supreme Court to overturn unreasonable federal regulations of private arms as a violation of the Second Amendment. The second, the right to "employ deadly force in self-defense," gives the Court the power to overrule regulations that impinge on citizens' efforts to guard themselves and their homes, independent of Second Amendment concerns.¹⁹

This last right, generally treated as a creature of criminal law, is one of the more subtle contributions of *District of Columbia v. Heller*.²⁰ Following CORE's suggestion that the right to self-defense is a "fundamental right" and the NRA's suggestion that it is an "essential right," the Supreme Court held that self-defense is in fact an "inherent right" capable of protecting those arms

15. Bell, *supra* note 6, at 523.

16. *Id.*

17. *Id.* at 524.

18. In explaining the Supreme Court's decision in *Brown*, Bell maintained the "interest of blacks" was only "accommodated" by the Supreme Court when it "converges" with the interests of whites. *Id.* at 523.

19. NRA Brief, *supra* note 7, at 30. I refer to the individual right to bear arms as a new civil right for two reasons. One, *Heller* is the first time that the Supreme Court has endorsed such a right. Two, even though proponents of the individual right have claimed that it predates the founding, it is only since the 1970s that it has been framed as a "civil" right. See, e.g., CONSTANCE EMERSON CROOKER, GUN CONTROL AND GUN RIGHTS 41–76 (2003).

20. Most constitutional law treatises do not include the right to self-defense as a fundamental right worthy of constitutional protection. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (1997); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000). Instead, the right is generally covered in criminal law texts as a subset of the justification defense. See, e.g., SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES 738–83 (8th ed. 2007); WAYNE R. LAFAVE, CRIMINAL LAW 539–50 (4th ed. 2003).

“overwhelmingly chosen by American society” to defend self, family, and property.²¹ One of those arms, what Scalia terms the “quintessential self-defense weapon,” is the handgun.²²

The implications of the Court recognizing self-defense as a fundamental right are potentially great. For one, *Heller*’s affirmation of self-defense provides a constitutional basis for protecting arms that does not necessarily rely on incorporating the Second Amendment to the states.²³ By identifying an “inherent” right to self-defense, the Court suggests that draconian state bans on the “quintessential self-defense weapon,” the handgun, will never pass constitutional review regardless of Second Amendment concerns.²⁴ As several briefs filed in *Heller* suggest, such bans either deprive “persons” of their “liberty” to defend their lives and homes, in violation of the Fourteenth Amendment’s Due Process Clause;²⁵ or, conversely, they strip “citizens” of one of their most important “privileges and immunities,” the privilege to own a gun for self-defense and the immunity from prosecution in cases of justified use of deadly force.²⁶

Looked at from a socio-legal perspective, *Heller*’s invocation of self-defense not only sounds a warning for state gun bans, but reverses the federal government’s policy of what Jonathan Simon has called “governing through crime.”²⁷ Since the 1960s, argues Simon, the federal government has used crime as an excuse to expand state power.²⁸ *Heller* suggests the opposite is going on. Rather than expanding state power, the Supreme Court is relinquishing it by avoiding further expansions of the criminal justice system in favor of using private violence as a legitimate

21. NRA Brief, *supra* note 7, at 31. According to CORE, “[t]he right of defending one’s life is one of the most basic rules of nature,” and the “right to defend oneself from deadly attack” is a “fundamental right.” CORE Brief, *supra* note 3, at 39. According to the NRA, the right to self-defense is an “essential” right. NRA Brief, *supra* note 7, at 31. Scalia identifies the right to self-defense as an “inherent” right. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008).

22. *Heller*, 128 S. Ct. at 2818.

23. While the Court can overturn earlier rulings, it held expressly that the Second Amendment did not apply to the states in *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

24. *Heller*, 128 S. Ct. at 2817–18.

25. NRA Brief, *supra* note 7, at 17.

26. As this article will illustrate, the Court’s most direct path to overturning state gun bans would be simply to hold those bans in violation of the same liberty interest that bans on abortion violate. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973).

27. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 5 (2007).

28. *Id.* at 3–4.

means of crime control. This turn to private violence, or what Lawrence Friedman has called a “private system of criminal justice,” echoes America’s longstanding vigilante tradition, suggesting that even conservatives have begun to grow weary of America’s costly, statist prison-industrial complex.²⁹

To explain more clearly how *Heller* represents a return to private criminal justice and an endorsement of a new civil rights, this Article will proceed in five parts. Part II will recover the argument that CORE makes in its brief, showing how it uses the history of slavery and Reconstruction, not the founding, to frame armed self-defense as a civil right inextricably linked to citizenship. Part III will discuss the interests that appear to be converging in *Heller* by comparing CORE’s brief to other briefs filed in the case, including a brief filed by a majority of Senators and Representatives in Congress, as well as a brief filed by the NRA. Part IV will walk through Scalia’s majority opinion in *Heller* showing how it begins with the founding but then moves quickly to an affirmation of the arguments made by CORE and the NRA.³⁰ Part V will provide a historical explanation for why these interests have converged in the manner that they have and what this means for civil rights generally.

II. FROM FREEDOM RIDES TO .45’S: THE CORE BRIEF

Before discussing CORE’s brief, it is helpful to provide some of the history of the organization. Founded in 1942 by college students in Chicago, the Congress of Racial Equality was not initially dedicated to armed self-defense.³¹ Inspired by the peaceful teachings of Mahatma Ghandi, CORE spent over two decades advocating non-violent protest as a means of dismantling racial

29. For Friedman’s discussion of the “private system of criminal justice,” see LAWRENCE M. FREIDMAN, *A HISTORY OF AMERICAN LAW* 440–41 (3d ed. 2005). While popular support for the prison-industrial complex seemed boundless in the 1990s, states have recently begun to question the fiscal desirability of further increases in mass incarceration. See, e.g., THE PEW CENTER ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008* (2008), http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf. In Texas alone, annual expenditures on corrections exceeded three billion dollars last year, a crushing number that has pushed the state to develop a variety of “problem-solving courts” aimed at diverting offenders from prison. Transcript, *Texas Court Aims to “DIVERT” First-Time Offenders* (National Public Radio broadcast Aug. 15, 2008) (on file with the author).

30. 128 S. Ct. 2783, 2822 (2008) (Stevens, J., dissenting).

31. MEIER & RUDWICK, *supra* note 3, at 4.

segregation in the American South.³² In 1947, CORE targeted segregation on interstate carriers by staging an integrated bus ride through Virginia, North Carolina, Tennessee, and Kentucky, something it called the “Journey of Reconciliation.”³³ In 1961, under the leadership of James Farmer, CORE orchestrated a similar protest by driving integrated buses filled with “freedom riders” through Deep South states like Alabama where white mobs set fire to one bus and brutalized the occupants of another.³⁴

In 1964, CORE continued its commitment to nonviolence by sending volunteers to Mississippi to participate in a voter education and registration project known as Freedom Summer.³⁵ White resistance to Freedom Summer quickly became violent in June culminating in the murder of three CORE volunteers: Andrew Goodman, James Chaney, and Michael Schwerner.³⁶ Despite Lyndon Johnson’s promise to send the FBI into Mississippi to protect the remaining activists left in the state, continued harassment by locals led CORE to doubt the federal government’s commitment to the black struggle.³⁷ Those doubts turned to disgust when the Democratic Party, aided by Lyndon Johnson, worked to derail a challenge to Mississippi’s 1964 presidential delegation by a group of CORE activists and Freedom Summer veterans who called themselves the “Mississippi Freedom Democratic Party” or MFDP.³⁸

The MFDP’s failure to unseat Mississippi’s lily-white delegation, together with the deaths of Schwerner, Chaney, and Goodman, led members of CORE to experience “mounting disillusionment” with the Democratic Party and the liberal coalition that supported it.³⁹ Though the organization maintained a public commitment to nonviolence, activists on the ground began to doubt whether the federal government would ever truly protect civil rights workers. As racist violence continued in the South, more and more proponents of nonviolence began to advocate armed self-defense. To take just a few examples, NAACP official Robert F. Williams implored black activists to meet “violence with violence” in North Carolina after a white jury acquitted a white

32. *Id.* at 6–11.

33. *Id.* at 33–39.

34. *Id.* at 135–58.

35. *Id.* at 275–81.

36. *Id.* at 277.

37. *Id.*

38. *Id.* at 279, 281.

39. *Id.* at 281.

defendant of raping and beating a black woman in 1959.⁴⁰ In 1964, Charles Evers, brother of assassinated NAACP officer Medgar Evers, declared that blacks “will shoot back” if attacked in Tennessee.⁴¹ Following the attempted assassination of James Meredith in Mississippi in June 1966, CORE leader Floyd McKissick joined Stokely Carmichael, a coordinator for the Student Non-Violent Coordinating Committee, or SNCC, in calling for armed self-defense and “Black Power.”⁴² By the time of CORE’s 1966 convention in Baltimore, McKissick had begun to publicly declare nonviolence a dying philosophy.⁴³

Moves toward armed self-defense in the South coincided with militant calls for black arms in the North as well. Perhaps no African-American leader personified this better than Black Muslim minister Malcolm X.⁴⁴ In 1964, X extolled the use of “the bullet” as a viable alternative to the formal political process or “the ballot” during a CORE sponsored talk in Cleveland.⁴⁵ While X’s call to arms hinted at the idea of armed revolt, he also stressed the need for armed self-defense. “It is criminal to teach a man not to defend himself when he is the constant victim of brutal attacks,” announced X in New York City in March 1964, “[w]hen our people are being bitten by dogs, they are within their rights to kill those dogs.”⁴⁶

Though CORE president James Farmer remained wary of X in the early 1960s, CORE leader Floyd McKissick took inspiration from his message when he rose to the helm in 1966.⁴⁷ CORE’s rejection of nonviolence and turn towards Malcolm X’s call for armed self-defense were widely misinterpreted in the press, leading many to think that McKissick and others aimed for violent

40. TIMOTHY B. TYSON, *RADIO FREE DIXIE: ROBERT F. WILLIAMS AND THE ROOTS OF BLACK POWER* 149 (1999).

41. Evers told Robert Penn Warren that blacks would “shoot back” during an interview in 1964. See ROBERT PENN WARREN, *WHO SPEAKS FOR THE NEGRO?* 109 (1965).

42. MEIER & RUDWICK, *supra* note 3, at 412.

43. *Id.* at 414.

44. For Malcolm X’s history with the Nation of Islam, see generally MALCOLM X & ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965).

45. MALCOLM X, *supra* note 1, at 23. X delivered a chilling endorsement of armed action to Robert Penn Warren in 1964, when he declared that if he came home and found his child bitten by a “snake” that he would go “out” and “kill snakes,” whether they had “blood on their jaws” or not. WARREN, *supra* note 41, at 261.

46. M.S. Handler, *Malcolm X Sees Rise in Violence: Says Negroes Are Ready to Act in Self-Defense*, N.Y. TIMES, Mar. 13, 1964, at 20.

47. MEIER & RUDWICK, *supra* note 3, at 417.

revolution.⁴⁸ This was not the case. CORE's endorsement of guns coincided closely with a larger shift on its part away from integrationist thinking and towards Stokely Carmichael's plea for black power.⁴⁹ Black power, for CORE, manifested itself primarily in the form of community-based programs aimed at developing black businesses, promoting economic independence, and providing job training to inner-city youth.⁵⁰ Guns, insofar as they were part of this program, aimed to provide African-Americans with a means of self-defense, not political revolt.⁵¹ This became all the more important once CORE began to lobby for local community control of schools, courts, and police.⁵²

While other proponents of black power, most notably the Black Panthers, became entangled in a series of violent conflicts with police, not all proponents of black self-defense adopted an antagonistic posture towards the State.⁵³ Under the leadership of Floyd McKissick, for example, CORE translated black power's emphasis on self-reliance, economic independence, and armed self-defense into a platform appealing to the political right.⁵⁴ In 1968, McKissick publicly endorsed Richard Nixon for President, an open revolt against the civil rights movement's identification with the Democratic Party.⁵⁵ Impressed with McKissick's emphasis on self-reliance and small government, Nixon in turn helped the black leader found Soul City, an all-black township in North Carolina.⁵⁶ Nixon also endorsed black power inspired programs designed to instill personal responsibility and economic independence, including the Office of Minority Business Enterprise and affirmative action.⁵⁷

When McKissick left CORE to dedicate himself to Soul City in 1968, an even more conservative proponent of black power named Roy Innis replaced him.⁵⁸ Innis denounced the left-wing leanings of radical civil rights groups like SNCC, renounced revolutionary

48. *Id.*

49. *Id.*

50. *Id.* at 415–16.

51. *Id.* at 415.

52. *Id.* at 416.

53. WILLIAM L. VAN DEBURG, *NEW DAY IN BABYLON: THE BLACK POWER MOVEMENT AND AMERICAN CULTURE, 1965 TO 1975* 45–60 (1992).

54. MEIER & RUDWICK, *supra* note 3, at 417.

55. James T. Wooten, *Integrated City Rising on an Old Plantation*, N.Y. TIMES, July 25, 1972, at 21; Wayne King, *McKissick is Succeeding Although Not "Supposed To;" A Spur to County*, N.Y. TIMES, Dec. 22, 1974, at 29.

56. King, *supra* note 55, at 29.

57. DEAN J. KOTLOWSKI, *NIXON'S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY* 97–98, 125 (2001).

58. MEIER & RUDWICK, *supra* note 3, at 423.

change in favor of gradual reform, and placed “black capitalism” at the center of CORE’s mission.⁵⁹ As political liberals abandoned the group, Innis led CORE into the twenty-first century and towards a pro-Republican, pro-gun platform closely aligned with the National Rifle Association, of which Innis became a member.⁶⁰

Understanding CORE’s trajectory from a liberal civil rights organization to a conservative group mistrustful of state power helps explain its decision to oppose D.C.’s gun ban in *Heller*. Indeed, it is CORE’s sense of history, both its own and the history of black America’s struggle with southern state regulations generally, that help explain the heavy emphasis on the past in its brief. “The history of gun control in America,” begins CORE, for example, is one of “discrimination, disenfranchisement, and oppression of racial and ethnic minorities, immigrants, and other ‘undesirable’ groups.”⁶¹ Such discrimination, CORE continues, began during the colonial era and persisted through the nineteenth and twentieth centuries. To illustrate, CORE divides the first half of its brief into three sections: one on slavery, the second on Reconstruction, and the third on Post-Reconstruction.⁶²

In its section on slavery, CORE draws from sources prior to the founding to establish that southern colonies used gun regulations not simply to control crime but also to exclude blacks from civic life.⁶³ Indeed, the underlying theme of CORE’s first section is that guns consistently served as an indicator of citizenship in the United States, much like the right to vote. As early as 1748, for example, free blacks in Virginia were denied the right to own a gun, despite the fact that they were neither slaves nor indentured servants.⁶⁴ Citing historian Winthrop Jordan, CORE makes it clear that the right to bear arms was “an important right and obligation” that marked “membership in the white community.”⁶⁵ Interestingly, this was long before Virginia became a part of the United States,

59. *Id.*

60. James O’Connor, *Roy Innis Defines Himself and Politics*, N.Y. TIMES, Sept. 22, 1996, at WC1.

61. CORE Brief, *supra* note 3, at 2.

62. *Id.* at ii, 3.

63. Examples of pre-convention sources that CORE cites include: An Act for the Better Ordering & Governing of Negroes and Slaves, in 7 STATUTES AT LARGE OF SOUTH CAROLINA 353–54 (D.J. McCord ed., 1836–1837); An Act for Preventing Negroes Insurrections, in 2 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 481 (W.W. Hening ed., 1823). See CORE Brief, *supra* note 3, at 5.

64. CORE Brief, *supra* note 3, at 7 (citing VA. CODE ch. 3, §§ 7, 8 (1819)).

65. *Id.* at 4 (citing WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550 TO 1812 78 (1968)).

suggesting that the right to bear arms pre-dated the founding and was inextricably linked to personal citizenship, not militia duty, a non-existent concern while the colonies were under British military protection.

To reinforce its argument that the denial of arms was part of a larger attempt to curtail personal citizenship, CORE discusses the extensive regulation of black arms across the South during the colonial period. Hence, in 1748 Virginia enacted a statute declaring that “[n]o free negro or mulatto, shall be suffered to keep or carry any firelock of any kind, any military weapon, or any powder or lead.”⁶⁶ South Carolina imposed blanket restrictions on black gun ownership “for the better ordering and governing of Negroes,” not just slaves, in 1712.⁶⁷ Three years later, Maryland enacted a similar law declaring that “[n]o negro” in the colony “shall be permitted to carry any gun, or any other offensive weapon.”⁶⁸ Soon all the southern colonies had extensive regulations preventing free blacks from keeping or bearing firearms.⁶⁹

The Constitutional Convention of 1787 did little to change things. In 1801, the newly minted capitol of Washington, combined the laws of Virginia and Maryland to prevent any “negro” from carrying “any gun, or any other offensive weapon.”⁷⁰ To eighteenth century abolitionist St. George Tucker, such severe weapons restrictions became tantamount to applying “badges of slavery” to the entire black population.⁷¹ Indeed, gun ownership became so closely intertwined with the notion of basic citizenship that denying blacks arms was akin to imposing upon them a condition that Orlando Patterson has called “social death.”⁷² This social, or civic, death continued through the antebellum era, even becoming national policy in 1856 when Chief Justice Roger Taney ruled that the Constitution could not possibly have been intended to allow free blacks to “keep and carry arms wherever they went.”⁷³ According to Taney, the right to bear arms was

66. CORE Brief, *supra* note 3, at 7 (citing VA. CODE ch. 3, §§ 7, 8 (1819)).

67. *Id.* at 4.

68. *Id.* at 7.

69. *Id.* at 6.

70. *Id.* at 6–7.

71. *Id.* at 7.

72. See generally ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982).

73. CORE cites *Dred Scott v. Sanford* in its brief. See CORE Brief, *supra* note 3, at 8–9 (citing *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 416–17 (1856)).

inextricably linked to citizenship, something that he refused to extend to African-Americans.⁷⁴

CORE's resuscitation of black history provides a compelling counterpoint to some of the historical arguments advanced by the petitioners and their supporters in *Heller*.⁷⁵ According to Pulitzer Prize-winning historian Jack Rakove, for example, gun ownership was so common during the early Republic that possessing arms was no different from possessing other property like a cow, a chair, or a wagon.⁷⁶ Indeed, in an amicus brief endorsing D.C.'s gun ban, Rakove joins Washington University professor David Konig to maintain that guns were "subject to the regulation to which all property was liable" and were "not major issues in eighteenth-century America."⁷⁷

While CORE agrees that guns were subject to a variety of regulations, it takes issue with Rakove's assertion that guns were "not major issues" in the eighteenth century.⁷⁸ For blacks, guns and their regulation were critical issues. Legal moves to deny blacks arms were not only critical to their repression, but actually marked a type of disfranchisement qua disarmament that was used to keep them firmly barred from the political sphere. Not only were gun regulations a serious issue, but the right to bear arms was "an important right and obligation" that marked "membership in the white community" and, by extension, citizenship in the state.⁷⁹

By identifying gun ownership as an "important right," CORE bolsters the notion that the right to bear arms was not simply a creature of the state militia.⁸⁰ In fact, CORE's invocation of black history reveals that guns and citizenship were inextricably linked, much like citizenship and voting. Looked at theoretically, CORE's story of gun restrictions and race during the seventeenth, eighteenth, and nineteenth centuries reinforces its stance that the right to bear arms should be considered an individual civil right.⁸¹

74. *Id.*

75. Brief for Petitioner, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290); Brief for Jack N. Rakove et al. as Amici Curiae Supporting Petitioners at 13, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) [hereinafter Rakove Brief].

76. Rakove Brief, *supra* note 75, at 13.

77. *Id.* at 12–13.

78. *Id.* at 12.

79. CORE Brief, *supra* note 3, at 4.

80. *Id.* (citing WINTHROP JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550 TO 1812* 78 (1968)).

81. See CORE Brief, *supra* note 3, at 4–19. CORE's extensive discussion of the relationship between guns and citizenship sets the stage for the possibility that the *Slaughter-House Cases* might be revisited and privileges and immunities extended to include either the right to bear arms, or at the very least

While CORE could easily have stopped with the assertion that the right to bear arms mentioned in the Second Amendment is in fact an individual right, it goes on. Borrowing from lessons that it learned in the Deep South in the 1960s, CORE also roots the right to bear arms in the ancient common law right of self-defense.⁸² Asserting that the “right of defending one’s life is one of the most basic rules of nature,” CORE identifies the right to bear arms in self-defense as nothing less than a fundamental right.⁸³

By invoking the language of fundamental rights, CORE introduces the possibility that the right to bear arms in self-defense might be protected by the Ninth Amendment, not the Second. According to the Ninth Amendment, the “enumeration” of certain rights in the Constitution “shall not be construed to deny or disparage others retained by the people.”⁸⁴ That the people have long retained a right to self-defense is something that CORE advances in its brief, opening the door for the argument that without guns, the right to self-defense “from a deadly attack” would be abridged.⁸⁵

Though not immediately applicable to the District, CORE’s mention of self-defense as a fundamental right raises the possibility that the Fourteenth Amendment might be used to strike down state gun bans.⁸⁶ The Supreme Court has long held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect fundamental rights not enumerated in the Constitution, including the right to privacy,⁸⁷ the right to travel,⁸⁸ and “rights growing out of the marital relationship.”⁸⁹ By identifying the right to self-defense as one such right, CORE suggests that the Supreme Court might use self-defense to strike

the right to use arms in self-defense. The Institute for Justice makes just such a case in its brief. *See infra* Part III.

82. CORE Brief, *supra* note 3, at 38–39. Widely accepted in the criminal law, the principle of justification, or self-defense, holds that an individual is authorized to use deadly force in cases where that individual reasonably believes that the use of deadly force is imminent against him. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 221–49 (3d ed. 2001).

83. CORE Brief, *supra* note 3, at 39.

84. U.S. CONST. amend. XIV, reprinted in KERMIT L. HALL ET AL., AMERICAN LEGAL HISTORY 686 (3d ed. 2005).

85. CORE Brief, *supra* note 3, at 39.

86. HALL, *supra* note 84, at 690.

87. *See* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

88. *See* *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250 (1974).

89. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 326 (1993) (citing *Zablocki v. Red Hail*, 434 U.S. 374 (1978)).

down state gun bans without ever invoking the Second Amendment.⁹⁰

To bolster its claim that guns are necessary for self-defense, CORE returns to black history. After the Civil War, argues CORE, southern states immediately continued the process of disfranchisement qua disarmament by enacting Black Codes aimed at controlling newly-freed slaves.⁹¹ These codes denied African-Americans a variety of basic civil rights including the right to travel freely, assemble in public spaces, vote, and bear arms.⁹² In Mississippi, for example, no “freedman, free negro, or mulatto” could “keep or carry firearms of any kind, or any ammunition” as early as 1866, only one year after fighting had ceased.⁹³

Concerned that blacks were being stripped of their newfound liberties, the federal government intervened, enacting a Freedman’s Bureau Act in 1866 and a Civil Rights Act that same year to prevent southern states from re-subjugating their black populations.⁹⁴ A critical component of the Freedman’s Bureau Act, notes CORE, was a provision holding that “personal liberty,” “personal security,” and the “constitutional right to bear arms” had to be secured among African-Americans.⁹⁵ Along similar lines, a central goal of the 1866 Civil Rights Act was to take away southern states’ police power to deny weapons to blacks.⁹⁶ For the radical Republicans who endorsed both statutes, the federal government was one of the few bodies powerful enough to intervene in the South on behalf of freed people of color, and even then blacks needed guns.⁹⁷ CORE asserted that “[i]n Mississippi men who were in the rebel armies are traversing the state, visiting the freedmen, disarming them, perpetrating murders and outrages upon them,” quoting a statement from a Reconstruction-era Massachusetts Republican.⁹⁸ Vigilante attacks on African

90. This evades the problem of having to overrule *Cruikshank*. While *Cruikshank* held that the Second Amendment has not been incorporated to the states, CORE is suggesting that the Second Amendment need not be incorporated to the states in order for states to strike down gun bans. *United States v. Cruikshank*, 92 U.S. 542 (1875).

91. CORE Brief, *supra* note 3, at 9.

92. *Id.*

93. *Id.* at 10 (citing 1866 Miss. Laws ch. 23, § 1, 165 (1865)).

94. *Id.* at 10–11.

95. *Id.* at 11 (citing 14 Stat. 173, 176 (1866)).

96. *Id.* at 11.

97. *Id.* at 10 (citing AKHIL REED AMAR, *THE BILL OF RIGHTS* 264–66 (1998)).

98. *Id.* at 11 (citing CONG. GLOBE, 39th Cong., 1st Sess. 40 (1865)).

Americans spiked after the Civil War, convincing federal officials that more intrusive legal measures were necessary.⁹⁹

In July 1868, radical Republicans succeeded in getting a majority of states to ratify the Fourteenth Amendment to the Constitution declaring anyone born in the United States a citizen whose rights to equal protection and due process were enforceable by the federal government against the states.¹⁰⁰ During the debate over the amendment, Kansas Senator Samuel Pomeroy declared that there were three rights that safeguarded all the others: the right to vote, the right to own property, and the right to bear arms.¹⁰¹ Senator Jacob M. Howard agreed, declaring one of the personal rights protected by the Amendment to be the “right to keep and bear arms.”¹⁰²

Republican hopes that the Fourteenth Amendment might be used to protect black arms became a significant force behind the drafting and ratification of the bill in the North.¹⁰³ Of course, that amendment does not apply to the federal capitol of Washington. However, its history bolsters CORE’s larger argument that arms were necessary for blacks to defend themselves. It also helps precisely explain how they were linked. Following the Civil War, northern Republicans hoped that guns might serve as a type of private device for helping slaves who could not trust their state or local governments to defend them against racist vigilante attacks.¹⁰⁴

Of course, southern states subverted northern intentions by developing a variety of creative legal means for disarming blacks.¹⁰⁵ Some states banned particular classes of firearms, focusing on cheap handguns that “poverty-stricken freedmen could afford.”¹⁰⁶ Other states placed “exorbitant business or transaction taxes” on the sale of firearms in order to keep guns out of the reach

99. See CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT AND THE BETRAYAL OF RECONSTRUCTION* (2008).

100. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

101. CORE Brief, *supra* note 3, at 12 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866)).

102. *Id.* at 12–13.

103. ERIC FONER, *RECONSTRUCTION* 258–59 (1988); STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866 TO 1876* 57–76 (1998).

104. HALBROOK, *supra* note 103, at 65.

105. CORE Brief, *supra* note 3, at 16.

106. *Id.*

of poor blacks.¹⁰⁷ Some states, in violation of the Fourteenth Amendment, simply confiscated weapons.¹⁰⁸

Often state action disarming blacks coincided with vigilante attacks on them. In Union County, South Carolina, for example, the local sheriff went into a black community and confiscated arms only days before “five hundred masked men” went on a killing spree.¹⁰⁹ Masked men became a recurring fear in the South as ex-confederates banded together to form a terrorist organization called the Ku Klux Klan. The rise of the Klan, argues CORE, led to a reconfiguration of the fear surrounding the right to bear arms.¹¹⁰ Rather than protect the individual against an encroaching central government, the right to bear arms became even more important for self-defense against private violence.¹¹¹

Perhaps the most stunning case of vigilante violence occurred in Colfax, Louisiana, in 1873. In April of that year, a group of African-Americans seized control of the county courthouse and insisted that they be given the chance to vote.¹¹² Enraged white citizens surrounded the courthouse, set it ablaze, and then murdered the African Americans as they tried to escape.¹¹³ When surviving black plaintiffs brought suit against Klan members for violating their right to bear arms, the Supreme Court rejected their claim, arguing that the Second Amendment did not apply because it only limited federal action.¹¹⁴ The Court also held that the Second Amendment did not apply because the Klansmen were not state actors.¹¹⁵ The ruling handed down in *United States v. Cruikshank* in 1875 ignored ties between the Klan and local elected officials, speeding black disfranchisement qua disarmament across the South.¹¹⁶

CORE’s invocation of *Cruikshank* together with its review of black history drove home the point that African-Americans had been consistently denied weapons to facilitate their oppression, curtail their citizenship, and take their lives. This last point was the most constitutionally salient. Without guns, CORE argued

107. *Id.* at 17.

108. *Id.*

109. *Id.* at 15.

110. *Id.*

111. CORE Brief, *supra* note 3, at 16 (citing AKHIL REED AMAR, THE BILL OF RIGHTS 266 (1998)).

112. LANE, *supra* note 99, at 34.

113. *Id.*

114. CORE Brief, *supra* note 3, at 19 (citing *United States v. Cruikshank*, 92 U.S. 542, 553 (1875)).

115. CORE Brief, *supra* note 3, at 19.

116. *Id.*

convincingly, blacks not only lost a symbolic indicator of citizenship, but the right to defend themselves against private vigilante violence.¹¹⁷ This was particularly devastating in areas like the Deep South, where states were not particularly committed to providing blacks with the kind of protection they needed from private violence.

To drive this final theme of guns and self-defense home, CORE concluded its brief by linking the plight of blacks in the nineteenth century to the plight of minorities in urban areas at the dawn of the twenty-first.¹¹⁸ Noting that African-Americans are “disproportionately the victims of crime,” CORE reminds the Court that blacks “have no right to demand or even expect police protection” in their homes or on the street.¹¹⁹ This leaves law-abiding citizens in under-policed urban neighborhoods with few choices when it comes to defending themselves. Either they can move, an unrealistic option if they are poor, or they can legally acquire a firearm. In CORE’s view, the right to own a gun represents both a legal right as well as a form of legal recourse, a modality through which minorities can assert their citizenship and seek redress for deprivations of their liberty and property.

CORE’s recovery of the right to bear arms as a guardian of other rights represents, in certain ways, an attempt to point the Supreme Court away from a narrow examination of the founders’ debates and towards a broader look at what the right to bear arms actually signified during the eighteenth and nineteenth centuries. Both slavery and Reconstruction, argues CORE, tell us something important about the relationship between constitutional rights and gun ownership that the founding does not.¹²⁰ While the founders were concerned with limiting federal power, Reconstruction presents the opposite dilemma: states dedicated to stripping freed slaves of their rights, particularly their guns. Removing guns in this context was not simply a symbolic denial of citizenship, but a stripping away of the most effective private modality that freed slaves had for defending their lives: their firearms.

Republicans in Congress knew this. Not only did they hope that the Civil Rights Acts would help keep arms in black hands, but black armament was one of the animating forces behind the Fourteenth Amendment.¹²¹ Sadly, the Supreme Court did not

117. *Id.*

118. *Id.* at 35–40.

119. *Id.* at 27, 28.

120. CORE spends no time in its brief discussing either the Convention or Ratification debates, but rather focuses on slave codes and post-bellum regulations of African Americans. See CORE Brief, *supra* note 3, at 4–17.

121. HALBROOK, *supra* note 103, at 25–60.

agree. Not only did it curtail the reach of the Second Amendment in *United States v. Cruikshank*, but it did so again in another case involving slaughterhouses in New Orleans.¹²² Though CORE did not even mention the *Slaughter-House Cases*, the Court used it to strip the Fourteenth Amendment's Privileges and Immunities Clause of much of its power by holding that national citizenship did not include the right to bear arms.¹²³ This marked a stark reversal of Justice Roger Taney's assertion in *Dred Scott v. Sanford* almost two decades earlier that one of the basic components of citizenship, which Taney was not willing to extend to blacks, was the right to bear arms.¹²⁴

Of course, the Fourteenth Amendment does not apply to the District of Columbia. However, CORE recovers the intentions behind it to highlight a larger normative claim, namely that without arms, southern blacks lacked any viable means of defending themselves. This right to armed self-defense, argues CORE, is a "fundamental right" that deserves constitutional protection.¹²⁵ To reinforce this notion, CORE ends its brief with a nod to the increase in crime in Washington D.C. since the gun ban was enacted in 1976—a move designed to illustrate the state's failure to provide its citizens with basic security.¹²⁶

III. THE CONVERGENCE

CORE was not the only party to maintain that the right to self-defense and the individual right to bear arms should be considered as separate civil rights; nor was it the only party to cite black history. In fact, several other groups used black history to urge a ruling in favor of the respondent in *Heller* as well. To take just one example, the libertarian aligned Institute for Justice (IFJ) submitted an amicus brief focused almost exclusively on the rights of freed slaves.¹²⁷ Citing Stephen P. Halbrook, the IFJ maintained that the framers of the Fourteenth Amendment intended to protect an individual right to bear arms precisely because they recognized that black citizenship was contingent on their ability to acquire guns.¹²⁸ This interest led them to incorporate the right to bear arms

122. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

123. *Id.*

124. 60 U.S. (19 How.) 393, 417 (1856).

125. CORE Brief, *supra* note 3, at 39.

126. *Id.* at 35–39.

127. Brief for the Institute for Justice as Amici Curiae Supporting Respondent, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) [hereinafter IFJ Brief].

128. *Id.* at 8.

into the Privileges and Immunities Clause of the Fourteenth Amendment, a clause that was subsequently neutered by the Supreme Court in 1873.¹²⁹ The decision that did the neutering was the *Slaughter-House Cases*, the ruling that severely limited the scope of national citizenship protected by the Constitution.¹³⁰ Citing prominent constitutional scholars like Akhil Amar and Laurence Tribe, the IFJ concludes by arguing that the Supreme Court should revisit *Slaughter-House* and revivify the individual right.¹³¹

Though the IFJ seems to forget that the Fourteenth Amendment does not apply to the District, the group's argument opens the gates for hunting even larger game, namely state gun bans. The IFJ's brief suggests, for example, that not only was the Second Amendment incorporated through the Fourteenth, but there is an even older, pre-existing right to self-defense independent of the Second Amendment. Returning to Fourteenth Amendment legislative history, the IFJ shows that the bill's drafters were expressly interested in making sure that freed slaves could "defend their homes, families, or themselves."¹³² This interest in the common law right to self-defense helps the IFJ establish gun ownership as a right pre-existing the Constitution that is protected by the Second Amendment but not granted by it.¹³³ To support this position, the Institute cites *Cruikshank* the same 1874 case holding that the right to bear arms was "not a right granted by the Constitution" nor was it "dependent upon that instrument for its existence."¹³⁴ While *Cruikshank* also held that the Second Amendment only applies to the federal government, and the federal government cannot intervene to stop private confiscations of arms, those holdings do not interfere with the IFJ's larger claim that the right to self-defense, not the Second Amendment, prohibits state-sponsored gun bans. In fact, the Institute's use of *Cruikshank* reinforces its argument that the Court need not incorporate the Second Amendment to the states to hold gun bans invalid.¹³⁵ It

129. *Id.* at 26.

130. *Id.* at 26–27.

131. *Id.* at 27 (citing Ahil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1258–59 (1992) and Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1121, 1297 n.247 (1995)).

132. IFJ Brief, *supra* note 127, at 13.

133. *Id.* at 32.

134. 92 U.S. 542, 553 (1875).

135. Even though *Cruikshank* recognized the right to bear arms as a "pre-existing" right, it limited the reach of the Second Amendment to the federal government and did not extend it to private actors. *Id.*

need only hold that possessing guns for self-defense is one of the privileges of citizenship wrongly infringed by state gun regulations.¹³⁶

Another brief using black history to argue for an individual right to bear arms as well as a right to self-defense came from Congress.¹³⁷ Fifty-five United States Senators, almost all Republican, and 250 United States Representatives, also overwhelmingly Republican, recruited Fourteenth Amendment historian Stephen P. Halbrook to file a brief showing that the right to bear arms mentioned in the Second Amendment is closely tied to the ancient common law right to self-defense.¹³⁸ For northern Republicans after the Civil War, argued Halbrook, the right to bear arms had less to do with organizing militias than making sure freed slaves had constitutional protection.¹³⁹ This protection was not needed from the federal government so much as state governments who were interested in re-subordinating them.¹⁴⁰ As far as northern Republicans were concerned, private arms were necessary to maintain the security of the freedmen's person and estate.¹⁴¹ To further this end, drafters of the Fourteenth Amendment sought to include the "right to bear arms" as a necessary shield against discriminatory state legislation, including gun bans, precisely so that the freed slaves could use them in "defense of [themselves] and family . . . and homestead."¹⁴²

Though closely related to the individual right to bear arms, the right to self-defense was, in Halbrook's view, independent of the Second Amendment.¹⁴³ The Second Amendment did not grant the right to self-defense, nor did it grant the right to bear arms; it simply prevented the federal government from infringing upon pre-existing private gun rights.¹⁴⁴ The right to self-defense, like the right to bear arms, was in Halbrook's view a "fundamental guarantee" that pre-dated the Constitution.¹⁴⁵

That a majority of United States Senators and Representatives used Halbrook as their spokesperson suggests a relatively dramatic

136. IFJ Brief, *supra* note 127, at 13.

137. Brief for 55 Members of United States Senate, the President of the United States Senate, and 250 Members of United States House of Representatives as Amici Curiae Supporting Respondent, *Heller v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) [hereinafter Senate Brief].

138. *Id.*

139. *Id.* at 14.

140. *Id.*

141. *Id.* at 15.

142. *Id.* at 16.

143. *Id.*

144. *Id.*

145. *Id.*

convergence of interests around the issues of gun ownership and self-defense. While it is probably safe to say that CORE represents only a small portion of the civil rights community, the Halbrook brief suggests that the civil rights community, traditionally conceived, may be changing. The new arbiters of civil rights in America may no longer be black ministers and the NAACP, but more conservative groups like the IFJ, CORE, and, as we shall see, the NRA.

Before discussing the NRA's role in prompting a new chapter of civil rights constitutionalism in America, it is perhaps helpful to take a look at the NAACP's brief.¹⁴⁶ Unlike Halbrook and the IFJ, the NAACP ignored black history in its *Heller* brief, arguing that the African-American past is irrelevant to the constitutionality of gun bans. What is more important, it maintained, are the effects of gun violence on African-American residents of urban areas.¹⁴⁷ In D.C. alone, argued the NAACP, all but two of the 137 firearm homicide victims in 2004 were black.¹⁴⁸ Many of these victims were from fifteen to twenty-nine years old.¹⁴⁹ This "contemporary epidemic of handgun violence," argues the civil rights group, suggests that gun bans should be kept in place, not removed.¹⁵⁰

Not happy with simply citing statistics, the NAACP also bridled at CORE's insinuation that just because past gun regulations targeted African-Americans, so too must the present ones have a discriminatory bent. According to the NAACP, this is simply not the case "with respect to the District's handgun ban"—a ban popularly enacted by the city's black majority.¹⁵¹ To say that such a ban categorically does "not serve the interests" of African-American communities is paternalistic if not insulting to black voters in Washington.¹⁵² For most black residents of the District, the gun ban is not only reasonable but "should not be confused with the Black Codes" enacted in the American South following the Civil War.¹⁵³

Perhaps because of concerns like the NAACP's, the NRA chose not to focus on black history, turning instead to the founders' interpretation of the Second Amendment and the essential right to "employ deadly force in self-defense."¹⁵⁴ Yet, it arguably takes a

146. NAACP Brief, *supra* note 14.

147. *Id.* at 1.

148. *Id.*

149. *Id.*

150. *Id.* at 6.

151. *Id.* at 18 n.19.

152. *Id.*

153. *Id.* at 19, 31.

154. NRA Brief, *supra* note 7, at 30, 31.

jab at the NAACP, opening its brief with the claim that it is “America’s oldest civil rights organization.”¹⁵⁵ This assertion, precisely because it is so provocative, warrants at least some scrutiny. While it is true that the NRA was founded in 1871, almost four decades before the NAACP, the National Rifle Association did not pitch itself as a civil rights organization until the 1970s. Prior to then, the NRA focused primarily on recreation, target shooting, and training, not defending the right to bear arms. In fact, from 1871 to 1977 the NRA’s main agenda was promoting marksmanship and safety.¹⁵⁶ Founded by Civil War veterans disgruntled with the Army’s lack of emphasis on “target practice,” a skill the military believed would instill a negative “sense of individualism among the soldiers,” the NRA built a state-of-the-art rifle range at Creedmoor, New York, to train soldiers, primarily National Guardsmen, in marksmanship.¹⁵⁷ The NRA also began holding shooting competitions including an international competition that drew almost 8,000 spectators to Creedmoor in 1874.¹⁵⁸ From 1874 to 1977, marksmanship training and firearms safety remained the primary concerns of the NRA, while lobbying formed only a minor part of its institutional mission.¹⁵⁹

Then, in 1968, Congress enacted a sweeping Gun Control Act (GCA), spurred by outrage over Lee Harvey Oswald’s use of an Italian army surplus rifle to assassinate President John F. Kennedy.¹⁶⁰ While older NRA leaders tended to support the legislation, a younger cadre of “hard-liners” viewed the GCA to be the beginning of a larger, liberal assault on gun rights in the United States.¹⁶¹ Led by a former Border Patrol officer named Harlon Carter, these “Young Turks” voted proponents of the GCA out of power in 1977 and quickly made lobbying against gun regulations one of the primary functions of the association.¹⁶²

As the NRA began to shift emphasis away from marksmanship and towards preventing regulation, it began to place unprecedented emphasis on the Second Amendment as a vital constitutional right. Never much of an issue while the NRA occupied itself with target shooting, the Second Amendment became the cornerstone of the association’s legal bulwark against potential gun regulators,

155. *Id.* at 1.

156. OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 20–22 (Univ. of Iowa 1998).

157. *Id.* at 21.

158. *Id.* at 23.

159. *Id.* at 29.

160. *Id.* at 30.

161. *Id.* at 30, 34.

162. *Id.* at 31–36.

particularly the portion of the amendment, which reads “the right of the people to keep and bear arms shall not be infringed.”¹⁶³ Despite the fact that the preceding clause referred to the necessity of a “well-regulated militia,” the NRA took the position that the right to bear arms was independent of any militia concern.¹⁶⁴ Though many historians disagreed, the NRA increased emphasis on the individual right, maintaining that it was necessary to prevent authoritarian rule, or “creeping socialism,” and to facilitate self-defense.¹⁶⁵

Over the course of the 1990s, NRA advocates fleshed out the dual position that not only was the right to bear arms an individual constitutional right, but the right to bear arms in self-defense was an even greater, absolute right also worthy of constitutional protection.¹⁶⁶ In 1994, NRA official Wayne LaPierre argued that the “use of arms for self-defense” was a right that derived from natural law itself, pre-dating the founding.¹⁶⁷ One year later, Tanya Metaksa, executive director for the NRA’s Institute for Legislative Action, maintained that self-defense was nothing less than “a primary civil right” without which “there are no rights.”¹⁶⁸

Metaksa’s attempt to frame self-defense as a civil right defied common conceptions of the term but reflected a growing consensus on the right that gun ownership and justified killing should be considered on the same plane as classic civil rights, like the right to vote. By assuming this position, the gun lobby engaged in a relatively radical expansion of the concept of civil rights, but not one completely without precedent. As early as 1964, President Lyndon Johnson had signed into law an ambitious Civil Rights Act that included provisions aimed at ending discrimination in the private workplace, not something that most would have associated with a civil right prior to 1964. In 1968, Congress continued its expansion of civil rights claims by handing down another ambitious piece of legislation targeting discrimination in private

163. *Id.* at 135.

164. *Id.*

165. *Id.* at 156. For a sampling of historians who oppose the individual rights reading, see Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); Saul Cornell, *Don’t Know Much About History: The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657 (2002); David Thomas Konig, *Arms and the Man: What Did the Right to “Keep” Arms Mean in the Early Republic*, 25 L. & HIST. REV. 177 (2007).

166. Wayne LaPierre, *Self-Defense: The Right and the Deterrent*, in GUNS, CRIME AND FREEDOM (1994), reprinted in GUNS IN AMERICA: A READER 174 (Jan E. Dizard, Robert Merrill Muth & Stephen P. Andrews eds., 1999).

167. *Id.*

168. Tanya K. Metaksa, *Self-Defense: A Primary Civil Right*, 41 AM. RIFLEMAN 74 (1995).

housing, again not a civil right traditionally conceived. Suddenly, civil rights actions abounded in areas of the law that had never harbored them before, as liberals employed the authoritative language of rights talk to rationalize redistributive social change.¹⁶⁹

In the 1970s and 80s, conservatives responded with their own versions of “rights talk,” sometimes relying on the very gains made by the civil rights movement in the 1960s to counter liberal positions.¹⁷⁰ To take just one non-gun related example, Phyllis Schlafly opposed the Equal Rights Amendment in 1972 by declaring that equal opportunity for women had already found expression in the 1964 Civil Rights Act.¹⁷¹ In 1978, conservatives adopted the language of rights to protect children from liberal influences in public school, particularly sex education, by adopting the Protection of Pupil Rights Amendment.¹⁷² In 1984, the Republican Party’s National Platform endorsed legislation designed to make clear that the Fourteenth Amendment, once aimed at protecting freed slaves, now applied to unborn children who had a “fundamental individual right to life.”¹⁷³ By the 1990s, gun rights proponents had also begun to master “rights talk,” arguing that the right to bear arms made other rights possible, precisely because an armed citizenry precluded the need for a police state.¹⁷⁴ Eager to separate guns from concerns over state militias, groups like the NRA located the right to bear arms in more than one source: not just the Second Amendment, but also the right to armed self-defense.

IV. THE MAJORITY OPINION

At first glance, the Court does not appear to be particularly influenced by the NRA’s designation of self-defense as a primary civil right or by the resuscitation of black history engaged in by CORE, the IFJ, and Congress.¹⁷⁵ The Court begins its opinion, as

169. Dudas, *supra* note 9, at 732.

170. Conservatives also deployed the language of rights in the 1950s and 1960s, particularly “states’ rights” in the American South. *See generally* KARI FREDRICKSON, *THE DIXIECRAT REVOLT AND THE END OF THE SOLID SOUTH, 1932 TO 1968* (2000).

171. DONALD T. CRITCHLOW, *PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN’S CRUSADE* 225–26 (William Chafe et al. eds., Princeton Univ. Press 2005).

172. *Id.* at 286–87.

173. *Id.* at 286.

174. *See, e.g.,* Metaksa, *supra* note 168, at 195.

175. Despite the fact that Scalia’s conclusion echoes CORE’s plea for arms as a means of augmenting the regulatory function of the police, the majority opinion does not mention the civil rights group once. Only two sources emerge

might be expected, with a textual analysis of the Second Amendment, noting that the term “right of the people” appears in the First Amendment’s Assembly and Petition Clause and in the Fourth Amendment’s Search and Seizure Clause. Since both clauses refer to individual rights, the Court holds that the right to bear arms must also be read as an individual right unrelated to a state militia.¹⁷⁶

The Court provides another textualist basis for the individual right by asserting that throughout the eighteenth century, “bear arms” was unambiguously used to refer to gun ownership outside of an organized militia.¹⁷⁷ This was true, the Court argues, despite the fact that “bear arms” also had an idiomatic meaning at the time of the founding, which meant “to serve as a soldier, do military service,” or “wage war.”¹⁷⁸ That meaning only became active, the Court argues, when used in the context of repelling foreign invasions or engaging in military action, moments signified by textually placing the right immediately before the term “against.”¹⁷⁹

Once done with its textual analysis, the Court moves to an originalist argument challenging Jack Rakove and David Konig. While Rakove and Konig maintain that the prefatory clause, “[a] well regulated Militia being necessary to the security of a free State,” limits the right to bear arms to formal militia service, the Court counters by noting that there were no formal militias in the eighteenth century.¹⁸⁰ Unlike today’s National Guard, militias at that time were made up of every man in the state able to bear arms.¹⁸¹ Though Article I, Section 8 of the Constitution granted Congress the power to provide arms to such state militiamen,

in the opinion that could arguably have come from CORE. One is Representative Butler’s quotation that section 8 of the anti-KKK bill was intended to enforce the individual citizen’s right to bear arms. Another is *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms*, a book that is also cited in two other amicus briefs. See STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS (1998). Given that so few sources are shared, it appears unlikely that CORE swayed the Court alone. Instead, it seems more likely that a convergence of interests occurred, bringing African-American history to the forefront of the majority’s opinion. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2810–11 (2008); CORE brief, *supra* note 3, at 10, 14.

176. *Heller*, 128 S. Ct. at 2791.

177. *Id.* at 2793.

178. *Id.* at 2830.

179. *Id.* at 2829.

180. *Id.* at 2799.

181. *Id.*

neither Congress nor the Constitution guaranteed that such arms would be provided.¹⁸² Indeed, anti-federalists feared that the federal government would not provide weapons to states precisely to weaken them.¹⁸³ This fear helps explain why state law at the time was “tolerant of private ownership of weapons,” a guarantee that even if states did not have the time or money to adequately arm their militias, then at least state militiamen could use their own private arms in emergencies.¹⁸⁴ Precisely because militiamen might need to use their own private arms, anti-federalists demanded a promise from the federal government that the people’s right to bear arms not be infringed.¹⁸⁵

By explaining the link between private gun ownership and the states’ need for an armed militia, the Supreme Court mounts a reasonable challenge to Rakove and Konig. Although both historians deny that the Second Amendment was designed to protect a private right to bear arms, they concede that anti-federalists were afraid the federal government might try to undermine state militias.¹⁸⁶ They also concede that state militias might be armed privately.¹⁸⁷ However, they refuse to take seriously the possibility that the federal government might have tried to confiscate or regulate private gun ownership as an indirect means of crippling state militias.¹⁸⁸ Perhaps this is because the federal government never attempted such a move. Regardless, Scalia refuses to accept the notion that the central government would not, at some point, try to confiscate arms in order to subjugate the people. To establish this point, Scalia invokes English history, noting that the Crown had confiscated the arms of Protestants expressly to subjugate them following the Restoration.¹⁸⁹ “[T]he way tyrants had eliminated a militia consisting of all the able-bodied men,” notes Scalia in his majority opinion, “was not by banning the militia but simply by taking away the people’s arms”¹⁹⁰

While the Supreme Court could have easily ended there, deciding *Heller* on its originalist and textualist analyses alone, it goes on. In order to fully appreciate the individual nature of the Second Amendment, argues the Court, it is necessary not simply to look at original meaning or text, but to examine the public

182. Rakove Brief, *supra* note 75, at 10.

183. *Id.* at 21–22.

184. *Id.* at 31.

185. *Heller*, 128 S. Ct. at 2797–98.

186. Rakove Brief, *supra* note 75, at 18–19.

187. *Id.* at 20.

188. *Id.* at 21.

189. *Heller*, 128 S. Ct. at 2798.

190. *Id.* at 2801.

understanding of the right to bear arms over the course of the nineteenth and twentieth centuries.¹⁹¹ While Justice Stevens derides this as a foray into irrelevant “postenactment legislative history,” Scalia, in a decidedly non-originalist mood, disagrees.¹⁹² Leaving the founders aside for a moment, Scalia asserts that analyzing the public understanding of constitutional provisions long after they are enacted is in fact a “critical tool of constitutional interpretation.”¹⁹³

In order to assess public understandings of the right to bear arms in the nineteenth century, Scalia turns to black history.¹⁹⁴ Echoing CORE, Scalia cites Virginia’s antebellum restrictions on gun control, including *Aldridge v. Commonwealth*, an 1824 case from Virginia holding that the right to bear arms did not apply to free blacks entering the state.¹⁹⁵ Scalia then cites *Waters v. State*, an 1843 Maryland case that openly declared free blacks to be a dangerous population that should be denied the right to bear arms.¹⁹⁶ Both cases, according to the Court, reveal that the right to bear arms “was an individual right,” albeit one “subject to certain restrictions.”¹⁹⁷

After flagging the restriction of black arms during slavery, Scalia moves to Reconstruction noting that “[b]lacks were routinely disarmed by Southern States after the Civil War.”¹⁹⁸ Citing a Freedmen’s Bureau Report from Kentucky, he shows how a state policy of confiscating black-owned weapons was perceived by federal officers to be in violation of an individual, not collective rights to bear arms.¹⁹⁹ Scalia then turns to South Carolina and quotes from a joint congressional report claiming that attempts to confiscate black arms were in “clear and direct violation of their personal rights.”²⁰⁰

By including southern Reconstruction in its opinion, the majority is able to show that following the Civil War the right to bear arms was considered a uniquely individual right. Southern attempts to rob blacks of their weapons, after all, had little to do with organizing militias. In fact, the opposite of what the anti-

191. *Id.* at 2805.

192. *Id.* (Stevens, J., dissenting).

193. *Id.*

194. *Id.* at 2805–07.

195. *Id.* at 2808 (citing *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449 (Va. Gen. Ct. 1824)).

196. *Id.* (citing *Waters v. State*, 1 Gill 302, 309 (Md. 1843)).

197. *Id.*

198. *Id.* at 2810.

199. *Id.*

200. *Id.*

federalists had feared in the eighteenth century was happening. Rather than the federal government confiscating private arms in order to weaken the states, the states were confiscating private arms in order to weaken the pro-Reconstruction federal government in the South.

Of course, this did not give the Supreme Court the power to challenge private confiscations of arms, nor did it give it the power to use the Second Amendment to invalidate state gun bans. The Court made this clear in *United States v. Cruikshank* in 1875.²⁰¹ As mentioned earlier, *Cruikshank* held that the Second Amendment only applied to the federal government, not the states, and only applied to government action, not private conduct.²⁰² Perhaps ironically, this position actually supports Scalia's ruling in *Heller* given that *Cruikshank* allows for Second Amendment protection against federally enforced gun bans, like the one in the District. Further, because *Cruikshank* is a Supreme Court case, it provides Scalia with more than just a public understanding of the Second Amendment during the nineteenth century; it gives him judicial precedent.²⁰³

While *Cruikshank* helps Scalia achieve the limited goal of striking down the District's gun ban, it does something else as well. By clearly asserting that the right to bear arms is a pre-existing common law right, it opens the door for Scalia to elaborate on the other significant, pre-existing common law right: the right to self-defense.²⁰⁴

That self-defense might be its own right, independent of the Second Amendment, is a position that the Supreme Court openly endorses in *Heller*. According to Scalia, "self-defense" is nothing less than an inherent right that is particularly acute when it comes to defense of the home.²⁰⁵ Scalia's invocation of the inherent right to bear arms is reminiscent of claims made by gun proponents like LaPierre since the 1980s.²⁰⁶ It is also evocative of a long line of Supreme Court decisions that have used the notion of inherent rights to reinforce principles long accepted by ancient English common law.²⁰⁷ Though reluctant to read new implied rights into

201. 92 U.S. 542 (1875).

202. *Heller*, 128 S. Ct. at 2812–13.

203. See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

204. *Id.*

205. *Heller*, 128 S. Ct. at 2864.

206. See, e.g., LaPierre, *supra* note 166, at 174.

207. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *E. Hartford v. Hartford Bridge Co.*, 51 U.S. (10 How.) 511 (1850); *Bergess Poole v. John*

the Constitution, Scalia has long been open to upholding ancient rights pre-dating the founding.²⁰⁸ This might explain his willingness to invoke post-ratification black history, which if anything is a history of the need for armed self-defense as a shield for protecting life and citizenship. Even if Scalia is not really interested in race, his invocation of race provides a compelling link between self-defense, a longstanding creature of the common law, and the Constitution.

After mentioning *Cruikshank*, the Court concludes with a discussion of handguns.²⁰⁹ Noting that self-defense has been central to the Second Amendment, the majority asserts that the handgun is the “quintessential self-defense weapon.”²¹⁰ Denying citizens such a weapon, maintains the Court, makes it impossible for them to defend their homes where the need for defense of self, family, and property is most acute.²¹¹ The Court’s assertion that private individuals must be allowed handguns in order to defend self and property coincides closely with CORE’s argument that African Americans need weapons in order to defend themselves from violent crime. According to both, the state is not only incapable of protecting citizens from attack, but is indifferent to their plight, actually making it harder for citizens to protect themselves. Given that rights to property and life itself are at risk, the Court suggests that some kind of private rights enforcement must be authorized, beyond the purview of the police.

That the Supreme Court strikes down the District’s gun ban as if it were yet another regulation burdening African-Americans, much like the Black Codes, highlights the Court’s larger shift away from the concerns of groups like the NAACP and towards a new civil rights.²¹² One way to read this is that the Court is using the goal of racial equality as a type of façade, a screen to hide some other agenda that has nothing to do with race. Just as the Cold War animated *Brown*, in other words, so too might the Court be worried about larger political considerations in *Heller* losing rural white voters to the Democratic Party perhaps, or angering powerful

Fleeger, 36 U.S. (11 Pet.) 185 (1837); *Mima Queen v. Hepburn*, 11 U.S. (7 Cranch) 290 (1813); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795).

208. *Kyllo v. United States*, 533 U.S. 27 (2001). See also STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 172–73 (1996).

209. *Heller*, 128 S. Ct. at 2817–22.

210. *Id.* at 2818.

211. *Id.* at 2817.

212. *Washington’s Black Majority is Shrinking*, N.Y. TIMES, Sept. 16, 2007, <http://www.nytimes.com/2007/09/16/us/16washington.html?ref=us>.

lobbies like the National Rifle Association. Of course, even if the Supreme Court were interested in placating lobbyists and right-centered voters, perhaps to get more conservatives on the Court during the next presidential administration, nothing compels it to cite black history. If anything, Scalia's deployment of black history appears to compromise his commitment to originalism. After all, how can popular understandings of the Second Amendment in the 1870s possibly indicate the founders' intent in the 1780s?

Perhaps the best explanation for Scalia's foray into black history is that it provides him with a dramatic entry-point for discussing the right to bear arms from within the context of the much older, pre-existing common law right to self-defense.²¹³ While Rakove and Konig are correct that the founders did not spend much time discussing the right to self-defense, this does not mean that the right did not exist, nor that they rejected it. In fact, the English Bill of Rights expressly mentioned it in 1689, marking the beginning of its long career as a pillar of English common law.²¹⁴

IV. IMPLICATIONS

What implications does *Heller*'s resurrection of the inherent right to self-defense coupled with the individual right to bear arms have for constitutional law or constitutional theory generally? There are at least three. One, *Heller* does more than simply hold that the Second Amendment protects an individual right to bear arms; it suggests that the individual right to bear arms emanates from sources beyond the Second Amendment. One such source is the inherent right to armed self-defense.²¹⁵ This right, which the NRA has stressed for the past thirty years, pre-dates the Constitution and exists as a type of fundamental or natural right.²¹⁶

The most likely implication of this is that by identifying an inherent right to self-defense, the Court is preparing the battlefield for striking down handgun bans at the state and local level. At present, *Heller* has no bearing on the states because the Second

213. See, e.g., RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 3–5 (1991); KERMIT L. HALL, PAUL FINKELMAN & JAMES W. ELY, JR., AMERICAN LEGAL HISTORY 34–35 (3d ed. 2005).

214. *Id.*

215. *Heller*, 128 S. Ct. at 2817.

216. *Id.* at 2793. If states insist on banning “the quintessential self-defense weapon,” the handgun, then they are arguably depriving persons of their liberty without due process of law, or denying citizens one of their most sacred privileges and immunities. *Id.* at 2818.

Amendment has never been incorporated. This could change if the Court decides to hear a challenge to a municipal gun ban outside the capitol, of which there is already one in Chicago.²¹⁷ If the Court takes the Chicago case, Scalia's opinion in *Heller* suggests that it might decide to overthrow Chicago's gun ban on any one of three grounds. First, it could use the Due Process Clause of the Fourteenth Amendment to overrule *Cruikshank* and incorporate the Second Amendment's individual right to bear arms to the states. Second, it could revisit the Privileges and Immunities Clause of the Fourteenth Amendment and do exactly what the Institute for Justice requests, which is to overturn the *Slaughter-House Cases* and identify the individual right to bear arms as one of the privileges of national citizenship.²¹⁸ Third, the Court could hold that even without privileges and immunities or even the Second Amendment, the right to armed self-defense exists as an inherent right necessitating the federal invalidation of state gun bans. If it wanted to get more specific, the Court could include armed self-defense within the Fourteenth Amendment's liberty interest, using the Due Process Clause to overturn state gun bans without overturning any of its own rulings.²¹⁹

While Scalia has traditionally been averse to liberty interest arguments precisely because they have been used to create implied rights, the right to self-defense might be different.²²⁰ Unlike the right to privacy, the right to self-defense is no product of ephemeral penumbras, but a pillar of ancient common law.²²¹ To illustrate this, Scalia quotes Blackstone, noting that people have a "natural right of resistance and self-preservation" as well as the right to use "arms for self-preservation and defence."²²² Scalia goes on to cite other sources as well, including the English Bill of

217. Dahleen Glanton, *New Battles Erupt Over Gun Laws Following Supreme Court Decision*, CHI. TRIB., July 27, 2008, http://archives.chicagotribune.com/2008/jul/27/nation/chi-gunlaws_bdjul27.

218. Justice Thomas has already intimated that he might be interested in revisiting the *Slaughter-House Cases*. See *Saenz v. Roe*, 526 U.S. 489 (1999).

219. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

220. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1986) (Scalia maintaining that a fundamental right must be a right "traditionally protected by our society"). Stephen M. Griffin notes that Scalia has been open to fundamental rights arguments so long as the "common law protected the right in question." STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM* 172 (1996).

221. WYANE R. LAFAVE, *CRIMINAL LAW* 522-68 (4th ed. 2003).

222. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008) (citing 1 WILLIAM BLACKSTONE, 1 COMMENTARIES *136, *139-40).

Rights, which held as early as 1689 that Protestants “may have arms for their defense suitable to their conditions.”²²³

Even if *Heller* is not applied to the states, its endorsement of both an individual right to bear arms and an inherent right to self-defense marks an interesting constitutional moment nevertheless. Unlike the mainstream civil rights interests that endorsed *Brown*, *Heller* marks a victory for a much more radical strain of black activism rooted in a tradition of armed self-defense. Long a part of African-American history in the United States, armed self-defense became particularly popular after black soldiers returned from overseas at the end of World War II.²²⁴ Some black veterans like ex-Marine Robert F. Williams returned home convinced that guns were critical to the achievement of true racial equality.²²⁵ Though views like Williams’s were temporarily obscured in the 1950s and 1960s by nonviolent direct action, even nonviolent groups like CORE moved towards a more arms-friendly stance as vigilante killings of black activists mounted in the Deep South in the 1960s.²²⁶ By 1968, CORE had become a leading advocate of armed self-defense, along with popular black martyr Malcolm X, Student Nonviolent Coordinating Committee leader H. Rap Brown, and the Black Panthers.²²⁷

Ironically, many black proponents of armed self-defense became Republican, underscoring the fact that black radicalism tended to share commonalities with libertarian conservatism.²²⁸ For example, one of the few black organizations to publicly endorse

223. *Id.* (citing 1 W. & M., c. 2, §7, in 3 Eng. Stat. at Large 441 (1689). Scalia also cites 2 J. DE LOLME, THE RISE AND PROGRESS OF THE ENGLISH CONSTITUTION 886–87 (A. Stephens ed., 1838) (1784); G. SHARP, TRACTS CONCERNING THE ANCIENT AND ONLY TRUE LEGAL MEANS OF NATIONAL DEFENCE BY A FREE MILITIA 17–18, 27 (3d ed. 1782)).

224. TIMOTHY B. TYSON, RADIO FREE DIXIE: ROBERT F. WILLIAMS AND THE ROOTS OF BLACK POWER 37 (1999).

225. *Id.* at 49–89.

226. The Student Nonviolent Coordinating Committee, or SNCC, went through a similar transformation. One reason for this was that both SNCC and CORE focused on grassroots organizing in the Deep South, possibly the most dangerous type of civil rights work. The NAACP and even the Southern Christian Leadership Conference, SCLC, focused on more strategic modes of activism, including litigation and media manipulation respectively. See generally CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S (1981).

227. LANCE HILL, THE DEACONS FOR DEFENSE: ARMED RESISTANCE AND THE CIVIL RIGHTS MOVEMENT (2004); CHRISTOPHER B. STRAIN, PURE FIRE: SELF-DEFENSE AS ACTIVISM IN THE CIVIL RIGHTS ERA (2005).

228. CHRISTOPHER ALAN BRACEY, SAVIORS OR SELL-OUTS: THE PROMISE AND PERIL OF BLACK CONSERVATISM FROM BOOKER T. WASHINGTON TO CONDOLEEZZA RICE 109–10 (2008).

Heller was Project 21, an organization of black conservatives who announced in a press release that the Court's gun ruling was "a great day for law abiding citizens" in the District of Columbia.²²⁹ While Project 21 represents a distinct minority of African-American voters in the United States, their endorsement of armed self-defense resonates with a long tradition of black militancy in America, a tradition that Scalia might sympathize with.²³⁰

Even if Scalia does not harbor any sympathy for black nationalism, his opinion highlights a convergence of conservative thinking and black power nevertheless. If *Heller* represents anything, it is a decidedly private, non-state oriented stance towards social policy. Indeed, *Heller* might be viewed as a type of anti-statist alternative to the big government solutions and programs devised in the 1960s and 1970s including Title VII, Head Start, Food Stamps, and even affirmative action, all of which provided regulatory mechanisms by which minorities could either seek redress for rights infringement or gain access to goods or services.²³¹ Title VII, for example, transformed the federal courts into a quasi-regulatory body assigned the duty of policing private industry hiring practices.²³² Head Start, Food Stamps, and affirmative action, by contrast, created regulatory bodies that administered goods and services to those who confronted structural racism and institutional discrimination at the macro-level.²³³

Heller represents a very different type of regulatory philosophy from the one that animated the Civil Rights Acts and the Great Society. Unlike Title VII and Head Start, *Heller* is de-regulatory in the sense that it aims to dismantle a relatively intrusive set of legal rules prohibiting private ownership of certain guns. Though the

229. Press Release, Project 21, *District of Columbia v. Heller* Supreme Court Second Amendment Decision Hailed by Black Activists (June 26, 2008) (on file with author).

230. If this is true, he might be reflecting a sentiment held by fellow justice Clarence Thomas, who actually admitted to sympathizing with black power in a recent memoir. "The more I read about the black power movement," recalled Thomas, "the more I wanted to be a part of it." CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 48 (2007). To take another example, presidential candidate Barack Obama expressed qualified support for the ruling, declaring that *Heller* "will provide much-needed guidance to local jurisdictions" and that the Supreme Court's opinion endorsing an individual "right to bear arms" did not have to be inconsistent with keeping "our communities and our children safe." *Supreme Court Overturns D.C. Gun Ban; What Next?* (Nat'l Pub. Radio broadcast July 3, 2008).

231. MARVIN E. GETTLEMAN & DAVID MERMELSTEIN, THE GREAT SOCIETY READER: THE FAILURE OF AMERICAN LIBERALISM 13-24 (1967).

232. *Id.*

233. *Id.*

NAACP rejects the notion that this will help blacks, Scalia disagrees, making *Heller's* deregulation of guns a kind of post-modern parallel to *Brown's* deregulation of state bans on interracial contact.²³⁴ In both cases, the Supreme Court removed legal restrictions that, in its opinion, harmed minorities.²³⁵ In both cases, the regulations in question had initially emerged under a rubric of attempting to reduce crime, violence, and dangerous social conflict in urban areas.²³⁶ While Jim Crow's early history as a police law aimed at reducing racial tensions is often overlooked, recovering it helps put Scalia's *Heller* opinion in a larger perspective. By invalidating the District's gun ban, the Roberts Court appears to join the Warren Court in cabining government and creating zones of freedom in which individuals regulate themselves, with whatever violence that might ensue, free from state intervention and expense. Within these zones, the deployment of legally sanctioned violence is not simply a function of the regulatory apparatus of the state, i.e. the courts and the police, but the inherent right of the people themselves.²³⁷

While most regulatory scholars would probably not say that armed self-defense performs a regulatory function, Scalia appears to disagree. By upholding an individual right to armed self-defense, the Court gently shifts the burden of crime control from the state to private citizens who, in acts of vigilante justice, will now arrest, prosecute, and execute criminal offenders on their own. Though vigilantism is generally not thought of as a social practice that performs a regulatory function, it has a long history of doing just that in the United States.²³⁸ In the late nineteenth century, vigilantism became a frequent form of substitute law enforcement

234. For more on *Brown*, see MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* (2007); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR RACIAL EQUALITY* (1976).

235. See KLUGER, *supra* note 234.

236. That segregation aimed to halt "dangerous social conflict" is a point made by Michael McGerr. See MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870 TO 1920* 183 (2003). For further support of McGerr's point, as well as evidence that Jim Crow was initially an urban phenomenon, see EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION* 145–46 (1992); JOHN W. CELL, *THE HIGHEST STAGE OF WHITE SUPREMACY: THE ORIGINS OF SEGREGATION IN SOUTH AFRICA AND THE AMERICAN SOUTH* 3 (1982).

237. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2864 (2008).

238. SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 31–33, 45–46, 122–23 (1980).

in the West.²³⁹ Vigilante groups emerged in California, Colorado, Nevada, Oregon, Texas, Montana, and other states.²⁴⁰ According to one chronicler of western vigilantism, “[s]wift and terrible retribution is the only preventive of crime, while society is organizing in the far West.”²⁴¹ Collectively, western vigilantes formed what historian Lawrence Friedman has called a “private system of criminal justice.”²⁴²

Heller suggests that the same thing might be happening in the District of Columbia. By overturning D.C.’s gun ban in the name of promoting self-defense, the Court seems to be intentionally fostering a climate in which “swift and terrible retribution” will be meted out to violent offenders by law-abiding private citizens.²⁴³ This represents a significant devolution of power from the State, which in most developed countries has a monopoly on legalized violence.²⁴⁴ By devolving the power of legalized violence, the Court does the exact opposite of what criminal law scholar Jonathan Simon claims that American government has done since the 1960s. According to Simon, government in the U.S. has used crime to legitimate an expansion of new forms of state power, whether more aggressive policing or more invasive public control of private life.²⁴⁵ *Heller* does something very different. It devolves power—in this case the state’s monopoly over the power to inflict death no less—into the hands of private parties.

What are we to make of this? One, the Supreme Court seems to be declaring that government has failed America’s cities. Not only have police failed to control crime, but the various Great Society programs that were initiated to solve what Thomas J. Sugrue has called “the urban crisis” have failed to slow the root sources of crime.²⁴⁶ Conceding that the state has been incapable of preventing crime, the Court is now shifting the burden of policing, frontier-style, onto the people themselves. Rather than increase the power of the criminal justice system over private life, as Simon argues,

239. RICHARD MAXWELL BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* (1975).

240. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 440 (3d ed. 2005). See also Richard Maxwell Brown, *Violence and Vigilantism in American History*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES* (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

241. FRIEDMAN, *supra* note 240, at 440.

242. *Id.*

243. *Id.*

244. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 15 (2003).

245. SIMON, *supra* note 27, at 4.

246. THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (1996).

Heller suggests that the government has begun to devolve power to private individuals, entrusting them with what is perhaps the state's most awesome prerogative: the right to take human life.

While Simon sees a malicious state determined to incarcerate minorities, *Heller* indicates an exasperated state incapable of preserving social order. Mass incarceration, though staggering, has failed. So too have the various recent innovations in policing, "Comp-Stat," broken windows, and so on.²⁴⁷ This suggests that *Heller* might best be framed as part of a larger conservative move towards "a private system of criminal justice" away from the prison-industrial complex.²⁴⁸

Heller's move towards private criminal justice has implications for other areas of law besides self-defense including the death penalty. During the eighteenth and nineteenth centuries, the death penalty in America was frequently administered by vigilantes, not state actors.²⁴⁹ Only with great effort did states intervene, claim a monopoly on the infliction of death, and surround the death penalty with a series of procedural protections designed to reduce the "carnival" aspect of killing and guarantee that the innocent were not executed.²⁵⁰ Today, thanks to procedural protections, most offenders who are sentenced to death are never actually executed.²⁵¹ This tracks a larger ambivalence about the death penalty in the United States, spurred by the Innocence Project and other programs that have revealed fundamental flaws in America's death penalty system.²⁵² Even the Supreme Court has seemed increasingly ambivalent about the penalty of life, refusing to extend it to child rapists and minors.²⁵³

Enter *Heller*. Even as the Court appears to be gaining doubts about the death penalty, *Heller* appears to be moving us in the opposite direction, towards vigilante executions. Indeed, the Court now appears to be shifting the onus of the electric chair itself onto private hands. Of course, private executions will happen irregularly and erratically, in the midst of violent confrontations on the street

247. DAVID A. HARRIS, *GOOD COPS: THE CASE FOR PREVENTIVE POLICING* 18–27 (2005).

248. FRIEDMAN, *supra* note 240, at 440.

249. WALKER, *supra* note 238.

250. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 20–45 (2002).

251. *Id.*

252. *Id.* at 200–32.

253. *See, e.g.*, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (holding the death penalty unconstitutional for child rape); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that it is unconstitutional to impose death penalty for crimes committed while offender was under eighteen).

and in private homes; but they will arguably still happen. What was once a special creature of the criminal law, the justification excuse, is now becoming a deregulated policy substitute for failed crime control.

Of course, this raises the question: has crime control truly failed? For the past two decades, crime has dropped dramatically in the United States.²⁵⁴ At the same time, state and federal prisons have exploded in number and size, incarcerating upwards of two million people, far higher than in most developed countries.²⁵⁵ For some, this dialectic of mass incarceration and reduced crime rates are linked, indicating that the criminal justice system is not only working, but is working overtime, successfully removing hordes of dangerous offenders from the streets.²⁵⁶

Assuming that American criminal justice has succeeded, not failed, the Supreme Court's ruling in *Heller* may still indicate a slight discomfort with *how* it has succeeded. Apparently unconcerned with encroaching state power, American voters have seemed so eager to improve security that they have channeled unprecedented amounts of public money into constructing a "prison-industrial complex" that might reasonably be said to mark the beginnings of a modern police state.²⁵⁷ Despite its professed commitment to defendants' rights, American criminal justice has become what some criminologists refer to as an "assembly-line" where trials rarely happen, offenders are encouraged to plead guilty, and defense lawyers are pushed by institutional constraints to spend more time accommodating "the courtroom work group" than defending clients.²⁵⁸ At the same time, police have adopted increasingly aggressive approaches to fighting crime, often focusing on minor "quality of life" crimes rather than violent felonies or grand larcenies.²⁵⁹ Police have also begun deploying increasingly sophisticated technologies, including crime mapping, DNA testing, and urban camera systems, all with an eye to increasing public security.²⁶⁰

While all of this statism does not appear to be bothering the majority of voters, it should, theoretically, bother conservatives. In

254. FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* (2007).

255. PEW CENTER, *supra* note 29.

256. JOHN E. CONKLIN, *WHY CRIME RATES FELL* (2003).

257. ZIMRING, *supra* note 254, at 45–60.

258. Maureen Mileski coined the term "assembly-line justice" and "courtroom workgroup" in her piece, *Courtroom Encounters: An Observation Study of a Lower Criminal Court*, 5 *LAW & SOC'Y REV.* 473 (1971).

259. GEORGE L. KELLING & CATHERINE COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996).

260. HARRIS, *supra* note 247, at 98–115.

fact, conservative antipathy to big government might explain Scalia's willingness to ride roughshod over local popular sentiment in D.C. as well as reject the desperate appeals of the NAACP, an enthusiastically pro-government, if not popular, civil rights group. To anyone truly interested in curbing state power, the type of draconian gun bans imposed in the District smack of authoritarianism helping explain Scalia's interest in overturning them.

Overturning gun bans serves other interests as well. By recovering an inherent right to armed self-defense, Scalia places the justified use of deadly force by private citizens at the forefront of the gun debate, arguably introducing a new non-state sponsored deterrent to future crime. If enough private citizens carry guns, private deterrence might actually lower crime rates on its own, without the help of the prison-industrial complex. To someone concerned about encroaching state power, private arms provide an answer to how the state can be cabined and crime can be handled. Finally, private arms also reduce the chance that the state will need to impinge on other rights in order to guarantee security, an argument long made by constitutional activists in the NRA.

V. CONCLUSION

Today, the interests that once-converged to support civil rights in the 1950s and 60s are no more. The Cold War is over, *de jure* segregation is gone, and the South is booming. It should perhaps be no surprise then that the Roberts Court has felt comfortable invalidating aggressive laws aimed at achieving racial integration in Seattle and Louisville in 2007.²⁶¹ But just because the Roberts Court ruled against desegregation schemes in *Parents Involved* does not mean that it is cutting back on civil rights entirely.²⁶² *Heller* suggests that the Court is willing to go in a new, arguably more radical direction. In a strange coda to Malcolm X's infamous Cleveland speech, the Supreme Court appears to be writing the first pages of a new chapter on civil rights, one aimed not simply at the constitutional endorsement of an individual right to bear arms, but an inherent right to self-defense.²⁶³

Though not civil rights in the traditional sense, both the individual right to bear arms and the common law right to self-defense have been touted as civil rights by a conservative, biracial

261. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

262. *Id.*

263. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2864 (2008).

coalition intent on providing citizens with the means necessary for defending themselves against violent crime. Though some of the impetus for this movement has come from what political scientist Jeffrey R. Dudas has termed the “politics of resentment,” much of it reflects a genuine conviction that without arms, the only long-term alternative to crime control is a rights-averse police state.²⁶⁴

In the short term, the Court’s turn to self-defense may sound the death knell for gun bans in cities like Chicago. Justice Scalia’s invocation of self-defense as an inherent right provides the Court with an option for invalidating gun bans that does not necessarily rely on incorporating the Second Amendment to the states or overturning past precedent.²⁶⁵ Precisely because the right to self-defense existed at common law, the Court could easily hold that any state measure unreasonably abridging a citizens’ ability to meet imminent harm with deadly force is a deprivation of liberty without due process of law.²⁶⁶

264. Dudas, *supra* note 9, at 731.

265. *Heller*, 128 S. Ct. at 2864 (2008).

266. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973).