Much Ado About ... Something Else: *D.C. v. Heller,* the Racialized Mythology of the Second Amendment, and Gun Policy Reform

Maxine Burkett**

I. INTRODUCTION

In late 2007, the National Rifle Association and the Brady Campaign to Prevent Gun Violence shared a rare moment of agreement. The U.S. Supreme Court's grant of certiorari in *District of Columbia v. Heller,* both organizations declared, brought before the Court the most important Second Amendment case in history.¹ For the first time since its 1939 decision in *United States v. Miller,* the Court squarely confronted the scope and meaning of the Second Amendment, and did so by reinterpreting this once-neglected area of constitutional law. For the District of Columbia itself, the case introduced a watershed moment—a determination of whether its longstanding handgun ban and regulation of other firearms would stand or fall, and thus a determination of its autonomy to legislate for the health and welfare of its citizens. Yet for the rest of the nation, I contend, *Heller* simply does not represent the transformative moment in constitutional interpretation that both sides of the gun policy debate may hope it to be.

Whether the "right to bear arms" guaranteed by the Second Amendment is an "individual" right or a "collective" right²—the

---


**Associate Professor, University of Colorado School of Law. I thank Nestor Davidson, Clare Huntington, Philip Weiser, and all the participants of the Thursday Workshop. For reviews of earlier drafts of this article, I thank Kathryn Abrams and Angela Harris. I also thank Jennifer DiLalla for her unparalleled assistance in preparing this article.


The constitutional issue before the Court in *Heller*\(^3\)—makes little practical difference in states’ and local governments’ ability to regulate firearms. The Second Amendment has never been incorporated against the states, and that issue was not before the Court in *Heller*. Yet even if the *Heller* holding were to apply to the states, gun policy would continue to be created by the political decisions of state and local legislative bodies, relatively unconstrained by acts of judicial constitutional interpretation.\(^4\)

Indeed, as recent scholarship makes clear, those decisions ultimately are not anchored in the Second Amendment at all, but rather derive from intensely embraced cultural values and cultural myths. Proponents and opponents of gun control essentially are arguing not so much about policy as about the preservation—or, in some cases, the generation—of venerated ways of life. In its most basic incarnation, this argument takes the form of a clash between a strongly avowed reverence for the nation’s individualist frontier spirit and an equally strongly expressed desire for a communitarian approach to American public life and policymaking.\(^5\)

While recent scholarship has taken a critical first step toward gun policy reform by making clear that debates over gun control have always been, at their heart, debates over competing cultural values, that scholarship has stopped short of its most valuable conclusion. The competing cultural values at stake in the gun debate have, at their core, an often unrecognized racial conflict that extends back to the very founding of the nation. A look at the story of the Second Amendment from the African American perspective reveals not only the greater complexity of the cultural conflicts undergirding the gun policy debate, but also lays bare the deep structure of gun policy that has aided black repression from the slavery epoch to today. The cultural mythology that undergirds the commitment to the right to bear arms has long gained force from and been perpetuated by a perennial struggle between white and black America. These myths pit white commitment to gun ownership against a counter-narrative in the African American community, which has simultaneously looked to guns as a defense against white oppression, to gun control as a means of disenfranchisement and dispossession, and to the contemporary prevalence of firearms as a threat to its livelihood.

To date, most scholars have failed to analyze the way in which gun policy has historically been deployed not to regulate gun ownership by

\(^3\) In granting certiorari, the Supreme Court fashioned its own Question Presented, as follows: “Whether the following provisions—D.C. Code secs. 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?” *District of Columbia v. Heller*, 128 S.Ct. 645 (Mem) (2007).

\(^4\) See infra Part V.

\(^5\) Id.
white men—the primary locus of the gun rights movement—but rather to disarm or generally disempower African Americans. In the culture wars over gun policy, therefore, it is not enough to highlight racial tension; the debate must also recognize the link between firearms and white control. By doing so, true resolution of the divisive gun debate may be achieved.

Heller’s most critical legacy thus will lie not in its interpretation of the constitutional right to bear arms, but rather in its potential to generate a renewed and reformed conversation about gun policy in light of these powerful underlying cultural inputs. At its most productive, that conversation will illuminate the powerful American mythology of gun ownership, a mythology the origins and continuing vitality of which are ineluctably bound up with racial conflict and with notions of true citizenship. Tracing that mythology from its colonial roots through the present will elucidate the motivations attached to the much-trumpeted cultural value of defending home, hearth, and the free state in the American context.

Part II of this Article examines what was at stake in Heller, both for the District of Columbia and for the nation as a whole, arguing that the case will have a limited impact at most on actual gun policy. While the “ideological, visceral, polarized, ad hominem—and, often, ugly”\(^6\) rhetoric of the “great American gun debates”\(^7\) might suggest otherwise, actual decisions about gun ownership and use will be made not by judicial fiat, but rather by legislative action at the state and local level. Even though the Heller Court held that the Second Amendment protects an individual right, state and local governments will still have significant freedom to craft gun policy.

Part III explores the more crucial reason for Heller’s ultimately limited impact: The debate over the right to bear arms is not grounded in constitutional interpretation, but in cultural values and cultural myth. This Part demonstrates that political fights over gun control are more accurately understood as fights over the ability to protect or construct revered ways of life. As a result, any significant policy reform can only derive from an understanding of and appeal to those ways of life.

Part IV delves into the specific cultural mythology that Richard Slotkin has called the “Cult of the Colt,”\(^8\) with a detailed focus on the myth’s racialized underpinnings and effects, and on the elements of American culture that enable its persistence. This Part develops my contention that the debate over gun control is steeped in and propelled by a larger, four-

---


7. *Id.*

century-old tension between white and black America, a tension that must be addressed—and ultimately eliminated—for meaningful reform to be possible.

Finally, Part V responds to recent scholarly calls for reframing and reforming the debate over gun policy. Solving the problem of gun violence means crafting both policy and cultural attitudes that will make it possible for those who embrace the values associated with gun ownership as well as gun control to protect and revere their ways of life without any need or motivation for quarrelling about armament. Systemic reform will require far more than illusory compromises between advocates and opponents of gun control, and it will be enacted on the ground by communities unwilling to "stand by while [their] citizens die."9

II. D.C. v. HELLER

In Parker v. District of Columbia, the D.C. Circuit held that the Second Amendment "protects an individual right to keep and bear arms."10 The court went on to hold that this individual right is violated by both the District’s ban on handguns and its regulation of the manner in which lawfully held firearms may be kept.11 Because the latter regulation "allow[ed] only for the use of a firearm during recreational activities," the court reasoned, it "amount[ed] to a complete prohibition on the lawful use of handguns for self-defense" and thus was per se unconstitutional.12 In so holding, the D.C. Circuit became the first federal appeals court in the nation’s history to strike down a law because it offends the Second Amendment.13

Parker was most immediately remarkable for its break from the seemingly settled Second Amendment jurisprudence of the Supreme Court and the vast majority of the circuit courts of appeals.14 Those courts have

11. Id. at 399-401. The D.C. Code "generally prohibit[s] the registration, and thus the possession, of any pistol—defined as a gun 'originally designed to be fired by use of a single hand'—that was not registered in the District prior to the effective date of the law" in 1976. Petition for cert., supra note 9, at 3 (citing D.C. Code §§ 7-2501.01(12), 7-2502.02). It also requires that lawfully held (i.e., registered) firearms "be kept 'unloaded and disassembled or bound by trigger lock or similar device, unless such firearm is kept at [a] place of business, or while being used for lawful recreational purposes within the District of Columbia." Parker, 478 F.3d at 400-01 (quoting D.C. Code § 7-2507.02).
12. Parker, 478 F.3d at 401.
14. As the District observed in its Petition for Certiorari, every federal circuit court of appeals
almost uniformly held that the Constitution contains no individual right to bear arms, but rather a right that is protected only in furtherance of the militia’s objectives. And it was precisely the potential for the Supreme Court to resolve what Respondents referred to, somewhat expansively, as a “profound split of authority among the federal appellate courts on the question of whether the Second Amendment secures individual rights” that has generated claims of the *Heller*’s momentousness.

This section explores *Heller*’s significance for gun policy in the United States. To provide context for the “profound split of authority” created by the D.C. Circuit’s constitutional interpretation, the section begins with brief summaries of competing visions of the right to bear arms in recent decades and of Supreme Court and circuit court holdings on the Second Amendment. It then turns to a discussion of *Heller*’s finding that there is an individual right to bear arms and that D.C.’s handgun ban and firearm regulations exceed the city’s authority to regulate for the health and welfare of its citizens. The section concludes by arguing that, in terms of the nationwide debate over policy, the case will have practical effect not because of its holding, but because the Supreme Court’s examination of the issue has the potential to generate a renewed and reformed conversation about guns.

A. Competing Visions of the Right to Bear Arms

Battles over the meaning of the constitutional “right to bear arms” often have focused exclusively on the Second Amendment’s sentence structure and punctuation, which, like that of many other constitutional provisions,
are not "marvel[s] of clarity." Because of the framers' punctuational license, there has been uncertainty as to whether the first clause regarding the militia directly relates to and defines the second clause regarding the "right of the people to bear arms." As a result of this ambiguity, three distinct visions of the right to bear arms have emerged: the collective right in furtherance of the militia, the individual right, and the republican theory of the militia's role in maintaining the well-being of the state.

The collective right theory understands the Second Amendment to protect state militias exclusively. The then-president of the American Bar Association elaborated upon this theory in 1990, explaining that according to case law, "the Second Amendment relates merely, solely, totally and only to the unhampered regulation of a state militia. It does not confer an individual right." By contrast, the individual rights theory understands the Amendment to protect the individual right to keep arms for the purposes of self-defense, hunting, and other "legitimate" purposes. Thomas Moncure, Jr., the former Assistant General Counsel of the National Rifle Association of America (NRA), adopted this theory in describing the Second Amendment as wholly concerned with preserving the liberty of individual Americans.

Finally, the republican militia theory understands the Second Amendment as providing the classic check on the national government—an
armed citizenry organized into militias for the common good.\textsuperscript{24} Consistent with this theory, the "[u]ltimate 'checking value' in a republican polity is the ability of an armed populace, presumptively motivated by a shared commitment to the common good, to resist governmental tyranny."\textsuperscript{25} It bears emphasizing, however, that at the time the Second Amendment was drafted, the very notion of a "republican polity" was vexed. "To be sure," gun-rights advocate Steven Halbrook has explained, "colonial authorities sought to disarm blacks and Indians . . . ."\textsuperscript{26} Citizenship itself was complicated by the existence of the racial hierarchy, and republicanism in America necessarily manifested itself as a reflection of this hierarchy. Within the prevailing racial order, in other words, any republican right to take up arms against tyranny was far from universal.\textsuperscript{27}

\textbf{B. The Second Amendment in the Supreme Court and Circuit Courts of Appeal}

Until \textit{Heller}, the Supreme Court had said relatively little about the right to bear arms. In its notorious \textit{Dred Scott} decision,\textsuperscript{28} the Court suggested in dictum that the Second Amendment protected an individual right. Considering whether African Americans were citizens, Chief Justice Taney focused on the putatively frightening implications of granting blacks the privileges and immunities of citizenship:

\begin{quote}
It would give to persons of the Negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased . . . , and it would give them the full liberty of speech in public and private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.\textsuperscript{29}
\end{quote}

While Taney's reflection seems to imply that the right to bear arms is comparable to the freedoms of movement, speech, and association, it derived not from an interpretation of the Constitution itself, but rather from an apparently fearful analysis of the social consequences of black access to arms.

\textsuperscript{24} For a general description of this theory, which "blend[s]" the collective right and individual right theories, see Levinson, \textit{supra} note 19, at 648–51.

\textsuperscript{25} \textit{Id.} at 648.


\textsuperscript{27} \textit{See infra} notes 161–213 and accompanying text.

\textsuperscript{28} \textit{Dred Scott} v. \textit{Sandford}, 60 U.S. 393 (1856).

\textsuperscript{29} \textit{Id.} at 417.
The Court turned to actual constitutional explication of the Amendment in the 1875 case *United States v. Cruikshank*, holding that the Constitution does not create a right to keep and bear arms. While such a right may exist independent of the Constitution, according to *Cruikshank*, the Second Amendment's protection of that right extends only "as against Congressional interference." The Court expanded on the latter idea a decade later, holding in *Presser v. Illinois* that "the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the state[s]."

The Court's most influential and oft-cited decision on the right to bear arms, *United States v. Miller*, held that the National Firearms Act and its registration requirement did not violate the Second Amendment. In an opinion written by the conservative Justice James McReynolds, the Court analyzed the constitutionality of restrictions on gun ownership solely by considering the relationship of the firearm at issue to the potential activity of the organized Militia. Constitutional protection of the right to bear arms, *Miller* suggested, is limited to arms having "some reasonable relationship to the preservation or efficiency of a well regulated militia." The unanimous Court reasoned that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."

Finally, in a 1980 case, *Lewis v. United States*, the Court used the rational basis test to determine the constitutionality of the 1968 Gun Control Act. Examining the Act under an Equal Protection challenge, the Court did not apply strict scrutiny, the test it applies when considering limitations on fundamental constitutional rights. Indeed, as Justice Blackmun explained,

31. *Id.* at 553.
32. *Id.* at 552.
35. *Id.* at 178.
38. *Id.*
40. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586 (2002) (Scalia, J., dissenting) (strict scrutiny as the appropriate standard of review when a fundamental right is implicated in a Due
rational basis analysis was appropriate because the Act’s “legislative restrictions on the use of firearms... do not trench upon any constitutionally protected liberties.” Under Lewis, in short, the right to bear arms is not a fundamental right. Among the circuit courts of appeals, only the Second Circuit has not directly construed the Second Amendment; it has, however, held that the Amendment does not create a fundamental right. The Tenth Circuit held in 2004 that the right to bear arms is limited to an individual’s “direct affiliation with a well-organized state-supported militia,” and cases in the First, Third, Eighth, and Eleventh Circuits have reached similar conclusions. In a somewhat different vein, the Fourth, Sixth, Seventh, and Ninth Circuits have concluded that the Second Amendment’s protections may be invoked only by the states themselves, not by individuals (who lack standing because the constitutional right is collective). Until the D.C. Circuit decided Parker, the outlier among the circuits was the Fifth, which had suggested in dictum that the Second Amendment does protect an individual right apart from any connection between the arms at issue and service in a militia.

Prior to Heller, then, the Supreme Court and the courts of appeals seemed to have settled two core propositions about Second Amendment jurisprudence with only minor disagreement. First, the Amendment protects a collective and not an individual right. Second, the Amendment applies to the federal government but has not been incorporated by the Fifth

---


43. Petition for cert., supra note 9, at 8 n.3 (citing United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984)).

44. United States v. Parker, 362 F.3d 1279, 1284 (10th Cir. 2004), quoted in Petition for cert., supra note 9, at 8.

45. Petition for cert., supra note 9, at 8-9 n.4 (citing Cases v. United States, 131 F.2d 916, 923 (1st Cir. 1942); United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996); United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992); United States v. Wright, 117 F.3d 1265, 1274 (11th Cir. 1997)).

46. Id. at 8-9 & n.5 (citing United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974) (per curiam)); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976); Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999); Silveira v. Lockyer, 312 F.3d 1052, 1087 (9th Cir. 2002)).

47. Id. at 9 (citing United States v. Emerson, 270 F.3d 203 (5th Cir. 2001)).
Amendment to apply to state and local governments.

Predictably, the *Heller* majority departed from earlier precedent and found, unequivocally, an individual right to bear arms for "traditionally lawful" purposes, such as self-defense within the home. Most notably, the Court found that this individual right was unconnected to militia service and extended not only to self-defense but also to such lawful purposes as hunting. The Court's reasoning focused disproportionately on the structure of the Amendment, finding that the Amendment is "naturally" divided into two parts—a prefatory clause and an operative clause. Importantly for the Court, the prefatory clause regarding the militia does not limit or expand the operative clause, regarding the right to keep and bear arms, but simply "announces a purpose." After an historical review of the militia in America—to identify "a purpose" the prefatory clause is meant to announce—and an examination of the use of key phrases in the operative clause of the Amendment over the past two centuries, the Court had "no doubt, on the basis of both text and history, that the Second Amendment confer[s] an individual right to keep and bear arms."

The *Heller* court did concede that there are limitations to this right, all of which are already codified in federal, state, and local laws. However, the Court offered no indication of the full scope of these limitations. It was clear to the Court that the District had overstepped the ill-defined boundaries.

**C. Heller and Gun Policy in the District of Columbia**

For a number of reasons that the next subsection explores, *Heller*’s resolution of the circuit split will have little practical effect, nationwide, on the gun policy debate. It could have dramatic effect, however, in the
District itself, where the Court’s decision has restricted the city’s level of autonomy in regulating for the health and welfare of its citizens. In its petition for certiorari, the District explicitly linked the gun policies at issue in the case to its autonomy as a government: The city adopted those policies “soon after being granted home rule authority.”\textsuperscript{58} The 1976 City Council made findings regarding handgun use in accidents causing the death of children, violence against women, criminal activity in general, and murders of law enforcement officers, and concluded that because “handguns present a singular danger, the solution was to stop the introduction of more handguns into the District.”\textsuperscript{59} Exercising its new power of self-government, the Council declared that adopting a handgun ban in the city code “reflects a legislative decision’ that handguns ‘have no legitimate use in the purely urban environment of the District.”\textsuperscript{60}

While \textit{Heller} was most closely watched nationwide for what it would say about an individual as opposed to collective right to bear arms in the Second Amendment,\textsuperscript{61} its most crucial holding for the District was whether the city’s handgun ban and other firearm regulations are unreasonable restrictions on any constitutionally protected right.\textsuperscript{62} The \textit{Parker} court reasoned that the handgun ban and the requirement for disabling other firearms within the home amounted to “a complete prohibition on the lawful use of handguns for self-defense,” and thus were per se unconstitutional.\textsuperscript{63} The District asked the Supreme Court, then, to state that because the Bill of Rights does not create or protect rights that are absolute, courts should defer to sound legislative judgment in regulating those rights that are protected.\textsuperscript{64} Even if the Court recognized an individual right, the District hoped to have

---

\textsuperscript{58} Petition for cert., \textit{supra} note 9, at 3.

\textsuperscript{59} \textit{Id.} at 4.

\textsuperscript{60} \textit{Id.} at 5.

\textsuperscript{61} Professor Sunstein’s prediction was on target in this regard: “Dominated as it is by Republican appointees, the court will adopt the individual-rights interpretation. It will accept a controversial reading of the amendment’s original meaning. It will run roughshod over long-settled understandings among the federal courts.” Sunstein, \textit{supra} note 13.

\textsuperscript{62} In this regard, Sunstein went on to predict that “the court will recognize that reasonable restrictions are permissible—and thus will energize, rather than end, the national discussion about the regulation of guns.” \textit{Id.}

\textsuperscript{63} \textit{Parker v. District of Columbia}, 478 F.3d 370, 401 (D.C. Cir. 2007).

the power to trump that right by identifying compelling state interests. Practically speaking, the city sought affirmation of its autonomy to legislate for the health and welfare of its residents, based on its understanding that "[w]hatever right the Second Amendment guarantees, it does not require the District to stand by while its citizens die." The District, however, did not prevail on the question of the handgun ban's constitutionality.

The issue of local autonomy in *Heller* was of especially critical significance to the African American community. According to Census 2000, D.C. is among the ten blackest cities in the nation, with roughly sixty percent of its population self-describing as "Black or African American alone," or "Black or African American alone or in combination." And gun violence affects black America with disproportionate force. The Children's Defense Fund has calculated that nationwide, "[t]he number of African American children and teenagers killed by gunfire since 1979 is more than ten times the number of African American citizens of all ages lynched throughout American history." While only thirteen percent of the U.S. population is black, "twenty-five percent of all firearm deaths and fifty-three percent of all firearm homicides during the years 1999 to 2004" had black victims. Such disparities are exacerbated in the District itself, where, in 2004, 135 of 137 victims of firearm homicide were black.

In considering a city routinely described as the nation's "murder capital," it seems courts would do well to respect rational legislative judgments as to how to stem the loss of lives—nearly always the loss of black lives—to gun violence. And such judgments are no less rational or

---

66. *Id.*
70. *Id.*, cited in NAACP amicus brief, *supra* note 68, at 27.
71. See, e.g., Robert Barnes, *Justices to Rule on D.C. Gun Ban; 2nd Amendment Case Could Affect Laws Nationwide*, WASH. POST, Nov. 21, 2007, at A01 (quoting Robert A. Levy, "a scholar at the libertarian Cato Institute who has spent years planning a challenge that would reach the Supreme Court," to the effect that the Court's grant of certiorari is "especially good news for residents of Washington, D.C., which has been the murder capital of the nation despite an outright ban on all functional firearms since 1976").
72. Justice Scalia, writing for the majority, makes a very brief attempt to address the specific
worthy of deference simply because neighboring jurisdictions have made different judgments permitting a regional flow of guns.\textsuperscript{73}

\textit{D. Heller and Gun Policy in the Nation as a Whole}

Despite the potential impact that \textit{Heller} will have in D.C., there are three reasons that the case is likely to have an extremely limited effect on gun policy nationwide. First, the Second Amendment has never been incorporated against the states.\textsuperscript{74} Second, even though the Court held that the Constitution protects an individual right to bear arms, rights protected by concerns of gun–violence riddled communities before dismissing these concerns, their relationship to this judicial exercise, and the choices made by the D.C. legislature outright. He writes:

\begin{quote}
We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many \textit{amicus} who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self–defense in the home. Undoubtedly some think that the 2\textsuperscript{nd} Am is outmoded in a society where our standing army is the pride of our Nation, where well–trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.
\end{quote}


\textsuperscript{73} \textit{See Petition for cert., supra note 9, at 28 n.16 (When he approved the legislation adopting the handgun ban and firearms regulation, "Mayor Washington recognized, 'no system of firearms control can be fully effective without appropriate controls at the regional and national level.' [B]ut just as 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955), a local legislature cannot be faulted for addressing only that part of a nationwide problem over which it has power."); NAACP amicus brief, supra note 68, at 28. But see Brief of Respondent at 29, 31, Heller, 128 S.Ct. 2738 (No. 07-290) (asserting that because the District acknowledges the continued presence of guns in the city, and "[b]ecause of [the District's] demonstrated—even if understandable— inability to police the entire city, local government cannot substitute for the right of individuals to keep functional firearms in their homes").}

\textsuperscript{74} \textit{See discussion supra, Part II. The question of incorporation was not presented by this case, but the Court, citing precedent, acknowledged that the Second Amendment applies only to the Federal Government. Heller, 128 S.Ct. at 2813 n.23. In \textit{Presser v. Illinois}, cited by the Court in \textit{Heller, id.}, the Court held that the Second Amendment limits the power only of the federal government, and does not limit the power of the states. Presser v. Illinois, 116 U.S. 252, 264–65 (1886). That the Court granted certiorari on a Second Amendment case coming from the District of Columbia, rather than from a state, means that \textit{Heller} is not the right vehicle through which to consider whether \textit{Presser} should be overturned and the amendment incorporated against the states. See Linda Greenhouse, \textit{Justices Will Decide if Handgun Kept at Home Is Individual Right}, N.Y. TIMES, Nov. 21, 2007, at A1. One scholar has argued, however, that a Supreme Court holding that the Second Amendment protects an individual right likely would include or lead to a holding that the amendment applies to the states. Dowd, supra note 2, at 106. Furthermore, Maryland and three other states have filed an \textit{amicus} brief on behalf of D.C., arguing that "allowing the appeals court ruling [in \textit{Parker}] to stand would destabilize current law and 'cast a cloud over all federal and state law restricting access to firearms.'" Barnes, supra note 71.}
the Bill of Rights are not unassailable. Indeed, states may restrict
fundamental rights to varying degrees.\textsuperscript{75} And with regard to the Second
Amendment, according to Professor Tushnet, "substantial amounts of gun
control are constitutionally permissible even if we accept the best versions
of the arguments favored by gun-rights proponents."\textsuperscript{76} In short, as the
subtitle of Tushnet's book—"Why the Constitution Can't End the Battle
Over Guns"—suggests, gun regulation or its absence will continue to be a
matter almost entirely of state and local policy, even after \textit{Heller}'s moment
of constitutional interpretation. Thus, gun policy will remain an issue
decided by legislative action, and not exclusively by courts.

Finally, and most crucially for policy reform, recent scholarship has
demonstrated that political fights over gun control ultimately are not about
constitutional interpretation at all; instead, they derive from and perpetuate
intensely held cultural values and cultural myths for which Second
Amendment rhetoric has become a sort of mask. The Court's determination
that the Second Amendment protects an individual right, in other words,
will not be an insurmountable bar for state and local governments that will
continue to formulate policy in the shadow of those values and myths.
\textit{Heller}'s most lasting legacy, therefore, is likely to be the opportunity it
provides, through the attention that it draws, for understanding and
responding to those policy debates in new ways.

\section*{III. MUCH ADO ABOUT . . . SOMETHING ELSE}

Over the last decade, Professor Dan Kahan and others have
demonstrated persuasively that the "Great American Gun Debate" has raged
for almost half a century without satisfying results because the rhetoric on
both sides has obscured what that debate is truly about.\textsuperscript{77} According to
Kahan,

Whatever they say in public, those involved in the gun control

\textsuperscript{75} Professor Heyman explains that "modern constitutional law distinguishes between
fundamental rights, which can be restricted only for compelling reasons, and nonfundamental rights,
which are subject to reasonable regulation to promote the common welfare." Steven J. Heyman,
\textit{Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression}, 78
explained that "legislative restrictions on the use of firearms . . . do not trench upon any
constitutionally protected liberties," and applied the rational basis test—rather than the strict
scrutiny test applied to fundamental rights—to an Equal Protection Challenge to the Gun Control

\textsuperscript{76} \textsc{Mark V. Tushnet, \textit{Out of Range: Why the Constitution Can't End the Battle
Over Guns}}, at xvi (2007).

\textsuperscript{77} \textsc{Dan M. Kahan, The Tyranny of Econometrics and the Circumspection of Liberalism: Two
Problems with the Gun Debate, in Guns, Crime, and Punishment in America} 44 (Bernard E.
debate are not really motivated by beliefs about guns and crime. . . . What does motivate them, a wealth of sociological and historical literature suggests, is their attachment to competing cultural styles that assign social meanings to guns.  

In short, conflicts over gun policy—and over the meaning of the Second Amendment—mask a deeper conflict over intensely held cultural values, and resolution of the “Great American Gun Debate” depends on unmasking that conflict over values.

This section begins by summarizing recent scholarship unmasking the true nature of the debate over gun policy. It then turns to what this scholarship suggests are the implications of that analysis, and how policymakers and scholars might better resolve the national conflict over guns. The section concludes by proposing that while Kahan is generally right in arguing that the gun debate masks a deeper battle over cultural values, and in suggesting that successful reform to gun policy depends on unmasking and addressing the sources of those values, any fruitful response to that argument must account for the racialized underpinnings of Second Amendment rhetoric.

A. The True Nature of the Gun Debate

Professor Kahan situates his theory of the “Great American Gun Debate” in a larger argument about theories of deterrence. Deterrence theory, Kahan posited, adopts a “disembodied idiom of costs and benefits” that ultimately “elides the points of moral contention that motivate public positions on these disputed issues.” As a result, the true ideological impulses behind the gun control debate are not explored, and to the extent that these ideologies are deleterious, they will not be addressed and dismantled. Instead, deterrence arguments have the opposite effect: “Not talking about these meanings in a public way doesn’t render them inert; if anything, norms that discourage divisive public discourse extend the life of these meanings by making it harder for their critics to expose them and

---


79. Id. Kahan uses the term “deterrence” to “refer broadly to the consequentialist theory . . . that depicts punishment as a policy aimed at creating efficient behavioral incentives.” Id. at 415. In terms of gun policy, according to Kahan, this theory translates into the competing ideas that “banning firearms, particularly handguns, will discourage violent criminals from arming themselves and preying on innocent victims” (the pro-gun-control position) and that “permitting potential victims to arm themselves will deter violent criminals from preying on them” (the anti-gun-control position). Id. at 451 (citations omitted).

80. Id. at 417.
easier for their beneficiaries to disclaim their significance in the law.\textsuperscript{81} Furthermore, Kahan’s research demonstrates, the putatively objective statistics quoted by advocates on both sides of the debate bear little relation to those advocates’ actual reasons for supporting or opposing gun control: “social meanings [of guns and gun control] that go to the heart of their fundamental moral commitments and cultural identities.”\textsuperscript{82}

These moral commitments and cultural identities, according to Kahan, fall generally, but not exclusively, into two camps:

[O]ne side is disproportionately rural, southern or western, and Protestant, as well as male and white; the other is disproportionately urban, eastern, Catholic or Jewish, as well as female and black. The two sides also subscribe to competing cultural ethics . . . . For the former, the “model is that of the independent frontiersman who takes care of himself and his family with no interference from the state.” To them, “the . . . gun symbolizes much that is right in [American] culture,” including “manliness, self-sufficiency, and independence.” [For] [t]he latter[,] “the gun is symbolic of much that is wrong in American culture,” including “violence, aggression, . . . male dominance,” individualism, and racism.\textsuperscript{83}

In arguing about gun control, Kahan posits, these two camps are less interested in crime control than they are in capturing “the expressive capital of the law,” and thus enshrining their deeply held cultural values and identity in the law.\textsuperscript{84} Indeed, Kahan goes so far as to declare that, in terms of this competition over values, gun control is to its advocates “what flag-desecration laws are to the party of patriotism.”\textsuperscript{85} He concludes that for gun control advocates to succeed in altering policy, they must essentially find some sort of ideological middle ground with their opponents, “assur[ing] gun owners that control is not motivated by disgust for their cultural identities.”\textsuperscript{86}

\textsuperscript{81} Id. at 418.

\textsuperscript{82} Kahan, Deterrence, supra note 78, at 451.

\textsuperscript{83} Id. at 453 (citations omitted). For a fuller discussion of the Cult of the Colt, see infra notes 102–20 and accompanying text.

\textsuperscript{84} Kahan, Deterrence, supra note 78, at 462.

\textsuperscript{85} Id. at 460. See also infra notes 244–59 and accompanying text.

\textsuperscript{86} Kahan, Deterrence, supra note 78, at 462.
B. The Policy Implications of the True Nature of the Gun Debate

Kahan and Donald Braman later expanded on Kahan's theory of the cultural power of guns and the cultural underpinnings of the debate over gun policy, explaining that "[i]f individuals adopt one position or another because of what guns mean rather than what guns do, then empirical data are unlikely to have much effect on the gun debate." In terms of affecting policy, then,

Instead of continuing to focus on the consequences of various types of regulation, academics and others who want to help resolve the gun controversy should dedicate themselves to identifying with as much precision as possible the cultural visions that animate this dispute, and to formulating appropriate strategies for enabling those visions to be expressively reconciled in law.

Kahan and Braman thus make a powerful proposal: The very structure and vocabulary of the gun policy debate must be changed, so that the "moderate middle" in the debate is enabled to consider the competing cultural values at stake in "meaningful yet respectful terms." These "moderate citizens" ultimately will accomplish reform, in Kahan's and Braman's appealing vision, by "seek[ing] policies that accommodate their respective worldviews."

Most recently, Professor Kahan has drawn on theories of risk perception to argue that what has been described as the "white-male effect"—the statistical tendency of "this seemingly fearless group of [white] men" to worry less about "myriad dangers" (including guns) than do women


88. Id. Kahan's and Braman's admonition that scholars and policymakers should move beyond the consequences of potential regulation and focus their attention instead on the cultural underpinnings of the gun debate is, in some sense, an analogue of Professor Zimring's concept of the "free-lunch syndrome" in that debate. Id.; see also Franklin E. Zimring, Continuity and Change in the American Gun Debate, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 29, 33 (Bernard E. Harcourt ed., 2003). Zimring argues that pro-gun-control forces have tended—to their detriment—"to pick on small and fairly uncontroversial control proposals but to invest these programs with the suggestion that their passage will have a substantial impact on rates of lethal violence." Id. at 33. Control advocates engage in "free-lunch" politics when they "couple small operational changes with the full weight of firearms control symbolism," thus eliminating "realistic analysis of the impacts of specific control strategies from public discussion." Id. It is simply not reasonable, Zimring argues, to expect real policy benefits from such "small investments." Id.


and minorities—derives from the typical cultural worldview of such men.\textsuperscript{91} Perceptions of risk from guns or other dangers, according to Kahan’s study, vary across populations precisely because those perceptions are the product of “motivated cognition, through which people seek to deflect threats to identities they hold, and roles they occupy, by virtue of contested cultural norms.”\textsuperscript{92} In terms of gun policy, Kahan and his colleagues posit, their findings suggest that gun-control advocates hoping to communicate the risks posed by firearms must find a way of conveying this information to their opponents in “an identity-protective fashion.”\textsuperscript{93} Kahan’s goal is to change the terms of the gun debate by acknowledging that its true focus is competing cultural values and then to find some means of accommodating those competing values in policy proposals that respect, rather than denigrate, them.

When Kahan and Braman suggest policies that might instantiate such a re-formed vision of the gun debate, their three “compromise” proposals seemingly fall into the trap of “free-lunch” politics warned of by Professor Zimring.\textsuperscript{94} Their first compromise stipulates that gun control advocates will avow that the Second Amendment protects an individual right, while opponents will agree to handgun registration.\textsuperscript{95} Their second compromise would entice handgun owners to register their weapons through “a tax rebate or some other monetary award.”\textsuperscript{96} Finally, their third compromise would make it possible for citizens to use the same “civic registration form”...

\textsuperscript{91} Dan M. Kahan, et al., \textit{Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception}, 4 J. EMPIRICAL L. STD. 465, 466 (2007). In designing their study and analyzing their results, Kahan and his colleagues drew heavily on the work of Mary Douglas, who created a “group-grid” typology, which classifies competing sets of norms, or ‘worldviews,’ along two cross-cutting dimensions.” \textit{Id.} at 468. Within this typology, people are classified on a “group” spectrum from “individualist” to “communitarian,” and on a “grid” spectrum from “hierarchist” to “egalitarian.” \textit{Id.} “Those with a low group or individualistic orientation expect individuals to ‘fend for themselves and therefore tend to be competitive’; those with a high group or communitarian worldview assume that individuals will ‘depend on one another . . . ’ Persons who have a high grid or hierarchical orientation expect resources, opportunities, respect, and the like to be ‘distributed on the basis of explicit public social classifications, such as sex, color, . . . holding a bureaucratic office, [or] . . . lineage. Low grid orientations value an egalitarian state of affairs in which no one is prevented from participating in any social role because he or she is the wrong sex, or is too old, or does not have the right family connections . . . .’ \textit{Id.} at 468–69 (citations omitted). Kahan and his colleagues concluded that “[t]he insensitivity to risk reflected in the white–male effect can . . . be seen as a defense response to a form of cultural identity threat that afflicts hierarchical and individualistic white males.” \textit{Id.} at 467.

\textsuperscript{92} \textit{Id.}

\textsuperscript{93} \textit{Id.} at 497.

\textsuperscript{94} Zimring, \textit{supra} note 88, at 33.

\textsuperscript{95} Braman & Kahan, \textit{Overcoming the Fear, supra} note 89, at 599.

\textsuperscript{96} \textit{Id.} at 599–600.
to register "as a voter, as a juror, or as a keeper or bearer of a firearm." It is simply not clear how these minor policy adjustments would address the deep cultural meanings of the gun debate that Kahan and his colleagues have so incisively identified.

C. Deepening the Inquiry: Cultural Values and Cultural Mythology

To acknowledge that the debate over gun policy has always, at its heart, been about something beyond the confines of the Second Amendment is to take an enormous first step in reforming that policy. Kahan and his colleagues, however, have stopped short of exploring the destination to which this crucial first step might lead. Such an exploration requires leaving aside compromise "free-lunch" solutions, which are "identity-protective" in only the most cosmetic sense. While the appearance of political conciliation over registration issues, for instance, may at first blush seem like a victory for Kahan's "moderate middle," that conciliation essentially masks the underlying cultural conflict. Conciliation allows both sides of the debate to evade more difficult issues by declaring victory for their worldview.

Truly transforming the debate over gun policy into a thoughtful discussion of the underlying cultural conflict means unmasking and confronting precisely those difficult issues, including the explicit and persistent racial component of the nation's Cult of the Colt. A key aspect of Second Amendment mythology has been the notion that the right to bear arms is (i) universally available to all Americans, (ii) essential for freedom, and (iii) vital to one's self-defense. The gun owner thus is venerated as the mythical guardian of the free state and the defender of home and hearth.

97. Id. at 600.
98. Kahan et al., supra note 91, at 497.
99. While the Heller majority would not describe this as mythology, it acknowledges the widespread belief in the individual rights meaning of the Second Amendment, despite consistent and unwavering Supreme Court interpretation finding otherwise to date. Justice Scalia argues that the "erroneous reliance upon an uncontested and virtually unreasoned case [Miller] cannot nullify the reliance of millions of Americans ... upon the true meaning of the right to keep and bear arms." District of Columbia v. Heller, 128 S.Ct. 2783, 2815 n.24 (2008). For Scalia, America's reliance on this "myth" is sufficient to support the majority's new interpretation of the Amendment. See id. at 2845 n.38 (Stevens, J. dissenting). Justice Stevens counters:

The majority appears to suggest that even if the meaning of the Second Amendment has been considered settled by courts and legislatures for over two centuries, that settled meaning is overcome by the 'reliance of millions of Americans' 'upon the true meaning of the right to keep and bear arms.' . . . [I]t is hard to see how Americans have 'relied,' in the usual sense of the word, on the existence of a constitutional right that, until 2001, had been rejected by every federal court to take up the question.

Id. (citation omitted).
However, a consideration of the relationship between gun ownership and black America reveals that that veneration has been built and sustained upon a racially charged foundation. An efficacious response to Professor Kahan's call for a re-formed debate over gun policy must not only expose that foundation but also address its implications for an "identity-protective" discourse.

The next two sections lay the groundwork for such a response, first examining the racialized history and mythology of gun ownership in the United States, then suggesting that true policy reform can be crafted only in the light of that history and mythology. If the Cult of the Colt's motivation to protect home and hearth—and, concomitantly, to protect cultural identity—derives in large part from irrational race-based hatred or race-based fear, then the most ambitious and most successful policy reform will seek to eliminate that hatred or fear. In short, if such a motivation were unmasked and dismantled, gun proponents could protect their deeper cultural identity without firing a single shot.

IV. THE RACIALIZED MYTHOLOGY OF THE SECOND AMENDMENT

In explaining why the District's ban on handguns is impermissible, the *Heller* majority observed that the handgun is the preferred weapon for self-defense. The Court thus embraced the cultural mythology underlying the Cult of the Colt: the notion that the gun owner is both the guardian of the free state and the defender of home and hearth. This section adds a missing piece to the gun debate puzzle by explaining the racialized nature of the cultural values and cultural identities at stake in the rhetoric of Second Amendment protection for gun ownership. In so doing, this section interrogates a variation on the "white-male effect" that Kahan identifies but does not seek to dismantle. For with respect to the virtues and risks of self-arming, African Americans have never had the mastery of the debate and have rarely had the advantage of Second Amendment interpretation. Instead, the public health crisis engendered by guns in African American communities has persisted and worsened while "private financial and political fortunes" have been made within the gun industry and gun

100. District of Columbia v. Heller, 128 S.Ct. 2783, 2818 (2008) ("[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.").


102. See *supra* notes 90–92 and accompanying text.

103. "The success of the gun industry and the NRA in blocking efforts to enact stricter gun control laws is a shocking story of the triumph of private financial and political fortunes over public health needs." Ira Helfand, M.D., *Foreword* to Dennis A. Henigan et al., *Guns and the Constitution, The Myth of Second Amendment Protection for Firearms in America, at*
The section begins by examining the cultural values—which ultimately have coalesced into a mythological identity—of the American gun owner, exploring the relationship between those values and the rhetoric surrounding the Second Amendment. The section then turns to a discussion of the racialized underpinnings of the mythology of American gun ownership, from its origins in the Constitution to its incarnation in both the disarmament and the armament of African Americans. This discussion suggests that the cultural mythology surrounding the right to bear arms both gains force from and perpetuates itself through a perennial struggle between white and black America. The section concludes that the myth and its varied cultural incarnations have had an immense social cost, a cost felt most severely by black America.

A. The Political Use of the Second Amendment

1. The White American Mythology of Gun Ownership

In describing the Cult of the Colt, Richard Slotkin has argued that despite the “fundamental principle of American politics that a democracy is a government of laws and not of men,” Americans have clung stubbornly to a belief that “might be called the ‘Cowboy Corollary’ to the Declaration of Independence: ‘God may have made men, but Samuel Colt made them equal.’” Indeed, Colt’s invention of the repeating revolver has been linked, by historians such as Daniel Boorstin, to a “democratization” of American justice. Yet as Slotkin points out, this mythology of Colt-generated equality rests on a fundamental error: “The whole point in having a weapon is to gain an edge,” and “the peculiar advantage of owning a repeating firearm like the Colt is not realized in a gunfight against an equally armed opponent. Rather, it lies in the capacity of a technologically advanced weapon to enable its user to defeat larger numbers of less well-armed adversaries.” In short, the gun permits its holder to transcend his perceived position of inferiority and to gain superiority over, rather than equality with, his adversaries. 

xii (1995).

104. Slotkin, supra note 8, at 54.
105. Id. at 57–58.
106. Id. at 58–59.
107. Slotkin observes that the Colt revolver’s “first great success” as an “equalizer” thus derived from:

[1] Its use by Samuel Walker’s Texas Rangers in mounted combat with Comanche Indians in 1836. The Comanche bow had an effective range comparable to the
It was precisely by means of this skewed sense of "equalizing," however, that the Colt became mythologized as "the gun that won the West" through its performance in the Indian wars.\textsuperscript{108} Indeed, today's gun culture had its origins in a conflation of two American identities with similarly vexed senses of equality: the militia heritage of the South and the frontier heritage of the expanding West.\textsuperscript{109} When Samuel Colt himself began spinning mythologized narratives of his inspiration for creating the repeating revolver, he turned not to an image of the bold frontiersman blazing new trails through the wilderness or to an image of "equalized" gunfighters settling supposed duels of honor.\textsuperscript{110} Instead, he painted a portrait of the solitary white planter potentially overwhelmed by a slave revolt but finding salvation in his gun.\textsuperscript{111} The same gun that could win the West through suppression of Indian tribes could, in Colt's vision, preserve the South through suppression of slave revolts.\textsuperscript{112} In both cases, whites temporarily finding themselves part of a threatened racial minority could use the Colt to achieve superiority and control—an "equalization" process with obviously baneful consequences for the white majority if it were made available to Indians, slaves, or free blacks.\textsuperscript{113}

Not surprisingly, the privilege of gun ownership in Colonial America attached to and was evidence of true citizenship, trumping the distinction of suffrage.\textsuperscript{114} As Professor Kahan has explained,

One could draw inferences about another's social competence, economic class, profession, and even desirability as a suitor from whether he carried a "Kentucky rifle," an "English shotgun," or a dueling pistol. To prevent the appropriation of status—and to repel subversive threats to authority—norms and laws regulated who

---

Rangers' single-shot carbine, and a higher potential rate of fire. Moreover, since the Rangers were attacking a tribal people operating within range of their home villages, they were likely to be outnumbered by the Comanche in most engagements. In that kind of combat, a repeating pistol was indeed an "equalizer."

\textit{Id.} at 60.

\textsuperscript{108} \textit{Id.} Slotkin quotes an 1859 author opining that it was the superiority of American civilization that allowed the Colt to be invented, so that "the less cultivated races are conquered by the more intelligent." \textit{Id.} (citation omitted). This particular element of the mythology was not put to rest until 1997, with the publication of Jared Diamond's comprehensive \textit{Guns, Germs, and Steel}.

\textsuperscript{109} Kahan, \textit{Deterrence}, supra note 78, at 454.

\textsuperscript{110} Regarding the Colt's putative democratization of "the right to fight" over issues of honor, see Slotkin, \textit{supra} note 8, at 57–58.

\textsuperscript{111} \textit{See infra} notes 168–88 and accompanying text.

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{See infra} notes 191–212 and accompanying text.

\textsuperscript{114} Kahan, \textit{Deterrence}, supra note 78, at 454 (footnotes and citations omitted).
could possess such weapons. Thus, "[w]ell into the nineteenth century the gun was a more widely held badge of membership in the body politic than the ballot."\footnote{115}

As a badge of citizenship in pre-twentieth century America, the privilege of gun ownership—and of achieving superiority over a more powerful opponent—thus belonged almost exclusively to white men.

Despite the growing obsolescence of the armed militia and the diminishing Western frontier, “cultural momentum” has perpetuated the mythic image of the armed patriot,\footnote{116} “bearing his arms about him and keeping them in his house, his castle, for his own defense.”\footnote{117} In American popular culture, the gun owner was and is a self-sufficient man fighting for hearth and home.\footnote{118} Today’s gun owner, like his predecessor, tends to embrace the image of the nineteenth-century “true man,” the rural—southern or western—white male.\footnote{119} By contrast, his cultural and ideological counterpart, who tends to support gun control, generally is urban, eastern, female, and black.\footnote{120} Yet the contemporary gun owner is also an educated member of the middle class, one who arguably is as troubled by senseless gun violence in urban America as most.\footnote{121} What, then, is the impetus for protected gun ownership in the twenty-first century United States?

2. The Argument for Self-Defense

The call to arms has been popularized in recent years by the argument for self-protection and crime deterrence.\footnote{122} Ronald Reagan, a member of the NRA, argued that law-abiding citizens had a right to bear arms in furtherance of their safety and welfare; liberals, he explained, were
Endorsing the right to protect oneself and one's family is a difficult position to contradict. Through this argument, gun advocates have dressed gun ownership in the most respectable of clothes. This dress makes the right to own guns today seem more palatable, if not completely sensible, while drawing our attention from some of the very tangible effects—and subtle underpinnings—of gun ownership.

Carl T. Bogus, for instance, argues that gun ownership among whites correlates with racial prejudice, in effect perpetuating the racial subjugation that helped to create the Cult of the Colt in American history. Professor Bogus cites the work of Robert Louis Young:

Gun ownership, as a response to crime, is not born of fear but of anger and a desire for the means to retaliate. Those who fear criminals buy locks, burglar alarms and watchdogs. Those who loathe criminals buy guns. Those who hate blacks are likely to feel a deeper hatred for imagined criminals and are therefore more likely to own guns than those who do not.

These gun owners thus embrace the mythology of their predecessors, in that their guns serve as much as a political and cultural weapon as a physical one.

Indeed, as Young's argument demonstrates, the line between defensive or retaliatory action and offensive attack can blur in the context of race. One striking example is the case of Bernhard Goetz. Goetz, while in a New York City subway car, was approached by four black youths who asked him for five dollars. In response to their request, and his perceived threat of attack, he shot each youth repeatedly, permanently disabling one. His response to the perceived threat was far greater than what many would consider purely defensive. However, the reasonableness of his actions would be viewed through race-tinged lenses. "[F]or many Americans, crime has a black face," Jody Armour explains. His actions were found

---

123. Kahan, Deterrence, supra note 78, at 459.


128. Armour, supra note 126, at 787.
Much Ado About ... Something Else 81

reasonable, and Goetz was acquitted, a verdict that a great majority of the city supported. Through his trial, in fact, Goetz became a media celebrity championing the cause of self-armament. He was a vocal proponent of the “fundamental human right of self-protection” and strongly advocated for distribution of an additional 25,000 guns to trained citizens. It was not long, however, before Goetz’s race politics would explicitly color his call for self-arming. A neighbor, Myra Friedman, repeated Goetz’s racist views, among them his belief that 14th Street needed to be cleansed of the “spics and niggers.” With that revelation, Goetz’s call for his right to bear arms for self-defense dissolved into what Young has suggested is often a racially motivated ambition to hurt others rather than to defend oneself.

To be sure, many in the public viewed the verdict as a statement on the “moral value” of black victims. Representative Albert Vann, from Brooklyn, explained “[i]f Goetz was a black man who shot four white youths on a subway train, there would be no doubt about the verdict. The Goetz case is just more evidence that blacks are not safe in New York City.” Self-defense arguments that may seem to work in a benign, race-neutral manner for white America, in other words, take on a significantly different meaning in the context of black-white interactions. “It may well be true,” George Fletcher explains, “that racial fears invariably infuse routine judgments in American society about what kinds of acts are self-

129. Armour explains that the Reasonable Racist may have beliefs that blacks are more dangerous out of true prejudice. This irrational response may still be reasonable, as it is a response that many “similarly situated” Americans have also had. See id.

130. The trial itself was rife with racist intent. See generally FLETCHER, supra note 127. The defense, without once making verbal reference to race, managed to evoke racist fears by use of role-play and innuendo. For demonstration of the bullets’ path, defense counsel specifically requested four black Guardian Angels, in order to make the menacing presence of black men all the more palpable. Id. at 207. Description of the crime scene and the four victims had a pregnant subtext. “[Counsel’s] strategy of relentlessly attacking the ‘gang of four,’ ‘the predators’ on society, calling them ‘vultures’ and ‘savages,’ carried undeniable racial undertones. These verbal attacks signaled a perception of the four youths as representing something more than four individuals committing an act of aggression against a defendant. That ‘something more’ requires extrapolation from their characteristics to the class of individuals for which they stand. There is no doubt that one of the characteristics that figures in this implicit extrapolation is their blackness.” Id. at 206.

131. Id. at 199.

132. Id. at 5.

133. Id.

134. Young, supra note 124.

135. FLETCHER, supra note 127, at 203 (“[M]any segments of the public would invariably read the verdict as a public declaration on the moral value of the black victims.”).

136. Id. at 199.
3. The Role of the NRA and Gun Advocacy

Gun advocates argue that more guns will reduce crime and increase self-protection. Vigorous marketing, by groups such as the NRA, both creates and sustains the desire for guns as a mythologized symbol of individualism and self-protection.138 This marketing also romanticizes “the culture of martial virtue and frontier independence that the gun connotes.”139 Certainly, if racial minorities are tacitly—and sometimes explicitly—perceived as savages,140 the frontier man is the required counterpart within the Cult of the Colt. The NRA provides the gun, and the mythologized culture it represents, to all willing Americans, and it does so by routinely exploiting fears of crime in a heavily racialized manner. NRA propaganda urgently warns of “stranger danger” and argues that self-protection is not just a right, indirectly invoking pre-Heller misperceptions of Second Amendment jurisprudence,141 but a responsibility.142 In its portrayals of the “enemy” against whom guns will be used, the NRA has juxtaposed frightening scenarios with photos of black men.143

Furthermore, the gun lobby has fed the struggle between its suburban and rural white membership and the black underclass, championing its own romanticized Second Amendment rights over the clear results of gun violence. As Andrew Herz argues, “[t]he pleasure of more efficient or pleasurable hunting and target competition weapons is seen to outweigh the hundred of lives lost to semi-automatic gunfire.”144 Herz cites Paul

137. Id. at 203.

138. “The positive social meaning of guns is sustained by the market, which simultaneously exploits and creates the appetite to share in the culture of martial virtue and frontier independence that the gun connotes.” Kahan, Deterrence, supra note 78, at 455.

139. Id.

140. Throughout the Goetz case, for example, the four black victims were “relentlessly” characterized as “savages,” “vultures,” and “predators on society”. See Armour, supra note 126, at 784; Fletcher, supra note 127, at 206.

141. Robert R. Simpson, former partner at Updike, Kelly & Spellacy, P.C., explained, “[T]he reason why you have the public perception that the Second Amendment provides an individual right to bear arms is due, in large part, to the NRA and their tremendous lobbying efforts and propaganda...it is not the law.” Symposium Dialogue: Guns and Liability in America, 32 Conn. L. Rev. 1425, 1435 (2000).


143. Bogus describes the NRA reaction to the L.A. riots as an exploitation of racial fears. Advertisements included color photos of black rioters. Bogus, supra note 124, at 1366.

144. Andrew D. Herz, Gun Crazy: Constitutional False Consciousness And Dereliction Of
Blackman, an NRA research coordinator, who dismisses gun violence as affecting only those who have illegally acquired a gun. The racist underpinnings of NRA rhetoric are highlighted in Blackman's assertion. The NRA engages in a "chilly" dismissal of the deaths of "bad" kids and "[t]urns a blind eye to the hundreds of utterly innocent children of color slain and injured each year by random gunfire."\textsuperscript{145} The cost to certain members of society is simply unworthy of notice or redress.

This sentiment is expressed throughout the rhetoric of gun advocates. If gun advocates are not disregarding urban casualties, they are appealing to legislatures not to punish good law-abiding Americans by disarming the whole nation because of the actions of the unruly. Virtuous white citizens are pitted against the mayhem of black gun ownership. Former U.S. House Representative Randy (Duke) Cunningham of San Diego shared this viewpoint in not as few words:

\begin{quote}
I went to [Senator Charles] Schumer's district, and I understand why he hates guns. They have all the projects and they shoot each other, and they do drugs, and they kill each other, and that is bad. But the answer is not just to be negative, but to look and see what is reasonable.\textsuperscript{146}
\end{quote}

Interestingly, even gun advocates' interest in the safety of white suburbs has yielded to their desire to perpetuate the cultural values that inform the mythology of gun ownership. Professor Kahan explains,

\begin{quote}
Indeed, when gun control proponents tried to leverage national anguish over recent school yard shootings into stricter gun control laws, control opponents in the House of Representatives countered with a \textit{Kulturkampf Blitzkrieg}, linking gun control to abortion, promiscuity, irreligiosity, and myriad other practices and policies perceived to be threatening to their constituents' cultural identities.\textsuperscript{147}
\end{quote}

These cultural identities, which find expression in calls for the right to bear arms for self-defense, have been nourished by the nation's racialized constitutional history.

\begin{center}
\textit{B. The Racialized Constitution—"Defective from the start"}
\end{center}

During the bicentennial celebration of the Constitution, Justice


\textsuperscript{145} \textit{Id.} at 116.

\textsuperscript{146} \textsuperscript{145} CONG. REC. H4371 (daily ed. June 16, 1999), quoted in Kahan, \textit{Deterrence, supra} note 78, at 458 n. 225.

\textsuperscript{147} Kahan, \textit{Deterrence, supra} note 78, at 461.
Thurgood Marshall described the ideological weaknesses of the putatively exalted document crafted and adopted by the founders. "[T]he government they devised was defective from the start," he explained, "requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today."\(^{148}\) Intentional omissions of women and blacks were a testament to the fact that the Constitution was a moral and ideological failure until the passage of the Fourteenth Amendment.

Indeed, the Constitution sanctioned, through slavery, direct and indirect propagation of racism. First, the slaveholding South exercised its power through the Importation Clause,\(^{149}\) which directly limited the otherwise expansive commerce clause. The South only agreed to give Congress such expansive commerce power in exchange for the perpetuation of the slave trade, in the short term, and indefinite perpetuation of slavery.\(^{150}\) In addition, compromises resulted in slaves being considered three-fifths of a person in the eyes of the polity.\(^{151}\) The three-fifths compromise provided political protection for slavery as it bolstered the number of Representatives the South could enjoy in the House and in the Electoral College while simultaneously devaluing the slaves' humanity as a matter of law.\(^{152}\) Further, the Fugitive Slave Clause limited the movement of slaves de jure, and African Americans de facto, throughout the nation.\(^{153}\) These constitutional compromises\(^{154}\) had profound effects, immediately and in the


\(^{149}\) U.S. CONST. art. I, § 9, cl. 1. "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each person." Id.

\(^{150}\) Marshall, supra note 148, at 1338.

\(^{151}\) U.S. CONST. art. I, § 2, cl. 3 (The Three-Fifths Clause). "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." Id. (emphasis added).


\(^{153}\) U.S. CONST. art. IV, § 2, cl. 3 (The Fugitive Slave Clause). "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service of Labour may be due." Id.

\(^{154}\) It is important to note that these compromises—the Fugitive Slave Clause, fashioned for slavery, as well as the federal commerce powers—were in direct contradiction to the States' rights stance that the South staunchly advocated.
long term. For example, the Importation Clause allowed the importation of roughly as many Africans to America from 1780 to 1810 as in the 160 years of prior American involvement in the slave trade.  

In short, prior to adoption of the Fourteenth Amendment, the Constitution actively worked to perpetuate the slave machine. Even sections of the document that did not explicitly make reference to slavery were crafted, at least in part, with a goal of maintaining that practice. For instance, Article IV, Section 4 states, “The United States... shall protect each [state]... against invasion; and... against domestic violence.” The inclusion of the term “domestic violence” is almost a direct reference to the potential for slave uprisings. In explaining his support for the Importation Clause, Luther Martin, a delegate to Maryland’s ratifying convention, explained that unlimited importation would increase the threat of slave revolts. Martin went on to draw an explicit connection between such a threat and the constitutional protection against “domestic violence”:

It was further urged that, by this system of government, every State is to be protected both from foreign invasion and from domestic insurrections; that, from this consideration, it was of the utmost importance it should have a power to restrain the importation of slaves; since in proportion as the number of slaves are increased in any State, in the same proportion the State is weakened... Even the Constitution’s putative limitation on slavery in the Importation Clause ensures that the slaveholding states would enjoy the domestic tranquility guaranteed by Article IV, Section 4.

As Martin and other delegates to the ratifying conventions recognized, slavery was becoming increasingly unwieldy, as the slave population was growing such that it would outnumber white Americans in the South. The southern states began to deem the large percentage of slaves, and the ever-increasing potential of slave revolt, as a “domestic security risk,” against which they would need protection. That protection took the form of

158. Diamond, supra note 155, at 117 n.135.
159. Id.
160. Id.
161. Id. at 115.
measured importation, in part regulated by Constitutional provision.\textsuperscript{162} In addition, the Constitution protected the southern states through the sanctioning of the militia under the Second Amendment. In guaranteeing the right of the states to be armed and organized in defense against domestic threats, the Second Amendment is certainly related to the protection of the states against the sort of “domestic violence” feared by Martin.

C. Black America, Guns, and the Second Amendment – From Slavery to Jim Crow

The Second Amendment is inextricably entangled in the historical struggle between white property owners and African Americans. We can only understand the purposes, motivations, and consequences of the Second Amendment if we first understand the origins and the evolution of the militia system and its Southern counterpart, the slave patrols, and the failure of the republican promise. Understanding these elements colors the way in which we read the right to bear arms. Originally, the militia was meant to protect white settler communities from Native Americans. The growing number of enslaved Africans, however, soon supplanted the threat of the Native Americans, and the emergent mythology of the gun was nourished by the explicit link between gun ownership and the ability for solitary white slaveholders to resist uprisings by their slaves. Professor Slotkin quotes from an early Colt promotional statement, published in the 1838 \textit{Journal of the American Institute}, providing the following creation narrative:

\begin{quote}
Mr. Colt happened to be near the scene of a sanguinary insurrection of negro slaves, in the Southern district of Virginia. He was startled to think against what fearful odds the white planter must ever contend, thus surrounded by a swarming population of slaves. What defense could there be in one shot, when opposed to multitudes, even though multitudes of the unarmed? The master and his family were certain to be massacred. Was there no way, thought Mr. Colt, of enabling the planter to repose in peace? no [sic] longer to feel that to be attacked, was to be at once and inevitably destroyed? that [sic] no resistance could avail, were the negroes once spirited up to revolt? . . . The boy’s ingenuity was from that moment on the alert.\textsuperscript{163}
\end{quote}

Aware of the threats created by slave uprisings and Indian attacks on the frontier, Samuel Colt shrewdly targeted his first marketing “toward outfits

\textsuperscript{162} U.S. CONST. art. I, § 9, cl. 1.

\textsuperscript{163} Slotkin, \textit{supra} note 8, at 59 (citation omitted). Slotkin notes that the insurrection to which the quoted material refers was most likely the Nat Turner Rebellion of 1832. \textit{Id.} at 60.
like the Texas Rangers (whose enemies were Indians armed with bows or single-shot muskets) and toward Southern planters.\textsuperscript{164}

Even before Colt had been inspired to protect the Southern planters, however, the militia system had adapted to the needs of the slave-holding society.\textsuperscript{165} That adaptation took the form of slave patrols, commissioned to maintain order through terror. This and the following section explore the political and philosophical impulses—the precursors of today’s gun culture—at the time of drafting the Second Amendment and reveal a racialized intent behind the Amendment. Indeed, a brief history of varied cultural interpretations of the Amendment vis-à-vis African Americans demonstrates the ways in which such interpretation intimately affected the condition of blacks throughout America.

1. “To The Security of the Master and the Public Tranquility”\textsuperscript{166}—Disarmed Slaves and Freedmen

From the dawn of colonialism, white slave traders had a definitive advantage in weaponry over natives. Bogus explains, “The non-white world literally found itself looking down the barrel of a gun.”\textsuperscript{167} The helplessness of Africans in America, with respect to weapons, made their enslavement much easier. Despite this disadvantage, Africans often rebelled. Prior to 1860, there were at least 200 reported slave revolts,\textsuperscript{168} even with slave owners’ and overseers’ strict disarmament measures. As a result, slave revolts were a constant fear. White fears inspired innumerable de facto and de jure attempts at keeping black men and women, slave or free, impotent. That fear inspired the slave patrols, of which even the most indolent would mobilize to “ketch a nigger.”\textsuperscript{169} The willingness of whites to use violence to

\textsuperscript{164}. \textit{Id.} at 59.

\textsuperscript{165}. DANIEL J. BOORSTIN, \textsc{The Americans: The Colonial Experience} 355 (1965).

\textsuperscript{166}. North Carolina’s highest court explained in 1829 that whites’ “dominion” over slaves “is essential to the value of slave as property, to the security of the master, and the public tranquility, greatly dependent upon their subordination; and in fine, as most effectually securing the general protection and comfort of the slaves themselves.” \textit{State v. John Mann}, 13 N.C. 263, 265 (1829).

\textsuperscript{167}. Bogus, \textit{supra} note 124, at 1369. The advantage gained by European use of weaponry is immeasurable and aided in the methodical subjugation of most of the inhabited land over the next two centuries. \textit{See Jared Diamond, Guns, Germs, and Steel} 76 (W.W. Norton & Co., Inc. 1999) (“By the 1700s, guns had replaced swords as the main weapon favoring European invaders over Native Americans and other native peoples.”).

\textsuperscript{168}. HERBERT APTHEKER, \textsc{Negro Slave Revolts in the United States, 1526–1860}, at 11 (Int’l Publishers 1939).

keep the enslaved or displaced in their abject position added to the unequal access to arms and ensured white supremacy for the early nation.

The South was the pioneer of gun legislation.\textsuperscript{170} Besides the fact that guns were a part of the "lawways and folkways" of the South, Cottrol and Diamond explain that white domination was crucial to the maintenance of order in America's "first truly multiracial society."\textsuperscript{171} During the early nineteenth century, throughout the South, laws proliferated that limited gun ownership to free white men. For example, Tennessee explicitly limited the right to that dominant group.\textsuperscript{172} Mississippi prohibited gun ownership for both slaves and free blacks.\textsuperscript{173} In South Carolina, slaves were only able to handle guns with written permission, and slave owners were required to search slave quarters for guns.\textsuperscript{174}

With respect to free blacks, state restrictions were often ambivalent. In South Carolina, for example, despite having the most severe slave codes, the legislature armed free blacks to help oversee the large slave population.\textsuperscript{175} This was not unusual, as a number of slave states in the antebellum South allowed free blacks to serve as members of the militia.\textsuperscript{176} Moreover, in both the North and the South, free blacks were armed militia members during times of invasion.\textsuperscript{177} However, Whites soon deemed free blacks a dangerous influence on the enslaved. This fear was exacerbated by slave rebellions uprisings, and conspiracies—particularly the Nat Turner Rebellion in 1831.\textsuperscript{178}

During this time, free blacks needed arms to protect themselves from the added danger of being kidnapped and sold into slavery.\textsuperscript{179} However, southern legislatures curtailed free blacks' access to arms. State provisions included severe penalties, from summary punishment for arms possession to

\begin{itemize}
  \item \textsuperscript{170} Id. at 1318.
  \item \textsuperscript{171} Id. at 1318–19.
  \item \textsuperscript{172} Id. at 1317.
  \item \textsuperscript{173} Id.
  \item \textsuperscript{174} Bogus, supra note 124, at 1370 n.31.
  \item \textsuperscript{175} Robert J. Cottrol & Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 GEO. L.J. 309, 326 (1991) [hereinafter Cottrol & Diamond, The Second Amendment].
  \item \textsuperscript{176} Id. at 331.
  \item \textsuperscript{177} Id. at 332.
  \item \textsuperscript{178} See Clayton E. Cramer, The Racist Roots of Gun Control, 4 KAN. J. L. & PUB. POL'Y 17, 18 (1995) (discussing the Turner Rebellion as an impetus for the increase in irrational fear among white Southerners).
  \item \textsuperscript{179} Id. at 20.
\end{itemize}
the death penalty for slaves or free blacks who shot at a white person.\textsuperscript{180} The state courts often unapologetically supported the position of the legislature. For example, in response to a disarmament measure, the Supreme Court of North Carolina insisted that the law's "only object is to preserve the peace and safety of the community from being disturbed by an indiscriminate use on ordinary occasions, by free men of color, of fire arms or other arms of an offensive character. Self preservation is the first law of nations, as it is of individuals."\textsuperscript{181}

Though purposeful black disarmament was limited to the South, blacks in the North also needed easier access to weapons because of the lack of police protection against mob violence. Blacks could and often did form private militias.\textsuperscript{182} However, though black self-armament sometimes succeeded as a deterrent, whites often violently suppressed these efforts. The September 1841 conflict in Cincinnati is paradigmatic of the relative impotence of blacks throughout antebellum America, even outside of the South. Blacks retaliating against white aggressions faced a six-pound cannon.\textsuperscript{183} After the militia took control, all blacks were disarmed and taken into protective custody.\textsuperscript{184} Like their Southern counterparts, Northern blacks were left vulnerable to racist vigilantism and dependent upon a malevolently disinterested local government.\textsuperscript{185}

2. Early Reconstruction Empowerment and Late Reconstruction Disarmament

Unfettered access to weapons seemed to be the necessary tool for blacks to effect political participation and power, as well as a practical means of keeping the recently emancipated free from future harassment or bondage. In theory, the acknowledgment of black citizenship could be expressed by extending a right to guns to all citizens. Further, divorcing that right from the purpose of militia preparedness might provide an individual

\begin{footnotes}
\item[180] Cottrol & Diamond, \textit{The Second Amendment, supra} note 175, at 336.
\item[181] \textit{State v. Newsom}, 27 N.C. 250, 251 (1844). The disarmament act in question was entitled "an act to prevent free persons of color from carrying fire arms." \textit{Id.} at 250.
\item[182] Cottrol & Diamond, \textit{The Second Amendment, supra} note 175, at 341.
\item[183] \textit{Id.}
\item[184] \textit{Id.} at 342.
\item[185] Cottrol and Diamond assert, "The 1841 Cincinnati riot represents the tragic, misguided irony of the city's authorities who, concerned with the safety of the black population chose to disarm and imprison them—chose, in effect, to leave the black population of Cincinnati as southern authorities left the black population in slave states, naked to whatever indignities private parties might heap upon them, and dependent on a government either unable or unwilling to protect their rights." \textit{Id.}.
\end{footnotes}
right for the newly emancipated.

Akhil Amar argues that the early Reconstruction period witnessed a conceptual change in the reading of the Second Amendment, necessarily impacting the political discourse surrounding a right to bear arms. At this time there was a definitive individualization of the Second Amendment in response to the needs of new citizens. In interpreting the Amendment, there was, Amar explains, a “shift from ‘keep’ to ‘own,’ from ‘bear’ to ‘carry,’ from ‘arms’ to ‘firearms,’ from ‘militia’ to ‘persons,’ and from collective self-defense (‘the security of a free state’) to individualized self-defense.”

For the safety and dignity of blacks, ardent Reconstructionists liberalized the Amendment. However, the safety and dignity of blacks, however, would quickly come under attack.

a. Vigilante, Extralegal, and Ad Hoc Legal Attempts to Disarm

Violent opposition met federal attempts at ameliorating the lot of the newly emancipated. Again, a fear of insurrection, as well as a newly perceived threat of the “collision” of races, fueled vigilante efforts to disable attempts at black self-empowerment. Whites would organize as militias for the purpose of exacting compliance with white supremacy. Major General Carl Shurz detailed abuses, including the deprivation of arms-bearing. Moreover, Major General Shurz described the organized militias as the “greatest evils” confronting the freedmen.


187. Halbrook, supra note 117, at 369. While the zealous Reconstructionists were driven by a strong sense of moral decency they freed one group, while continuing to ignore, if not virtually destroy, another. Id. Their treatment of Native Americans is most notable. Id. Halbrook explains,

Some Western Senators wished to exclude Indians, as well as Chinese, from being considered citizens, partly because citizens had a right to bear arms, a right not to be accorded to Indians. The oppression of Native Americans and the seizure of their lands proceeded in earnest. Accordingly, the Senate voted to define all persons born in the United States, without distinction of color, as citizens, “excluding Indians not taxed.”

Id.

188. Id. at 348.

189. Id. at 353 n.53.

190. Halbrook, supra note 117, at 354. (Report of Major General Carl Shurz, whom President Johnson had sent to tour the South, transmitted to the Senate by Johnson (Dec. 13, 1865)).

191. Id. at 368 n.134.

I am convinced that these militia organizations only endanger the peace of the communities where they exist, and are a source of constant annoyance and injury to the freed people; that herein is one of the greatest evils existing in the southern States for the freedmen. They give the color of law to their violent, unjust, and sometimes inhuman proceedings.
that they were disarming freedmen, they were acting wisely in the eyes of many, including lawmakers. Senator Saulsbury, an unabashedly racist Representative from Delaware, opposed a Civil Rights Bill that would prohibit the disarmament of the freedmen by states. At the same time, Senator Saulsbury invoked the Second Amendment for the protection of "the whole white population" to arm themselves and organize into militias.

Notwithstanding the attempts to thwart militia aggression and to empower blacks through legal access to self-protection (and, by extension, self-preservation and personal liberty) the South attempted to effectuate a new form of slavery articulated in the "Black Codes." Described as a "twilight zone between slavery and freedom," the Black Codes were passed on the heels of the Civil War. Among these codes were laws that forbade blacks not in the military from carrying firearms and laws prohibiting whites from lending weapons or ammunition to free blacks or Mulattoes. One law, Florida's Act of 1893, had the explicit purpose of disarming blacks only, though it was couched as a broad gun control act. Concurring in the Florida Supreme Court's 1941 opinion in Watson v. Stone, Justice Buford stated explicitly that the purpose of the act was "to give white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied." These laws were glaring attempts at subjugating blacks, and they were successful.

This legal disarmament led to continued oppression by extralegal entities. The Ku Klux Klan and similar renegade groups emerged as the neo-slave patrols at the close of the Civil War. Driven by their self-proclaimed "patriotic mission," these private organizations replaced the State arm of suppression. The early Klansmen and nightriders actively confiscated arms from blacks at all costs. In the early 1900s, throughout

\[\text{Id.}\]

192. Id. at 383–84.
193. Id.
194. See Cottrol & Diamond, The Second Amendment, supra note 175, at 344 (citing KENNETH STAMPP, THE ERA OF RECONSTRUCTION, 1865–1877, at 80 (1965)).
195. Id.
196. Id.
197. Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941).
198. See Cottrol & Diamond, The Second Amendment, supra note 175, at 344.
199. Id.
the North and South, states with a significant Klan population adopted laws limiting blacks’ access to guns, either through explicit gun regulations or by laws giving local officials wide discretion in granting licenses for firearms. In addition to disarmament, lynching became the new form of physical degradation to which these extralegal entities subjected blacks. Between 1882 and 1968, lynching became a frequent occurrence. Blacks were often lynched for the pettiest social transgressions. Headlines described lynching for blacks for being too familiar with white women and even for hiring a lawyer for a property dispute.

b. State Laws, Local Enforcement, and Federal Law

Local law enforcement often ignored such blatant cruelty, with Southern officials routinely circumventing protection of freedmen and enforcement of federal law. Many laws were administered unevenly. For example, the Fourteenth Amendment’s requirement that blacks and whites should be treated equally led to the passage of several restrictive gun laws that were “equal in the letter of the law, but unequally enforced.” The state courts were, unsurprisingly, complicit. Justice Buford’s oft-quoted concurrence in Watson v. Stone, discussed briefly above, concluded with the declaration that restrictive gun control had never been applied to the white population, and that the court would do nothing to redress that failure in the law’s application.

While federal prosecutors brought many cases against white defendants under the new postbellum civil rights laws, the Supreme Court would do no better in protecting blacks against local aggressions. For example, in United States v. Cruikshank, the Court had the opportunity to find an individual right to arms, thus allowing the black men and women for whom this case was brought to find legal protection against vigilante disarmament. The defendant was Klansman William Cruikshank, who was indicted for banding together with the intent to injure, oppress, threaten, or intimidate two citizens of “African descent.” The Court held that because the Constitution did not guarantee a right of “bearing arms for a lawful purpose,” the count charging Cruikshank with disarmament of those black

---

201. Polsby & Kates, Jr., supra note 121, at 1267.
203. Id. at 352–53.
204. Cramer, supra note 178, at 20.
205. Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941).
206. See generally United States v. Cruikshank, 92 U.S. 542 (1875). See also supra Part II.B.
207. Cruikshank, 92 U.S. at 548.
citizens was "defective."\textsuperscript{208} Cruikshank, used today to bolster the legal arguments of gun control advocates, thus has its history in blacks' crippled access to guns terribly needed for self-protection during the volatile Reconstruction period.

c. Early Black Self-Armament

While whites in the Colonial period embraced the Cult of the Colt as a means of achieving "equality" with and superiority over Indians, slaves, and freed blacks, African Americans were compelled to embrace a similar belief in the gun as equalizer after the Civil War. Confronted, often violently, with continuing disparities in power and civil rights—disparities that the law would not or could not address—black Americans looked to the model of self-defense so vigorously embraced by white gun owners. Consequently, over the next several decades many black activists, from W.E.B. DuBois to the prominent figures of the Civil Rights Movement, called for black self-armament.\textsuperscript{209}

From the moment of emancipation, "the right to bear arms was defended in black newspapers."\textsuperscript{210} The LOYAL GEORGIAN, a prominent black newspaper during Reconstruction, was vociferously in support of the right to bear arms, which would be used purely for defensive purposes.\textsuperscript{211} During Reconstruction, many Congressional Republicans similarly believed that it would be more difficult for freedmen to be terrorized if they were capable of "returning fire."\textsuperscript{212} However, in light of the racist opposition with which they were faced, armed blacks served more as an important symbol than as a formidable deterrent. For example, even in the absence of such deterrence, the "victim perseverance" that blacks demonstrated was vital to discredit the Ku Klux Klan.\textsuperscript{213} "Guns gave victim groups the courage and the means to sustain themselves in the face of KKK threat and police indifference or hostility."\textsuperscript{214} However, black men and women could not effect total emancipation through the gun alone.

\textsuperscript{208} Id. at 553.

\textsuperscript{209} David C. Williams, Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment, 74 TUL. L. REV. 387, 445 (1999) [hereinafter Williams, Constitutional Tales]. See infra Part III.D.

\textsuperscript{210} Halbrook, supra note 117, at 381 (quoting DOROTHY STERLING, THE TROUBLE THEY SEEN: BLACK PEOPLE TELL THE STORY OF RECONSTRUCTION 394 (1976)).

\textsuperscript{211} Halbrook, supra note 117, at 381.

\textsuperscript{212} Cramer, supra note 178, at 20.

\textsuperscript{213} Polsby & Kates, supra note 121, at 1268.

\textsuperscript{214} Id.
The Civil Rights Movement would see a call to arms of a different nature. Certainly, black activists sought weapons primarily for protection; however, a growing and vocal minority saw gun access as an opportunity to wage battles.

D. The Civil Rights Movement

Though the twentieth-century liberation movement is remembered for the poignant pictures of sit-ins and inspiring speeches on nonviolence and race reconciliation, guns were certainly a part of that movement. Whether guns or nonviolent resistance had a greater impact in influencing white America cannot be known. The Movement will always be marked by “the quiet dignity” demonstrated by black protestors; at the same time, there was a less glamorous struggle occurring. The armed movement would grow out of these skirmishes and the general frustration felt by black Americans who were met with injury in the face of serenity.

1. The Nonviolence Movement

Martin Luther King, Jr., inspired by the Bible, Christian pacifism, and the teachings of Mohandas Gandhi, advocated nonviolent and passive resistance. He preached that any reversion to violence would undermine the “moral righteousness” of the Movement, threatening any attempts at gaining sympathy. King was not the first to employ this tactic. Glenn Smiley, the white Fellowship of Reconciliation minister, and Bayard Rustin, a civil rights activist, promoted Gandhi’s ideas as a tool for blacks in America. While King’s was the most popular voice of this brand of nonviolent resistance, on the ground and in local coffee shops and stores, several other morally righteous activists organized and conducted nonviolent resistance workshops for black and white students.

215. In a letter to the Advertiser, Juliette Morgan, a white librarian, commented, “It is hard to imagine a soul so dead, a heart so hard, a vision so blinded and provincial as not to be awed with admiration at the quiet dignity, discipline and dedication with which the Negroes have conducted the boycott.” JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS 1954–1965, at 79 (Penguin Books 1987).

216. Id.

217. Id.

218. Fellowship of Reconciliation (FOR) was an interracial organization, founded in 1914 for the advancement of pacifism and international understanding. Id. at 125.

219. Id. at 123.

220. James Lawson, a divinity student at Vanderbilt, spread the tactics of nonviolent resistance in Nashville and across the South by conducting workshops for black and white students; by 1960, several Southern black campuses were familiar with the nonviolence workshops. WILLIAMS, supra
The workshops were not for the faint of heart. Students were taught how best to protect themselves from the likely violent reactions of many white Southerners. "Nonviolence required compassion, commitment, courage, and faith, but most importantly, it required discipline." Nonviolent resistance continued to be the most significant part of the Civil Rights Movement for much of the latter 1950s and early 1960s. By the mid-1960s, however, the manner of black protest began to change. New approaches based on nascent and long-standing ideologies emerged. Black Nationalism and Black Power, which at times called for full-scale revolution, would provide alternatives to the nonviolent protest methods, marches, and court battles. As Juan Williams explains, "Nonviolence was no longer the only tool for change; many blacks had seen too many murders, too many betrayals."

2. The Armed Movement

A number of legal scholars argue that the success of the Civil Rights Movement was made possible, at least in part, by the presence of armed resistance. In addition, though not at the forefront of the popular philosophy of the Civil Rights Movement, a number of African Americans—most notably, the Black Panthers and Malcolm X, both relying on the Second Amendment—advocated the use of arms for self-defense, if not for effectuating greater equality. Don Kates stated, "I found that the possession of firearms for self-defense was almost universally endorsed by the black community, for it could not depend on police protection from the

note 215, at 122–23. In addition, Marion Barry of Student Nonviolent Coordinating Committee (SNCC), known to be a strong proponent of direct action, coordinated workshops for black teenagers. id. at 212–13.

221. Id. at 123.

222. Id. at 287.

223. Id.

224. WILLIAMS, supra note 215, at 287.

225. Id.

226. Id.

227. See, e.g., Cottrol & Diamond, The Second Amendment, supra note 175, at 355.

In addition, others argue that the knowledge of black self-armament deterred greater racist violence. Defensive gun use would produce at least a stalemate. If a black person answered a Klan gunshot, often both would simply disperse.

Organized resistance included armed efforts by Negroes with Guns, Deacons for Defense and Justice, the Black Panthers, and later the Congress of Racial Equality (CORE). In addition, the North Carolina chapter of the NAACP used firearms to discourage the Klan. The Black Panthers explicitly invoked the individualist view of the right to bear arms to articulate their pursuit of personal security. Their party platform read,

> We believe we can end police brutality in our black community by organizing black self-defense groups that are dedicated to defending our black community from racist police oppression and brutality. The Second Amendment to the Constitution of the US gives a right to bear arms. We therefore believe that all black people should arm themselves for self-defense.

There was certainly ample provocation for organized resistance. Attacks on the Freedom Riders and nonviolent protesters, the murder of four black girls in the Birmingham church bombing, the murder of Edgar Veers, and, later, the murder of Martin Luther King, Jr., were among the many egregious assaults on black people.

Throughout the South, the entire state structure often explicitly favored whites. Law enforcement encouraged and sometimes facilitated attacks on nonviolent protesters. Attacks on Freedom Riders would often go unchecked, at best. In Enfield, North Carolina, Klan dues were paid and collected in the police station. The courts, including federal district...
courts, provided no recourse. United States District Court Judge Cox stated that students engaging in civil disobedience “must expect to be injured or killed,” ostensibly without legal remedy. The sentiment of black leaders in the Movement increasingly began to mirror that of Floyd McKissick, the Executive Director of CORE. By 1967, McKissick described the tactics of peaceful civil disobedience, marking the “old-style” movement, as outdated. They needed to be replaced by insurrections inspired by the “Negro revolution.” However, possession of a significant instrument of empowerment, the gun, would not go unfettered.

3. Mythology in Conflict: Legal Disarmament

In some ways, of course, black leaders calling for black armament were echoing the values at the heart of the white mythology of gun ownership: the idea of the armed patriot defending his very existence. Yet this call to armed self-defense simultaneously resonated with the historical underpinnings of that white mythology from the violent racial conflict that spurred Samuel Colt to market his new weapon to Indian fighters taking possession of the American frontier to slave owners seeking to maintain control over rebellious slaves.

Despite black leaders’ at times explicit invocation of the rhetoric of the white mythology, the undercurrent of continuing racial conflict meant that the black use of arms for defensive purposes would not be tolerated anywhere in the nation. If vigilante efforts to disarm Blacks were unsuccessful, “legitimate” means were used. The actions of the California state legislature, in response to the Black Panther Party, are an excellent example of how state structures would disarm blacks by any means necessary.

In 1966, Huey Newton and Bobby Seale founded the Black Panther Party for Self-Defense in California. Prior to the 1967 gun control statute, carrying firearms in public was common in California. With the call to arms by the Panthers in 1966, the police began confiscating blacks’ weapons for disturbing the peace, as there was no applicable weapons prohibition. Soon after, then-State Assemblyman Donald Mulford introduced legislation banning the carrying of firearms within the city limits. The time had

237. Id. at 953.
238. Id. at 964.
239. Id.
240. JOHN R. LOTT, JR., MORE GUNS, LESS CRIME 68 (1998) (“Even in the 1960s much of the increased regulation of firearms stemmed from the fear generated by Black Panthers who openly carried guns.”).
241. Leonardatos, supra note 231, at 970. (“The time has come . . . when we have to legislate
come with the emergence of the Black Panthers.

In response to this proposal, the Panthers stormed the Assembly chamber in the Capitol. In a lengthy statement, Bobby Seale harshly denounced American racism and the California legislature specifically. His opening statements were as follows:

Statement of the Black Panther Party for Self-Defense calls on the American people in general and the black people in particular to take full note of the racist California legislature aimed at keeping the black people disarmed and powerless at the very same time that racist police agencies throughout the country are intensifying the terror and repression of black people.242

After Seale read his statement, the Panthers were removed from the Capitol. While being removed, the Panthers vociferously claimed their Second Amendment rights, shouting that they had a constitutional right to bear arms. Then-Governor Ronald Reagan, at the Capitol when the group was removed, agreed that they did have a right to bear arms, but insisted that carrying loaded weapons on the street was a “ridiculous way to solve problems that have to be solved among people of good will . . . . Americans don’t go around carrying guns with the idea of using them to influence other Americans.”243

Reagan’s comments set the stage for a distinction that would be embraced by the mythology of American gun ownership: a distinction between puerile foolishness by blacks,244 and the mature and responsible gun ownership by law-abiding (white) citizens.245 The 1967 bill was undoubtedly meant to disproportionately affect black protestors. Mulford later affirmed that the invasion of the Capitol inspired him to toughen the bill,246 virtually admitting his intentions to disarm a discrete group.247

242. Id. at 971.

243. Id. at 972.

244. At a press conference on May 9, 1967, Governor Reagan addressed possible repeal or revision of state law allowing the Panthers to enter the Capitol. “[T]he idea in a country like ours that grown men and women think they have got to run around playing cowboys with guns on their belts. They come in and try to impress a legislature. If it wasn’t so terribly serious, you’d have to laugh at it, but it is terribly serious . . . .” Id. at 972 n.145.

245. Id. at 980. At a press conference held on May 9, 1967, Ronald Reagan signaled his support of the California gun bill by stating, “[T]he first thing any real sportsman learns is to carry an empty gun until he gets to the place where he’s going to do the shooting. So this would work no hardship on the honest citizen.” Id.

246. Leonardatos, supra note 231, at 971–72.

247. Then-Assemblyman Willie Brown thought that the bill might be racially motivated. Mulford had opposed similar gun control measures, “until Negroes showed up in Oakland—his district—with arms and then he [sought] restrictive legislation.” Leonardatos, supra note 231, at
On July 26, 1967, three days after the start of the Detroit riots, the California State Senate passed the Gun Control Statute. Governor Reagan approved it two days later and the law took effect immediately. Section 6 of the Act of July 28, 1967, stated explicitly,

This act is an urgency statute necessary for the immediate preservation of the public peace ... The State of California has witnessed, in recent years, the increasing incidence of organized groups and individuals publicly arming themselves for purposes inimical to the peace and safety of the people of California.

As a result of this measure, the Panthers were no longer a serious threat. A known or suspected Panther could be stopped and searched for a weapon on city streets. Prohibited gun possession was only a misdemeanor, but it was often used to trump up other charges or simply for the purpose of harassment.

California was not alone in its legal disarming; the federal government followed suit with the Gun Control Act of 1968. This act prohibited the Saturday Night Special, a cheaper gun used primarily by African Americans. One journalist argued that this act, in no uncertain terms, was written as a gun control measure but was passed to control blacks. The effect of armament, especially considering the ease with which legal access to guns was curbed, remains uncertain.

Whether the armed civil rights movement was more effective than the non-violent approach is an important inquiry that is beyond the scope of this

973.

248. Id. at 976. Leonardatos hypothesizes that the statute was a preemptive strike by the legislature in response to a real grassroots movement rather than an isolated act of mayhem, like the 1965 Watts riots. Id.


250. Leonardatos, supra note 231, at 987.

251. Id. at 987. It is interesting to note that the NRA opposed the restrictive law, of course, advocating another approach. Cynthia Leonardatos explained, “the NRA advocated the idea that groups of armed civilian posses should be dispatched into the communities during times of unrest to stop citizens bent on violence and destruction.” Id. at 980. Consistent with their affinity for racist innuendo, the NRA advocated a modern day militia to quash unruly Black activism. Recognizing the danger to gun advocacy of allowing such contentious and inflammatory ideology to go unchecked, Reagan generally denounced vigilante justice. Id. at 980 n.189.


253. Robert Sherill, at one time a correspondent for The Nation, speculated that the Gun Control Act of 1968 forbidding the Saturday Night Special was as a result of a fear of armed blacks. “The Gun Control Act of 1968 was passed not to control guns but to control blacks, and inasmuch as a majority of Congress did not want to do the former but were ashamed to show that their goal was the latter, the result was that they did neither. Indeed, this law, the first gun-control law passed by Congress in thirty years, was one of the grand jokes of our time.” ROBERT SHERILL, THE SATURDAY NIGHT SPECIAL 280 (1973), quoted in Cramer, supra note 178, at 21.
We do know that black self-armament encouraged stricter gun control provisions, state and federal. We also know that something was lost in the movement with the introduction of an armed agenda. The latter-day consequences of guns in black communities would be severe. In a poignant example, Huey Newton was shot and killed by a low-level drug dealer in 1989. Newton went from being at the forefront of the right to bear arms for common defense liberation to becoming a statistic in a city that is still racked by gun violence.

In a frightening shift, blacks' self-armament in the last two decades has been another instrument of oppression rather than liberty. As gun-related violence in America has increased, African Americans in urban communities disproportionately feel the devastation. Instead of African Americans looking down the barrel of white guns, the perpetrators of gun oppression are other African Americans. The racialized rhetoric and mythology of the Second Amendment, however, have rendered white America complicit with respect to this crisis.

In light of this phenomenon, this article turns now to a consideration of how, building on Professor Kahan's call for a change in the terms of the gun policy debate, scholars and policymakers might affect true reform and bring an end to the havoc that guns have wrought and continue to wreak in black America.

V. REFORMING GUN POLICY IN THE UNITED STATES

Mark Tushnet's recent analysis of the gun policy debate, Out of Range, has a telling subtitle: Why the Constitution Can't End the Battle Over Guns. Like Kahan, Tushnet acknowledges that the debate's true focus lies in cultural values. Kahan argues for the efficacy of a "moderate middle" that can somehow assuage the cultural anxieties and protect the cultural identities of both sides of the debate, a position that gravitates toward notions of compromise and neutrality. Tushnet declares that in a "cultural

---

254. Leonardatos, supra note 231, at 957 n.51. It is also important to note that many of the particularly inflammatory speeches during the late sixties had the effect of inciting riots, destruction, and confrontation within black communities. After one such speech in Cambridge, during the week of the Detroit riots, flames engulfed the Black ghetto and the activist was arrested for incitement to riot. See id. at 965. The necessary end result of advocating violence is the destruction of Black communities, and one's own arrest.

255. "We know that the statistics tell us that black crime is usually committed against the black community," FLETCHER, supra note 127, at 200 (quoting Sherrye Henry, a talk show host).

256. TUSHNET, supra note 76.

257. Id. at xiv. See also supra notes 78-79 and accompanying text.

258. See Braman & Kahan, Overcoming the Fear, supra note 89.
wars battle," such as the gun debate, "neutrality is probably impossible."259
"Even to stand apart from a particular battle," according to Tushnet, "is to
take a position."260

This section argues that taking the work of Kahan and his colleagues to
its most valuable policy conclusion means recognizing that "moderate
middle" compromises in the gun debate ultimately are "identity
protective"261 in only the most cosmetic sense. Such compromises typically
devolve, by political necessity, into "free-lunch" propositions that permit
both sides to claim at least partial victory but that accomplish "incremental"
policy benefits, at best.262 Perhaps the most baneful consequence of these
compromises is not that their "moderate middle" stances ultimately are
illusory, but rather that their political "solution" masks the deep and
continuing cultural—and specifically, racial—conflict that nurtures and
perpetuates the nation's gun culture in the first place.263 As Tushnet argues,
neutrality is not a viable position in a "culture wars battle" with that conflict
at its heart.264

This article thus proposes, in response to Kahan's call for a
simultaneously re-formed and identity-protective gun debate, that reform
can result only from deep, systemic changes in American policy and culture.
In other words, as Tushnet recognizes, true gun control is not likely to
derive from "gun control."265 Rather than attempting to find compromise
positions, this section argues that real progress in the nation's gun policy
depends in large part upon convincing those who embrace the mythology of

259. TUSHNET, supra note 76, at xv.
260. Id.
261. Kahan et al., supra note 91, at 497.
262. Zimring, supra note 88, at 33. See also TUSHNET, supra note 76, at 75-77 (assessing three
possibilities for reform to gun control policy—licensing requirements for concealed weapons, safe
storage laws, and enhanced enforcement of existing laws—and suggesting that none of the three is
likely to accomplish real results, aside from boosting the fundraising capabilities of the
organizations that push for their adoption).
263. Zimring, supra note 88, at 33. Professor Zimring thus observes that while free-lunch
rhetoric makes for "good politics," it simultaneously removes from discussion "realistic analysis of
the impacts of specific [gun] control strategies." Id.
264. TUSHNET, supra note 76, at 75-77.
265. Tushnet writes,

The sources of violence are deeply rooted enough in culture and psychology that
adding or dropping specific gun control requirements is quite unlikely to make much
difference. Perhaps paradoxically, advocates of gun control might actually be
impeding the adoption of more effective policies for reducing violence. . . . Take the
issue of gun control off the political agenda, and those interested in reducing violence
might win more elections . . . .

Id. at xvii.
gun ownership that protecting home and hearth—and thus protecting their cultural identities—must not be a matter of arming themselves against some consciously perceived or unconsciously felt racial threat. Accomplishing that goal will be no small task: writ large, it will mean ending racial tensions and biases in the United States.

This may seem to be a breathtakingly broad proposition, but its sweep need not deter policymakers from beginning to work towards that goal. They should do so by initiating three programs. First, policymakers should construct a program of education and public relations designed to unmask and explain the racialized history of gun rights in the United States, as well as the broader socio-psycho-cultural forces that create and perpetuate racial discrimination. Second, they should create public policy aimed at eliminating systemic inequalities that have led to the entrenchment of an impoverished, overwhelmingly non-white urban underclass routinely stereotyped as a looming menace that must be defended against. Finally, policymakers should emphasize community autonomy in determining the most effective way to protect the community’s members from guns and other threats to public health and welfare.

A. Identity-Protective Reform

Professor Kahan’s powerful argument for reframing the gun debate turns on the idea that no real policy reform will be possible until each side is able to describe and implement its proposals in a way that will not threaten the deep cultural identity of the other side. Implicit in that argument, of course, is the concomitant notion that policy proposals likewise cannot threaten or call into question the deep cultural identity of those who propose them. In short, advocates on both sides of the debate must craft policy proposals that respect and protect cultural identities that appear to be in intractable opposition.

Yet the racial conflict that informs and nurtures so much of the mythology of American gun ownership also provides an opportunity for those who advocate restrictions on gun ownership and use to craft precisely such an identity-protective proposal. First, such advocates must take advantage of the nation’s intense interest in Heller and begin a new conversation about gun policy, focusing on the underlying cultural values that have driven political conflicts over gun control. This revitalized conversation must attend honestly and explicitly to racialized motivations for gun ownership by Americans, illuminating the driving motivation

\[266. \text{ See supra notes 80–86 and accompanying text.}\]
\[267. \text{ Id.}\]
\[268. \text{ See supra Part IV.}\]
behind the desire to protect home and hearth—and, by extension, the desire to protect cultural identity itself. For if that motivation derives both from an aspiration for full, acknowledged membership in the American body politic and from a perception of looming threat that itself derives from race-based hatred or fear, then recognizing such membership and eliminating such hatred or fear would eliminate the impetus for armament. An identity grounded in veneration of the American frontier spirit and celebration of full American citizenship might be protected without its proponents needing to fire a single shot. Most importantly for gun-ravaged African American communities, attempts at disarmament will not be met with the unparalleled vehemence of threatened culture warriors.

Achieving such results will be a mammoth undertaking, the specifics of which are beyond the scope of this article. What will be crucial, in the context of the argument made here, is that advocates of reducing the nation’s gun violence be able to articulate not only the racialized elements of the mythology of gun ownership, but also a vision of how and why an identity grounded in other elements of that cultural story can be nourished in the absence of racism. Assuming the truth of President Reagan’s declaration that “Americans don’t go around carrying guns with the idea of using them to influence other Americans,” eliminating racially grounded motivations for gun ownership should facilitate a reformed and revitalized gun policy that protects cultural identities—and lives—on both sides of the debate.

B. Community-Protective Autonomy

Moving the nation beyond race-based hatred and fear and ensuring full participation in the body politic for all Americans will not happen overnight. As policymakers work toward that goal, courts should be respectful of the efforts of individual communities, such as the District of Columbia, to protect their own identities by crafting the gun policy most appropriate for their community. The extent to which courts are willing to do so, in light of Heller’s holding, is likely to be one of the true legacies of the case. Communities emerge from and incarnate cultural identities just as individuals do. And, just as Professor Kahan urges policymakers to respect individuals’ desire to preserve those identities, so courts should respect and defer to the same desire in states and local governments in questions pertaining to gun violence. In both situations, policymakers and courts should be attentive to the role that race has played and continues to play in creating and sustaining cultural values, including the values that inform

269. *Quoted in Leonardatos, supra* note 231, at 972.


271. See NAACP amicus brief, *supra* note 68, at 27.
relevant gun policy. For the predominantly black District of Columbia, then, the choice to limit gun ownership, even with the understanding of gun control's history of racial oppression, deserved significant judicial respect.\footnote{272}

It is true that community laws and regulations are simply "one piece of a much larger puzzle" of nationwide gun violence and that an individual community's laws, standing alone, may be insufficient to "solve this puzzle."\footnote{273} Even so, and even where "the absence of regional regulations permits guns to flow into [a community] from neighboring jurisdictions,"\footnote{274} state and local governments should not be deprived of that most basic of the police powers: to protect the health and welfare of their citizens.\footnote{275} The deprivation of such a power is especially poignant in the case of the District of Columbia, which has spent years seeking both statehood and a meaningful voting presence in Congress.\footnote{276} Disabled from influencing gun policy at the national level, similarly situated localities should be granted substantial deference in seeking to protect its citizens at the community level.

VI. CONCLUSION

Recent scholarship has taken a critical first step toward gun policy reform by making clear that debates over gun control have always been debates over competing cultural values; however, that scholarship has stopped short of its most valuable conclusion. The competing cultural values at stake in the gun debate have, at their core, an often unrecognized racial conflict that extends back to the very founding of this nation. This article has proposed that effecting meaningful reform to gun policy depends first upon unmasking that racial conflict as a predominant motivating factor

\footnote{272. Despite what Clayton Cramer has aptly described as the "racist roots of gun control." Cramer, supra note 178, the predominantly black District of Columbia determined that the most effective means of protecting its citizens from gun violence is through restrictions on ownership and use; that community decision is worthy of significant respect. It bears noting that in its amicus brief in \textit{Heller}, the NAACP argued emphatically that the solution to the nation's history of racially discriminatory application of gun control laws lies not in invalidating those laws themselves, but rather in ensuring their enforcement in accordance with the Equal Protection Clause. NAACP amicus brief, supra note 68, at 29–31. The brief emphasizes that \textit{Heller} has made no colorable claim that the District's regulations are "racially discriminatory in either origin or application." Id. at 31.}

\footnote{273. \textit{Id.} at 25.}

\footnote{274. NAACP amicus brief, supra note 68, at 27.}

\footnote{275. See \textit{Heller}, 1285 S. Ct. at 2847 (Breyer, J., dissenting).}

\footnote{276. See, e.g., Mary Beth Sheridan, \textit{Activists See Gains In Quest For Vote; After Setback, D.C. Advocates Look to 2009}, \textit{WASH. POST}, Oct. 9, 2007, at B01.}
within the American mythology of gun ownership. Attempts at reform must then create systemic social change to eliminate that motivation. While doing so presents an immense challenge for policymakers, *Heller* has the potential to create fertile ground for a reframed and revitalized national discussion and thus for political action. Whether that discussion is likely to happen is unclear. In light of the brief, non-racialized popular analysis of the *Heller* decision thus far, the likelihood of a transformative discourse may elude the American polity for some time longer. However, by explicitly acknowledging and addressing the race-based implications of the gun debate, such a discussion would go far towards respecting divergent cultural identities while ultimately preserving the lives of Americans on both sides of that debate.