

THE PANTHER DECLAWED: HOW BLUE MAYORS DISARMED BLACK MEN

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I am clearly within the limits of historical truth when I say that the civilizations of the past that arose to world domination through Caucasian initiative, effort, and genius disappeared as the result of the insidious contaminating influence of mongrelism. . . . The use of firearms and the placing of the ballot in the hands of the negro in a white man's country are inconsistent with good government, good order, and good feeling between the races. The outcome of such an experiment and any effort to make it permanent policy under our form of government will inevitably lead to disaster.

James Vardaman, Democratic Senator from Mississippi, addressing the Senate in 1917¹

Mass media simply ignored any aspect of the black liberation struggle that was positive and ongoing. Their valuable messages of radical social critique, their call to end racist domination, and their demand for justice and freedom for all . . . images that everyone remembered were of beautiful black men wearing leather jackets and berets, armed with machine guns, poised and ready to strike. The message that lingered was that black men were able to do violence[.]”

Bell Hooks, 2004²

These steadfast images of black men naturalize and reinforce racial inequality. They reinforce the message that Black men are naturally aggressive, are violent, cannot succeed on their own, are

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Thank you to Alan Gura, The Second Amendment Foundation, and countless others who have worked to clarify, defend and expand the recognition and free exercise of rights this Article discusses; however, we must do more to make these fundamental individual rights accessible to every person, and in particular Black people who reside in cities and have a history of having their Second Amendment rights trampled, frustrated, and limited. Thanks to Abigail Swallow, my research assistant, who helped scrutinize and improve earlier drafts.

1. 55 CONG. REC. 6061, 6063 (1917).
2. Bell Hooks, *WE REAL COOL*, 59-60 (2004).

not suited for professional careers, are not good fathers, and need to be controlled by white men[.]

Abby L. Ferber, 2007³

[T]his fear led to “systematic efforts” in the “old Confederacy” to disarm the more than 180,000 freedmen who had served in the Union Army, as well as other free blacks. Some States formally prohibited blacks from possessing firearms.⁴ Others enacted legislation prohibiting blacks from carrying firearms without a license, a restriction not imposed on whites. Additionally [t]hroughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves.

Associate Justice Clarence Thomas, 2010⁵

[M]ayoral challenger Lori Lightfoot accused then-Mayor Rahm Emanuel of victim shaming for citing an absence of “values” and “character” in the African-American community after a weekend bloodbath that left 12 people dead and 71 others shot.

THE CHICAGO SUN-TIMES, 2020⁶

INTRODUCTION

This Article focuses on the legal history of regulation from WWII to present in cities like Chicago and Washington, D.C., and with a particular focus on the former. Not coincidentally, these cities are also the two defendants in important, positive litigation circa 2010 to reestablish urban gun owners’ rights. Many policy and social controversies in Chicago and Washington, D.C. also echoed through the Black neighborhoods of Brooklyn, Cincinnati, Detroit, Milwaukee, Minneapolis (as recently as George Floyd’s death), Oakland, Queens, St. Louis, and elsewhere. While each locus houses its own histories, mythologies, politics, and social environs, the history of “gun control” or the sanctioned disarmament of Black populations in violation of their Second Amendment rights is inescapably and unquestionably coincident with Democratic control of these cities. Chicago’s City Hall hasn’t housed a Republican mayor’s administration since 1931⁷ and the last Republican elected to Chicago’s City Council left

3. Abby L. Ferber, *The Construction of Black Masculinity: White Supremacy Now and Then*, 31 J. Sport & Soc. Iss. 11-24, 22 (2007).

4. This “unequal protection” doctrine was common in the South. As of “1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms.” *McDonald v. Chicago*, 561 U.S. 742, 777 (2010) (Thomas, J.).

5. *Id.* at 847 (Thomas, J.) (internal citations and quotations omitted).

6. Fran Spielman, *Lightfoot Delivers Tough-Love Anti-Crime Message*, THE CHICAGO SUN-TIMES (21 February 2020).

7. William Hale Thompson was the last Republican mayor of Chicago, a personal friend and political ally of Al Capone and nearly unanimously supported by the 75,000 or so Black voters residing in Chicago in 1919. Though the Chicago race riots

office in 1971.⁸ Washington, D.C. has never had a mayor (or, prior to that, Mayor-Commissioner) that was not a Democrat. Baltimore has had Democratic mayors since 1967, Milwaukee since 1960. Cincinnati hasn't had a Republican mayor since 1971, Minneapolis since 1973. These are cities essentially subject to one-party rule for the last fifty, sixty, or seventy years. Despite the prevalence of this environment, this Article pays special attention to Chicago illustratively as an example and analytically as an instructive prototype.

The Article examines this area with a consequentialist lens, concluding that the effect of strict rules in these cities has created a state of play wherein a mostly-wealthy, predominantly-white ruling class living in safer areas is allowed to be armed while a mostly-impooverished, primarily-Black-and-brown underclass is isolated in underprivileged areas and incrementally, irreversibly, and systematically disarmed. This disarmament apartheid is especially severe in cities like Chicago and Washington, D.C. This Article discusses Second Amendment rights not only as fundamental Constitutional rights, but also as vital civil rights that all people, regardless of color, must be able to enjoy easily, equally, and without fear of—or interference from—their governments.⁹ This Article can also be considered an expansion upon, and a contemplation of, points raised by Justice Thomas in his insightful concurrence in *McDonald*,¹⁰ which specifically and forcefully discusses the disarmament of Black Americans as contrary to our nation's founding principles. Characterized as truculent by some commentators, this Author considers Thomas's concurrence prescient and even of architectural import.

As in all legislative histories, the context of modern-day urban firearms regulation matters. Much of this legislation finds its origins in the wake of the 1968 Democratic National Convention in Chicago, the riots on Chicago's west side and across three of Washington D.C.'s quadrants, the community reaction to the assassination of Fred Hampton in December of 1969, and the perception that, as Stokely Carmichael put it, "white America ha[d] declared war on black America" and that "Black people have to survive, and the only way they will survive is by getting

of 1919 hurt his credibility with Blacks, he ran again in 1927 and won. However, the city's affection for Republican cronyism and, especially, a mayor at times openly in cahoots with organized criminals soured and Thompson left office a very unpopular man. The Chicago Tribune wrote an obituary of his mayoral administration featuring these damning comments: "For Chicago Thompson has meant filth, corruption, obscenity, idiocy and bankruptcy. . . . He has given the city an international reputation for moronic buffoonery, barbaric crime, triumphant hoodlumism, unchecked graft, and a dejected citizenship. He nearly ruined the property and completely destroyed the pride of the city. He made Chicago a byword for the collapse of American civilization. In his attempt to continue this he excelled himself as a liar and defamer of character." Reprinted in part April 9, 1998 under the headline Thompson and available at <https://www.chicagotribune.com/news/ct-xpm-1998-04-09-9804090051-story.html>.

8. George B. McCutcheon served a single four-year term as the lone Republican alderman from 1967 to 1971.

9. Referring to federal, state, county, and municipal authorities in plural.

10. See generally *McDonald v. Chicago*, 561 U.S. 742 (2010).

guns[.]”¹¹ Carmichael would later urge Blacks to “make the white racist Americans understand that Negroes have the necessary force to set right the outrages which have been made against Negroes in the United States.”¹²

The context for the disarmament of Black men is, comparatively and tragically, far less nuanced than the relevant statutes’ procedural pedigrees. To many whites, including Sen. Vardaman of Mississippi, it is an understatement to say that a Black man holding a gun is “inconsistent with good government” (to use the Senator’s words). Rather, to these whites, a gun in the hand of a Black man is the Promethean crime, the *infraction de Louverture*, the foreshadowing of tragedy, and a reminder of white mortality. Whatever its context, it is something to be prevented, lest someone important be hurt¹³ in a crime, skirmish, or riot. Yet as seldom as Black men are welcomed into the brotherhood of gun owners, even more rarely have they been invited near the levers of government.¹⁴ To encourage such a trespass would be, in the perspectives of contemporary Vardamans, “inconsistent with good government.”

Though Black Republican City Councilman Oscar Stanton De Priest had notably served in Chicago’s City Council decades earlier, by the 1960s the City Council was a carefully-installed set of gears in Mayor Daley’s mostly-white, mostly-Catholic, power-concentrating political machine.¹⁵ The City Council was alarmed by what it saw in 1968 and 1969 and it would be in this chamber that the most aggressive domestic arms control framework in American history would be devised—and renewed, with few revisions, until it was finally found to be unconstitutional in 2010.¹⁶ This Article tells the story of the incremental and unidirectional mechanisms designed to limit the rights of nonwhite people, and particularly Black men, to lawfully buy, keep, and carry firearms in America’s cities. Collaterally and in parallel, this is the story of Democratic mayors in Chicago and Washington, D.C. who asked Black people to trade away their Second Amendment rights in exchange for other rights and then did not bother to wait for an answer.

Though strikingly similar events occurred in several cities, this article pays particular attention to Chicago, where limitations on the exercise of

11. Ben A. Franklin, *Army Troops in Capital as Negroes Riot*, THE NEW YORK TIMES (6 Apr. 1968).

12. *Dr. King’s Death Stuns Black, White Americans*, THE LAWTON CONSTITUTION at 28 (5 Apr. 1968).

13. “[Eddie] Murphy’s portrayal [of a Black con man in the 1982 film *48 Hours*] . . . is parodic—we know that although he is a black man with a gun he *will not kill anyone important*.” M. Winokur, *Black Is White/White Is Black*. . . , in LESTER B. FRIEDMAN, UNSPEAKABLE IMAGES: ETHNICITY AND THE AMERICAN CINEMA at 169 (1991) (emphasis added).

14. “With only recent access to halls of power in cities where we are the majority, African Americans are reluctant to denounce the leaders who sell them out.” Gloria House, *Foreword*, in ROBERT F. WILLIAMS, NEGROES WITH GUNS (1998).

15. Richard J. Daley would serve as Mayor of Chicago for 21 years, from 1955 to 1976. His son, Richard M. Daley, would serve as Mayor of the city for 22 years.

16. *See McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Second Amendment rights were particularly severe and egregious and have only recently been addressed by the courts.

The arguments and observations in this Article are separate and apart from debates about gun violence or the contemporary crime rate. This is *not* an article about gun violence, the frequency of gun violence, or how to best reduce gun violence. Just as the First Amendment does not care how many journalists are in the United States or how many printing presses there are, the Second Amendment exists independent of how many people are armed or how much violence is occurring. What this Article *is about* is the concept that all individual Constitutional rights should be accessed and enjoyed equally by all individuals. Yet, the onerous ordeal of enjoying one's Second Amendment rights as a Black person in American cities is materially different from the comparatively easier process of enjoying those same rights as a white person.

There is arguably no set of rights in the Constitution more important than those within the Second Amendment; these rights safeguard all other Constitutional rights. It is an armed populace—and only an armed populace—that can effectively resist and repel odious government action. This action must be resisted swiftly, stopped abruptly, and, when¹⁷ needed, confronted with overwhelming violence. Without the Second Amendment, the tyrannical state¹⁸ enjoys a total monopoly on violence;¹⁹ the downtrodden populace serves at such a government's heel and bends to its whim. As Locke argued, there are situations in which the state abuses its power to such an extent that it is a moral obligation to fight against, or even to overthrow, that government.²⁰

The thesis of this Article is that Black and white people equally bear the burden of resisting the state—including the police—in these scenarios, but that municipalities where many Black people reside have enacted inappropriate and unconstitutional measures to deny Black people the tools with which to participate as armed individual protectors of our democracy, our Constitution, and our shared way of life. It is these measures that, though neutral on their face, constrain the ability of the Black man to take up arms for the common defense, for the defense of his home, and even for the defense of his person.

THE NEIGHBORHOOD'LL NEVER BE THE SAME²¹

The issue of so-called “gun control” in the wake of WWII was not on the political radar screen. People were interested in job creation, infrastructure spending, the suburbanization of America, the quality of

17. “When,” not “if.”

18. The “tyrannical state” is a government that, even for a moment or even by mistake, exercises “power beyond right.” See JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* at ch. 18 (1689).

19. See Julio Faundez, *Douglass North's Theory of Institutions: Lessons for Law and Development*, 8 HAGUE J. RULE LAW 373, 392-95 (2016).

20. *Id.* See in particular Locke's analysis of William Barclay's defense of the rights of kings.

21. “For most people, Friday's just the day before the weekend. But after this Friday, the neighborhood'll never be the same.” Ice Cube in *Friday* (1995).

schools, and beating the Soviets to the Moon. But that changed in the 1960s, and while “white flight” wasn’t yet firmly planted in the journalistic vocabulary, “white fright” was gaining steam. The Black Panther Party ran a voter registration drive in 1972 that led to thousands of liberal Black potential voters registering for the first time; the Party’s Chairman, Bobby Seale, ran²² (and won 23% of the vote) in the Oakland mayoral race. Then the violence in Chicago in 1968 gained national attention,²³ followed by the assassination of Fred Hampton²⁴ in December of 1969. White fears of Black empowerment and Black masculinity and Black armament rhymed with those a century and a half earlier.²⁵

Shocked by the intensity and duration of violence in Baltimore, Chicago, and Washington, D.C. in the final months of the 1960s, these Democratic Party strongholds swiftly drafted and passed legislation²⁶ with the effect of limiting firearm ownership – and, in particular, handgun ownership – in the ten-year period beginning in 1975. These measures had the effect of discouraging Black gun ownership and crippling Black communities’ capacity for self-defense.²⁷ These provisions included banning ownership of all handguns and many rifles in Washington, D.C. in 1975, not allowing any person in Chicago to own or possess a handgun for any reason in 1982, and only allowing Maryland residents to purchase certain firearms after January 1, 1985.²⁸ Only after these restrictions were eased a generation later did gun ownership and self-defense return to Black communities, “What is different now is that the largest rise in gun sales in 2020 — nearly 60% — has been among African Americans, who increasingly fear that they can’t rely on law enforcement for safety,” wrote two contributors to THE CHICAGO SUN-TIMES in 2021.²⁹

22. See Earl Caldwell, *Seale Rated as Underdog Again In Oakland, Calif., Mayor Race*, N.Y. TIMES (13 May 1973).

23. See generally discussion of the events and aftermath of Aug. 28, 1968 at M. Astor, *The Whole World Is Watching’: The 1968 Democratic Convention, 50 Years Later*, N.Y. TIMES (28 Aug. 2018).

24. Chairman, Black Panther Party of Illinois; Deputy Chairman, Black Panther Party (at the time of his death).

25. In 1822, a group of free Blacks and slaves led by Denmark Vesey planned a rebellion in which they would slay their masters and flee to Haiti. H. Aptheker, *AMERICAN NEGRO SLAVE REVOLTS* 268–270 (1983). Events like the Vesey revolt led to fears about Blacks having access to arms in the mid-1800s. See, e.g., Act of Dec. 23, 1833, § 7, 1833 Ga. Acts pp. 226, 228 (“it shall not be lawful for any free person of colour [*sic*] in this state, to own, use, or carry fire arms of any description whatever”).

26. See dozens of proposed permutations and revisions for Mun. Code. Chi. § 8-20-050 et seq. (passed in 1968, implemented per mayoral order in 1969 and as later amended and revised legislatively and administratively). Draft legislation in archive at Chicago History Museum, Legislative Files, Council Files 1968-71, 1601 N. Clark St., Chicago.

27. Chicago maintained a gun registry from 1968 until 2013. See Steven Yaccino, *Chicago City Council Reluctantly Ends Gun Registry*, N.Y. TIMES (11 Sep. 2013).

28. The list of approved handguns, referred to as the Maryland Handgun Roster (“MHR”), is maintained by the Maryland State Police and periodically updated. The method for administering and maintaining the MHR is described by Public Safety Art. 5, Secs. 404-405 (1985 and as amended).

29. Margareth Etienne & Suja Thomas, *How Second Amendment gun rights fall short for African Americans*, CHICAGO SUN TIMES (26 Jan. 2021).

Prior to this crackdown, shooting ranges were scarcely different from bowling alleys – places for friends to practice their skills or simply to showcase their abilities in hitting targets from about sixty feet away, with leagues, after-work get-togethers, and teams representing trade unions and social clubs. Unlike today, a substantial portion of the middle-aged male populations of cities like Chicago and Washington, D.C. had served in the military (in the Second World War or in the Korean War) and were eager to maintain and sharpen the firearms skills they'd obtained as servicemembers, something gun clubs and shooting ranges facilitated. The leadership masthead of Chicago's Edison rifle club, for instance, showed all but one of its board members alongside a retired U.S. Army or U.S.M.C. rank in 1954.³⁰

After the restrictions on gun ownership were implemented, leisure firearms activities in cities declined substantially. A pre-war list of small-bore firearms marksmanship matches in *American Rifleman* lists 50-yard and 100-yard marksmanship matches at the George Washington University Rifle Club in Washington, D.C. and the Ridgeville and Commonwealth Edison Rifle Clubs in Chicago.³¹ By the 1960s, only the Commonwealth Edison range in Chicago remained open, but would soon be closed.³²

Though almost undoubtedly³³ (in a post-Reconstruction jurisprudence) unconstitutional,³⁴ in the 1980s Chicago gradually closed its gun shops and gun ranges. For decades, there were no gun shops in the City of Chicago, retail dealers like pawn shops were not allowed to deal in firearms, and there were no shooting ranges at which to congregate with fellow firearms enthusiasts or practice one's marksmanship. In other words, the exercise of one's Second Amendment rights in Chicago was made cumbersome and was, perhaps, nearly-irreparably crippled. This was especially true for Black men³⁵ without access to suburban gun shops and gun ranges, due to low incomes, obligations during these shops' hours of business, and/or dependance on public transit. The use of practical inconvenience, arbitrary taxes and fees, and outright prohibitions to discourage Black gun ownership is nothing new,³⁶ but it is particularly

30. *Summer Newsletter*, Edison Employee Rifle Club (Summer 1954) (Chicago History Museum archives, Commonwealth Edison marketing and miscellaneous materials).

31. See F.H. Phillips, *Outdoor Small Bore Matches*, 69 *American Rifleman* 624 (1923).

32. Ellen Mayer, *What Happened to Chicago's Rifle Ranges?*, 5 Feb. 2016 Radio Broadcast on WBEZ (2016).

33. Image credit: CHICAGO TRIBUNE Archives.

34. See, e.g., *Proceedings in the Ku Klux Trials at Columbia, S. C.*, in the United States Circuit Court, November Term, 1871, p. 147 (1872) (Courts have consistently held "the State cannot interfere with the right of the citizen to keep and bear arms. The right to keep and bear arms is included in the fourteenth amendment, under 'privileges and immunities.'").

35. *McDonald v. Chicago*, 561 U.S. 742, 847 (2010) (Thomas, J., concurring) (Fourteenth Amendment makes Second Amendment fully applicable to states and denying right to bear arms is inconsistent with Constitutional intent).

36. As early as 1871, the question was raised whether the first eight Amendments were similar in posture or whether some were more important than others. Justice Thomas's concurrence reminds us there is no seniority among them and all must be equally valued and enforced, and that the Fourteenth Amendment requires each be

invidious to exploit the pecuniary inequality of whites and Blacks to disadvantage, disarm, and imperil the latter.³⁷ Today, the Black median annual household income in Chicago is \$27,713—the highest it’s been in years, and yet far below the 2019 national median annual household income of \$68,703 (which includes all households, including Black households).³⁸ Recent Bureau of Labor Statistics data suggest the Black male unemployment rate in Illinois is 254% the equivalent white rate.³⁹

By discouraging and criminalizing Black men carrying of firearms and encouraging and normalizing the white carrying of firearms, the City of Chicago not only endorses an apartheid scenario in Chicago with a white armed minority, but it puts Black rights in a black market and puts Black lives at risk every day. This Article argues in favor of a radical expansion of Black gun ownership in Chicago, Black concealed carry in Chicago, and Black options for violence in self- and community-defense rather than continued reliance upon a municipal police force that has proven to be unrepresentative, indifferent, impotent, and untrustworthy. It argues, further, that this approach is extensible to, and needed in, other urban contexts where the police view Black men as a group to provoke and surveil rather than to protect.⁴⁰

MAY-ISSUE AND SHALL-ISSUE FRAMEWORKS

In short, “may-issue” frameworks task the chief law enforcement officer of a county, town, parish, or other jurisdiction with determining whether a person needs the ability to own and carry a firearm; that per-

in full force for white men and Black men alike. “During an 1871 debate on a bill to enforce the Fourteenth Amendment, Representative Henry Dawes listed the Constitution’s first eight Amendments, including ‘the right to keep and bear arms,’ before explaining that after the Civil War, the country ‘gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens’ who formerly were slaves. Cong. Globe, 42d Cong., 1st Sess., 475–476 (1871). ‘It is all these,’ Dawes explained, ‘which are comprehended in the words ‘American citizen.’ ‘ Ibid . ; see also id. at 334 (remarks of Rep. Hoar) (stating that the Privileges or Immunities Clause referred to those rights ‘declared to belong to the citizen by the Constitution itself’).” *Id.*, parentheticals as in Justice Thomas’s opinion.

37. See 1865 Miss. Laws p. 165, § 1, reprinted in 1 Fleming 289 (barring 180,000 free Blacks from possessing firearms); see also La. Statute of 1865 § 17 “Firearms and Negroes” (requiring permits, taxes, and fees in Louisiana for Black gun owners and not requiring same for white gun owners).
38. The idea that Black people would become disarmed not only through affirmative efforts by whites to legislate away Black gun ownership but also through their poverty was anticipated as early as the 1860s. The Freedmen’s Bureau Act of 1866 speaks not merely of equality in a general egalitarian sense, but mentions specifically protection of “the constitutional right to bear arms,” and protects Black enjoyment of the “full and equal benefit” of this right in each and every state. 14 Stat. 176–177 (1866).
39. Jessica Semega et al., *Income and Poverty in the United States: 2019*, part of Report No. P60-270, U.S. Census Bureau (2020).
40. Bureau of Labor Statistics, *Expanded State Employment Status Demographic Data*, Table EX-14 (2017–2020); see also Michael Lucci, *Illinois’ economic weakness results in nation’s highest black unemployment rate*, ILLINOIS POLICY INSTITUTE, <https://www.illinoispolicy.org/illinois-has-the-nations-highest-black-unemployment-rate/> (last accessed May 12, 2021).

son “may issue” a permit, or may not. Often, a person denied these rights has limited procedural recourse and may not have a formal route of appeal, despite having one of his (or her) fundamental rights limited through the stroke of a single bureaucrat’s (or, often, cop’s) pen. Meanwhile, “shall-issue” frameworks demand that a person legally allowed to own and carry a firearm be given the legal ability to do so with few limitations (for instance, perhaps a person must not be insane or must not be a felon). Obviously, the may-issue framework gives great latitude to empowered bureaucrats and gives little power to the applicant vulnerable to arbitrary decisions; meanwhile, the shall-issue framework disempowers the bureaucrat and requires her (or him) to bestow upon the applicant the appropriate legal blessing to own and carry firearms. Latitude is, in this context, problematic and invites decisions on the basis of political patronage, celebrity, popularity, affinity, friendship, or race.

There is no shortage of precedent or evidence for the proposition that latitude invites abuse and facilitates discrimination, and may-issue frameworks amplify and exacerbate racial disparities in the most extreme context: allowing some residents to exercise fundamental Constitutional rights enshrined in the Second Amendment while others are effectively prevented from exercising the same rights.

The shall-issue framework,⁴¹ though helpful in cultivating a “color-blind” exercise of individuals’ Second Amendment rights, does not by itself eliminate racial discrimination as to who may exercise these rights. At the start of the past decade (2010), Chicago created a shall-issue framework ensuring nearly everyone with a concealed carry permit was white by forbidding concealed carry of firearms on public transportation, limiting firearms training and firearms practice sites to majority-white suburbs difficult to reach by public transportation (and half an hour or more by car from the city center), and ensuring that there was nowhere in the City of Chicago to legally purchase a firearm of any kind.

Even in shall-issue states, however, the gaps in who applies for a concealed carry handgun permit and who is approved are substantial. An analysis of data from five states by Shapira et al.⁴² found whites were 1.3 to 2.0 times more likely than Blacks to apply for a concealed carry handgun permit and that Black applicants were 3.3 to 5.5 times more likely to be denied a permit than white applicants.⁴³ Among Black applicants, Black men were nearly twice as likely as Black women to have applications denied.⁴⁴

41. See, e.g., fact pattern in *Kolender v. Lawson*, 461 U.S. 352, 354 (1983) (Lawson, law abiding Black man, stopped or arrested *fifteen different times* in 22-month period); Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 *FORD. URB. L.J.* 621, 623-25 (1993).

42. In a shall-issue framework, the law enforcement agency administering a concealed carry permit program “shall issue” the permit to every qualified applicant; this contrasts with “may-issue” frameworks in a minority of states where these agencies may make (often arbitrary) determinations as to whether an applicant receives a permit.

43. Harel Shapira et al., *Trends and Patterns of Concealed Handgun License Applications: A Multistate Analysis*, 5 *SOCIAL CURRENTS* 3-14 (2018).

44. *Id.*

Though neutral on their face, shall-issue frameworks allow examiners of an application to use increased scrutiny as to applicant defects due to implicit bias⁴⁵ to deny applications from Black applicants while accelerating, allowing, or endorsing the application activity of white groups. This may include white felons receiving permits while Black felons do not, white domestic abuse perpetrators receiving permits while equivalent Black applicants do not, and so forth. However, it is worth noting this is still preferable to may-issue frameworks in which police officers or executives of the responsible law enforcement agency may permissibly make wholly arbitrary judgments as to whether a person receives a permit.

The majority of states, plus Guam and Puerto Rico, utilizes a shall-issue framework; California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, Rhode Island, and Washington, D.C. use a may-issue framework.

TOTAL BANS AND POST-BAN LIFE

It could nearly be called tradition, so prevalent are examples in American history of Black populations being denied fundamental rights and then receiving inadequate restoration of, and insulting compensation for, those rights. And history repeats itself again in the case of firearms-related rights, with Black individuals suffering disproportionately under the firearms bans in Chicago and Washington, D.C. and then having these rights further tampered-with and compromised once bans were lifted.

It was five years between emancipation by constitutional amendment in 1865⁴⁶ and Black men being eligible to cast votes nationally.⁴⁷ It would be another fifty years⁴⁸ before women, white and Black, enjoyed this right. And no promise, referendum, or act of Congress can by itself fully restore fundamental rights, including Second Amendment rights, denied to Black people in the past; these wrongs are now committed to history. They are irreversible harms.

Handgun bans like the one in Chicago illegally and disproportionately affected Black residents and prevented their enjoyment of a fundamental right. Now that the right to be armed is recognized as individual,⁴⁹ fundamental,⁵⁰ and recognized by federal and state governments,⁵¹ the question is how to ensure that as many people as possible enjoy comprehensive and unfettered access to this right. Specifically, how to not only recognize that this right exists, but also how to ensure that access to the

45. See 2015 and subsequent data compiled related to, cited in part within, M. Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 AM. J. PUB. HEALTH 1923-29 (2017).

46. Implicit bias might include discriminating against people with stereotypically Black names (e.g., Lakisha and Jamal's applications receiving more scrutiny versus Emily and Greg's applications receiving less), cf. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal?*, 94 AM. ECON. REV. 991 (2004).

47. U.S. CONST. AMEND. XIII (1865).

48. U.S. CONST. AMEND. XV (1870).

49. U.S. CONST. AMEND. XIX (1920).

50. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

51. U.S. CONST. AMEND. II (1791).

right is equal to white and Black residents and to rich and poor residents. Like voting rights, this may require further intervention to ensure everyone can participate in the joys and privileges of lawful firearms ownership without fear of police meddling or erroneous prosecution.

Today, despite Black mayors in the City Halls of Atlanta, Baltimore, Charlotte, Chicago, Dallas, Denver, Houston, New Orleans, Newark, San Francisco, and Washington, D.C., the gap in access to firearms remains. Many popular Democratic measures hurt Black gun ownership or make gun ownership in Black neighborhoods more expensive, less desirable, or simply too difficult to enjoy.

Democratic mayors often favor regulations requiring special training to exercise one's Second Amendment right to carry a weapon; meanwhile, no special training is required to exercise one's Sixth Amendment right to defend one's self in court⁵² or one's First Amendment right to publish a newspaper,⁵³ both activities for which – unlike self-defense – many universities offer advanced degrees, and activities that, like use of a firearm, could possibly endanger the person exercising the right or those around her. Mayors often,⁵⁴ as in Chicago,⁵⁵ also ban firearms on public transit,⁵⁶ though Black populations disproportionately rely upon public transit.⁵⁷ If public transit is not a common *locus* for violence, then there is no reason to believe passengers will become violent once armed, and in cities where transit systems are an ecosystem that produces violence, there passengers should be armed to protect themselves. In the latter city, with a violent transit system, Black people should be armed because they are more likely to fall victim to that violence,⁵⁸ more likely to witness that violence,⁵⁹ and more likely to encounter violence from police.⁶⁰ The next section contemplates public transport bans as an example of an on-its-face race-neutral policy that limits Black gun ownership and, in turn, the Black right to self-defense.

52. See *McDonald*, 561 U.S.

53. See generally *Farett v. California*, 422 U.S. 806 (1975) (Stewart, J.).

54. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (Burger, C.J., unanimous opinion).

55. A rare exception is New York City, which allows concealed carry on its subway train and buses.

56. ABC7 Eyewitness News, *Concealed Carry on Mass Transit Under Consideration* (1 Apr. 2013) (Mr. Claypool of Chicago Transit Authority declaring concealed carry on the CTA “a recipe for disaster.”).

57. See CHI. MUN. ORD. 10-8-526 et seq. (2010 and as amended); see also companion ordinance CTA Reg. 98-126 (updated and amended in parallel to *id.*).

58. John Greenfield, *Transit Boards Overwhelmingly Male, Whiter Than Ridership*, THE CHICAGO READER (22 May 2018) (only 28% of CTA passengers in Chicago are white).

59. Of all people killed by firearms in Chicago in 2021 (as of April 8, 2021), 83% were Black. Chicago Civilian Office of Police Accountability records for 2021 YTD.

60. Over 90% of non-officer witness statements for events involving a firearm discharge in Chicago in 2021 have been Black. Chicago Civilian Office of Police Accountability records for 2021 YTD.

WEAPONS BANS ON PUBLIC TRANSPORT

Among the most invidious of Chicago's restrictions⁶¹ is the inability to possess firearms on public transit.⁶² It is puzzling, of course, why a person (armed or unarmed) poses more of a threat to the safety of others when standing on a bus or train rather than standing on a sidewalk or street. It is similarly unclear why an armed person seated on a bus poses more of a danger than an armed person seated on a park bench, or in a church pew, or on a stump in the forest (all places where concealed carry is possible). But the racial impact of this public transit restriction is both concerning and disparate.

Because non-white residents of Chicago are less able to pay for taxis, less likely to own reliable vehicles, and less likely to live short distances from their workplaces, these residents are reliant on public transportation⁶³ to an extent and in a way that white people are not.⁶⁴ This substantially restricts both their ability to obtain a concealed carry permit (because there are no firearms training facilities served by the bus or train routes provided by the Chicago Transit Authority and no gun shops within the city limit) and their ability to exercise their Second Amendment rights and their concealed carry privileges.

This regulation's interference with firearms training opportunities extends beyond the licensing provision (which requires that a permit holder obtain firearms training). Locating shooting ranges and other training facilities outside the city limits and making them inaccessible via public transportation also severely limits non-white populations' abilities to shop for weapons and ammunition, to practice and maintain their marksmanship, and to introduce their friends and family to shooting sports and firearms-related pastimes.

The prohibition against concealed carry of firearms on public transit also meaningfully reduces the number of law-abiding citizens⁶⁵ who are moving around the city equipped with a firearm. For instance, if one's workplace allows concealed carry (as many office buildings do), an employee who commutes on public transit in Chicago cannot take advantage of this opportunity. One option would be to keep a pistol in one's desk

61. 100% of people killed by police in Chicago in 2021 (as of April 8, 2021) have been Black; victims have ranged in age from 13 through adulthood. Chicago Civilian Office of Police Accountability records for 2021 YTD (some details redacted because of Mr. Toledo's status as a minor, aged 13, at the time police shot him). When Mr. Toledo was killed, he was carrying a gun that police believed another person might have provided in violation of CHI. MUN. ORD. 8-16-090.

62. And Washington D.C.'s, which prohibit concealed carry of firearms on Metrorail. See Prohibited Places to Carry a Concealed Firearm, <https://mpdc.dc.gov/page/prohibited-places-carry-concealed-firearm>.

63. CHI. MUN. ORD. 10-8-526 (2010, 2016, and as amended).

64. The Chicago Transit Authority estimates 60+% of its ridership on buses, trains, and subways are Black or Latino. See Ashley Mouldon, *Chicago transit disparity*, CHICAGO REPORTER (1 May 2010), <https://www.chicagoreporter.com/chicago-transit-disparity/>.

65. The median Black annual household income (not individual income) in Chicago is \$27,713. See Heather Cherone, *Anti-Gentrification Measure Extended for 6 Months as Officials Craft New Plan*, WTTV (8 Dec. 2020), <https://news.wttw.com/2020/12/08/anti-gentrification-measure-extended-6-months-officials-craft-new-plan>.

drawer at work and another pistol at home, an expensive proposition with reliable pistols costing hundreds of dollars each.

It is worth noting there are no other fundamental Constitutional rights that are substantially limited while riding public transportation. One's ability to write an article, engage in a political discussion, or read a text from one's religious tradition is unchanged whether on a park bench or on a bus seat. Whether arrested while sitting on a park bench or while sitting on a bus, one's Constitutional rights are identical and one enjoys the same Constitutional safeguards in his or her interaction with the arresting officer(s). This illustrates just how exotic the Chicago provision is in specifically curtailing one's Constitutional rights while using public transportation.

Some may say the Chicago Transit Authority is providing a service and that many services have terms and conditions that govern their customers. And of course, this is true; we do not allow people to defecate on or commit assaults on the bus. But imagine if one of the restrictions on one's use of the U.S. Postal Service was that no letter will be delivered by the Post Office if it contains anything negative written about the President, or if letters would be delivered but only if they were not written in Spanish; these impermissibly restrict the letter-writer's fundamental First Amendment rights.

Restricting the Second Amendment rights of a user of public services is no less problematic. By disallowing concealed firearms on Chicago's CTA⁶⁶ and Washington, D.C.'s Metro, the municipal government arbitrarily and severely limits the rights of people who utilize public transit relative to those fortunate enough to own automobiles with which to commute or, alternatively, those fortunate enough to own homes in pricey downtown areas near their workplaces.

THE SUBURBANIZATION OF FIREARMS

In the wake of *Heller*⁶⁷ and *McDonald*,⁶⁸ the Chicago City Council frantically looked for ways to ensure as few Black residents as possible legally possessed firearms. The City quickly implemented "a permit regime⁶⁹ for lawful gun possession and required one hour of range training⁷⁰ as prerequisite to a permit, but prohibited firing ranges everywhere in the city."⁷¹ Hence, a prerequisite was placed as to gun ownership that was impossible to achieve within the city limits.⁷²

This essentially required Black residents not only to leave Chicago to obtain the hour of range training required, but to travel to suburbs poorly-served by public transit and beyond the ambit of the municipal

66. Presumably criminals are not carefully following these regulations.

67. CTA being a common abbreviation used to refer to "Chicago Transit Authority" vehicles and transit lines.

68. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

69. See *McDonald*, 561 U.S.

70. See the so-called "Responsible Gun Owners Ordinance," Chi. Mun. Code § 8-20-280.

71. *Id.* § 8-20-120(a)(7)

72. See *Ezell v. City of Chicago*, 651 F.3d 684 at 689-90 (7th Cir. 2011).

public transit system of Chicago (the Chicago Transit Authority system or “CTA”). Of the surrounding suburbs with gun ranges, all with gun shops offering on-site ranges and training were majority-white as of the 2010 Census⁷³ and all had white Chiefs of Police or a most senior law enforcement officer who was white; Chicago has not been a majority-white census area since the 1960 Census.

But requiring that residents of Chicago travel outside the city to enjoy their Second Amendment right to keep and bear arms is no more reasonable than allowing journalists in Chicago to print newspapers so long as they obtain an hour of training in Mainz, Germany where Guttenberg was born. And the Seventh Circuit agreed, albeit without as colorful an analogy; the Court of Appeals critiqued the District Court’s denial of injunctive relief and stated that harm to one’s enjoyment of Constitutional rights is not measured by one’s ability to exercise the same right “in another jurisdiction.”⁷⁴

The Seventh Circuit searched fruitlessly for any evidence at all furnished by the City in support of the assertion that the discharge of firearms in urban environments posed special dangers. Judge Sykes asserted the City “produced no empirical evidence whatsoever” about these supposed special dangers firearms pose in ‘urban’⁷⁵ settings.⁷⁶ Of course, an “urban” setting is an important imaginary place in the American segregationist narrative, a *locus* less white, less safe, less familiar than wherever the story is being told – special because of its *otherness*, its ghettoization, its alien quality. All of this is communicated to many white ears by the simple word “urban.” As Kehinde Andrews correctly wrote in *The Guardian* two years ago, “Not only is urban an obviously wrong category, but it is also born out of racial stereotyping of black communities.”⁷⁷ “Urban means [B]lack,”⁷⁸ and “[i]t doesn’t take a sociologist to figure out “urban” means [B]lack.”⁷⁹

ADVOCACY FAILURE: THE NRA AND BLACK CITY-DWELLING GUN OWNERS

The bar for who may exercise fundamental Constitutional rights must be set, and kept, low. Arbitrary restrictions on the exercise of fundamental rights must be viewed with suspicion and, if problematic, destroyed with decisive action, as occurred in Congress’s actions to moot *Lassiter’s* effect⁸⁰ (which would have allowed literacy tests as a prerequisite to voting, the testing often administered with discriminatory effect). Second Amendment access to firearms must be treated with no less respect than

73. *See id.* at 698.

74. *See* 2010 Census results for Barrington, Lyons, Lombard, and Waukegan.

75. *Ezell*, 651 F.3d at 697 (Sykes, J.).

76. Quotes added for emphasis by the Author.

77. *Ezell*, 651 F.3d at 708-09.

78. Kehinde Andrews, ‘Urban’ Sounds: It’s Time to Stop Using this Hackneyed Term for Black Music, *THE GUARDIAN* (14 August 2018).

79. Ian Frazier, *The Rap*, *THE NEW YORKER* (1 Dec. 2008).

80. Michael Krikorian, *Op-Ed: Why Hollywood’s homicide rate shrank as assaults rose – a commander’s unfiltered analysis*, *THE LOS ANGELES TIMES* (4 Jan. 2018).

First Amendment access to printing presses regardless of an accessor's race, gender, or other immutable attributes.⁸¹

To drive this mechanism of cultural and legislative correction, however, often requires advocacy. Yet the most likely advocates to drive reform in this area have failed spectacularly in all three requisite activities: 1) understanding the nature and scope of the problem, 2) understanding the people affected by the problem, and 3) understanding how resources might be deployed to combat the problem.

Embracing all three issues, the National Rifle Association's advocacy failures can be fundamentally organized into two categories: distraction and impotence. In the first category are initiatives and narratives that focus on things completely irrelevant to the exercise of Second Amendment rights, like hunting. In the second category are campaigns and efforts that focus on valid goals (like having more Americans acquainted with the safe and accurate use of firearms) but are ineffective in reaching urban populations. Both contributed to the Black community's inability to exercise fundamental rights.

In a 2017 piece in *THE ATLANTIC*, David A. Graham argues⁸² the NRA has failed the Black community in its messaging, in its advocacy, and in its framing of key issues. This Author agrees. By frequently engaging in misguided and Constitutionally-decoupled arguments that erroneously link the Second Amendment to leisure activities like hunting, the NRA message fails to recognize the use for firearms central to the Founding Fathers' vision and central to the urban Black population's predicament: defending the community against violence and misbehavior initiated by the government. That the Third Amendment is adjacent and contemporaneous to the Second is no coincidence: An unarmed landlord or innkeeper refusing to barrack armed soldiers in eighteenth century Boston is less imaginable and less persuasive.

The lack of interest, investment, and effectiveness in advocating for Black gun owners' rights combined with a multi-decade campaign by Democratic mayors to impair or destroy Black gun owners' rights has coalesced in a dangerous recipe: inaction and indifference from would-be advocates and a consequential trampling of Black individuals' rights by Democratic bureaucrats eager to both prevent gun ownership and confiscate extant guns.

They're not going to do anything . . . We're drowning, and instead of throwing us a life jacket, they want to throw us away.

George Eskridge, Jr.⁸³ on Chicago Mayor Lightfoot's gun control measures, 2019

81. Image credit: Sean Rayford, © Getty Images 2020.

82. *Compare Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959) with *The Voting Rights Act of 1965*, 52 U.S.C. § 10101 *et seq.* and related amendments to 52 U.S.C. §§ various (1965).

83. *Compare McDonald*, 561 U.S., with *Gitlow v. New York*, 268 U.S. 652 (1925).

Democratic mayors have dismissed the prevailing federal jurisprudence including Justice Thomas's analysis in *McDonald*,⁸⁴ distrusted the NRA's advocacy⁸⁵ for expanded concealed carry (or, as the Author favors, "constitutional carry" not requiring a permit of any kind⁸⁶), and discounted the value of having armed reasonable people in neighborhoods which the police and mayors admit⁸⁷ they cannot effectively or efficiently police⁸⁸—during one weekend in 2020, Chicago's 911 emergency call center received 65,000 calls. . . and that was a Sunday.⁸⁹ The victim of these mayors' persistent and stubborn deafness are people like Otis McDonald, the eponymous plaintiff⁹⁰ in *McDonald v. City of Chicago*. Otis is a Black man in his eighties⁹¹ who lives in a typical Chicago neighborhood. "I know every day that I come out in the streets, the youngsters will shoot me as quick as they will a policeman," McDonald said in an interview with Chicago's paper of record, the TRIBUNE.⁹² McDonald continued: "I would like to have a handgun so I could keep it right by my bed," he said, "just in case somebody might want to come in my house."⁹³

84. David A. Graham, *Do African Americans Have a Right to Bear Arms?*, THE ATLANTIC (21 Jun. 2017).

85. Brian Freskos, *Will Lori Lightfoot Be the Mayor to Finally Solve Chicago's Gun Violence Problem?*, THE TRACE (11 Nov. 2019), <https://www.thetrace.org/2019/11/lori-lightfoot-chicago-gun-violence/>.

86. See ABC7 Eyewitness News, *Emanuel Challenges Judges Who Overturned Illinois Concealed Carry Ban*, (12 Dec. 2012) ("This ruling runs counter to, not only common sense, but what every police chief in the country says, which is we should not allow more guns on the street," said [then-Mayor of Chicago Emanuel.").

87. Alexandra Hutzler, *SCOTUS May Step Into Gun Control Debate By Hearing NRA-Backed Lawsuit On Concealed Carry*, NEWSWEEK (26 Mar. 2021).

88. Nineteen states, most of them Republican-leaning, have "constitutional" or "permitless" carry provisions. Most recently, Tennessee. See Natalie Allison, *Gov. Bill Lee Signs Permitless Carry Bill into Law as Tennessee Joins 18 Other States*, THE TENNESSEAN (9 Apr. 2021), <https://www.tennessean.com/story/news/politics/2021/04/08/tennessee-constitutional-carry-gov-bill-lee-signs-gun-bill-into-law/7090168002/>.

89. "Chicago Police Supt. David Brown said 699 people were arrested Sunday, primarily for looting. Of those arrests, 461 took place on the South and West sides, Brown said. Police officers found 64 guns during the course of those arrests, he said. Aside from the property damage, the city saw its most violent weekend of the year. There were 48 shootings and 17 people killed on Sunday alone, Brown said, adding that 132 officers were also injured." Kelly Bauer, *Don't Take Matters Into Your Own Hands, Wary Top Cop And Mayor Tell Chicagoans After Days Of Looting, Shootings*, BLOCK CLUB CHICAGO (1 Jun. 2020), <https://blockclubchicago.org/2020/06/01/dont-take-matters-into-your-own-hands-wary-top-cop-and-mayor-tell-chicagoans-after-days-of-looting-shootings/>.

90. "[I]f we had a police department three times the size it would have been difficult to keep up with the calls for service yesterday. Now, I know that's cold comfort, but I want to be clear that we didn't stand by and let the South and the West side burn[.]" Lori Lightfoot, Mayor of Chicago. See *id.*

91. *Id.*

92. See generally *McDonald v. City of Chicago*, 617 F. Supp. 2d 752 (N.D. Ill. 2008).

93. Mr. McDonald was 76 in 2010. See D.C. Weiss, *Why Otis McDonald Is Lead Plaintiff in High Court Gun Rights Case*, AMERICAN BAR ASSOCIATION JOURNAL (1 Feb. 2010).

A RIGHTS RESTORATION ARGUMENT

Black people, and particularly Black men, are incarcerated at rates that far exceed the incarceration rates associated with comparable white populations.⁹⁴ Black Americans (and Black immigrants) are arrested at higher rates, held on bond (and high bond⁹⁵) more often, are more likely to face serious charges (and become felons as a result),⁹⁶ more likely to be convicted,⁹⁷ and more likely to be incarcerated.⁹⁸ As a result, more Black people—and especially Black men—are ineligible to own firearms, are ineligible to carry concealed weapons, and are ineligible to obtain and maintain their marksmanship skills. This, despite the fact these people are statistically more likely to live in higher-crime neighborhoods⁹⁹ that are less-effectively policed and more likely to live in areas that have crime rates more heavily compositionally weighted toward violent versus non-violent crimes.

While there has been a recent movement in many states to restore the voting rights of those convicted of crimes, there has not been a parallel movement to restore the Second Amendment rights of these persons.¹⁰⁰ This is an area of substantial divergence between the Fifteenth Amendment¹⁰¹ voting rights of Blacks who have had contact with the criminal justice system and the Second Amendment firearms-related rights of these same individuals.

In sixteen states and the District of Columbia, felons lose their voting rights only while they are experiencing incarceration. In twenty-one states, felons lose their right to vote while imprisoned and also for a period thereafter. And, in eleven states, felons lose their voting rights indefinitely.¹⁰²

In Chicago, a city with the largest county jail in the country which typically houses a mostly-Black population, SB2090¹⁰³ requires vote-by-

94. *Id.*

95. *Id.*

96. Black males account for 34% of the U.S. prison population, a rate of incarceration 5.8 times as high as for white males and 4.9 times their representation in the U.S. population (Black males account for less than 7% of the U.S. population). U.S. BUREAU OF JUSTICE STATISTICS (2018) and U.S. CENSUS BUREAU (2019). The incarcerated population includes, as of November 2018, 2,272 per 100,000 Black male residents and 392 per 100,000 white male residents. U.S. BUREAU OF JUSTICE STATISTICS (2018).

97. See David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q. J. ECON. 1885-1932 (2018).

98. See M. Marit Rehavi & Sonja Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320-1354 (2014).

99. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017-1055 (2012).

100. See David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEG. STUD. 347-383 (2012).

101. Earl Fredrick, III, *Death, Violence, Health, and Poverty in Chicago*, 19 HARV. PUB. HEALTH. REV. 1-25 (2018) see in particular Table 2 at p. 8, illustrating relationship between poverty and exposure to criminal violence.

102. In Maine and Vermont, felons do not lose their voting rights.

103. U.S. CONST. AMEND. XV (1870).

mail opportunities for those housed in the jail and HB2541¹⁰⁴ requires voter education and voter registration information for youths incarcerated in the jail's juvenile justice facility. Despite these empathetic and restorative postures toward the voting rights of people who have come in contact with the justice system, the attitude toward restoring the firearms-related rights of formerly-incarcerated people could not be more different – even though Second Amendment and Fifteenth Amendment rights are equally *fundamental* in a Constitutional sense and both important to one's ability to exercise rights that are central to participation in American society.

Typically, in Chicago, a formerly-incarcerated person is charged under 720 ILCS 5/24-1.1¹⁰⁵ if in the possession of a firearm. Interpretation of felon-in-possession is incredibly broad in Chicago; possession can simply mean the presence of a firearm in the person's home, place of business, or vehicle. A conviction under 5/24-1.1 is a Class 2 felony and those convicted are ineligible for probation. This means the only way for someone convicted of a felony in Illinois to have his or her Second Amendment rights fully restored is a pardon from the Governor of Illinois that specifically authorizes expungement of the felony conviction from his or her record. According to data released by State's Attorney Kim Foxx's office in 2017, the most common felony charge brought in Cook County is unlawful use of a weapon, and of nearly 3,200 prosecutions, about 80% of defendants were Black.¹⁰⁶

At the federal level, 18 U.S.C. App. §1202(a)(1)¹⁰⁷ is the pertinent legislative mechanism for barring those convicted of felonies from legally possessing firearms. As Justice Blackmun wrote of §1202(a)(1) in *Lewis*,¹⁰⁸ "The statutory language is sweeping, and its plain meaning is that the fact of a felony conviction imposes a firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action, such as a qualifying pardon or a consent from the Secretary of the Treasury."¹⁰⁹ However, the tough-on-crime panic of 1968¹¹⁰ in the press and in Congress¹¹¹ is—or should be—distant from the present-day discussion. In a country where Black and female felons can regain their Fifteenth and Nineteenth Amendment¹¹² rights to vote either upon release from prison or after a reasonable duration thereafter, to bar these same persons for a lifetime from regaining their Second Amendment rights

104. There is substantial nuance in this and some felons in these states have their voting rights restored, but many of these states require additional action on the part of the individual to restore any voting rights.

105. Now codified as Public Act 101-0442 (2019).

106. Now codified as Public Act 101-0441 (2019 and as further amended in 2020).

107. (2012).

108. Jonah Meadows, *1st-Ever Felony Data Report Released By Cook County Prosecutors*, PATCH POL. & GOV. (18 Oct. 2017).

109. Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (1968 and as subsequently amended); *see also* related contemporary legislation codified as, *e.g.*, 18 U.S.C. App. §1203(2) and 18 U.S.C. §925(c).

110. *United States v. Lewis*, 445 U.S. 55 (1980) (Blackmun, J.).

111. *Lewis* at 60-61.

112. *See, e.g.*, 114 CONG. REC. 13220 (1968) (remarks of Sen. Tydings); *id.*, at 16298 (remarks of Rep. Pollock).

seems manifestly unreasonable, substantially unjust, and ripe for reexamination.

ACCESS TO THE TOOLS OF VIOLENCE AS AN IMPORTANT INGREDIENT OF DEMOCRACY

The capacity for unexpected, disruptive, and overwhelming violence in the citizenry is the final and crucial check on police power. It is elemental in a functioning democracy and encapsulated in the aims and words of the Second Amendment. Most critical is that historically- and contemporarily-disadvantaged people possess the tools for this kind of violence: in the U.S. context, Black people.

. . . if the state has coercive force, then those who run the state will use that force in their own interest at the expense of the rest of the society[.]

Nobel Laureate Douglass North
on the dangers of a state monopoly on violence¹¹³

If you're not ready to die for it, put the word 'freedom' out of your vocabulary.

Activist, advocate, civil rights leader, and philosopher
Malcolm X¹¹⁴

The Second Amendment has nothing to do with hunting. In fact, many legal scholars—including this Author—believe hunting weapons and activities may not even be protected by the Second Amendment; instead, military-style weapons are protected, military-style sidearms (handguns) are protected, and NFA weapons¹¹⁵ are protected. These weapons are protected because they are the weapons necessary to violently and effectively resist the state; these weapons are the weapons that North¹¹⁶ and Scott¹¹⁷ understood were sometimes the only way for those otherwise disenfranchised, oppressed, and silenced to be “heard” and the weapons that Malcolm X and others spoke of as checks on state power.

In fact, in *Miller*,¹¹⁸ though its outcome was erroneous given our current understanding of the Second Amendment,¹¹⁹ the Supreme Court agreed, saying the Second Amendment safeguards civilians' right to pos-

113. The legislative debate regarding 18 U.S.C. App. §1201 took place in 1968 and the Omnibus Crime Control and Safe Streets Act of 1968 was passed less than twenty-four hours after a man armed with a .22 caliber Iver Johnson Cadet revolver shot Robert F. Kennedy in Los Angeles.

114. U.S. CONST. AMEND. XV (1870); U.S. CONST. AMEND. XIX (1920).

115. DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* at 74 (1990).

116. *Racial Militancy and Pride Urged at West Coast Rally*, CHI. DEFENDER (28 Nov. 1962).

117. Weapons controlled via stamp tax by the National Firearms Act, meaning machine guns, grenades, etc.

118. North, *supra* note 115.

119. JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* (1985).

sess military-style weapons,¹²⁰ not hunting guns.¹²¹ It is only with military-style weaponry that civilians could credibly intimidate the police or the soldiers of a tyrannical state; it is only with military-style weaponry that Black populations could plausibly resist well-equipped urban police departments or affect self-defense in cases of police brutality.

Any polite request from the state—to pay a tax, for instance—is subtly embossed with the threat of violence; part of the state’s ability to limit the choices of the individual is its ability to cause physical harm to that individual through the state’s monopoly on violence. This is understood to be tolerable and even necessary; the social contract provides protection of the individual, but this protection is not costless. It requires the individual to cede certain natural rights, including the right to use violence, to the state.

Throughout American history, Black people have been disadvantaged in their position relative to whites and disadvantaged in their power relative to the state. “White Americans were armed so that they could maintain control over nonwhites. Nonwhites were disarmed so that they would not pose a threat to white control of American society.”¹²² Quieting dissenting voices through a disparity in access to privileges and access to weapons is consistent with Nobel Laureate North’s theories: capacity to generate violence is sometimes the only way to draw and hold the state’s attention.

No one wants to fight on the streets or to have to stay home all day on garrison duty as to one’s personal belongings. But, as North observes, in many situations it is only through threat of violence that individuals can aim the state’s short attention span and substantial resources at the problem of guarding people who need its protection.

CONCLUSION

The actions, platforms, and rhetoric of Democratic mayors (and “tough-on-crime” big-city Democratic mayoral candidates in particular) over the course of the last fifty years in cities like Chicago made it nearly impossible for Black men to exercise their Second Amendment rights. These mayors’ policy frameworks created a dangerous new urban apartheid society composed of whites who can roam the city armed and Blacks and non-whites who are systematically disarmed, emasculated, and stripped of the kind of revolutionary agency Douglass North and others propose is so central to a democracy.

As this Article comes to press, S.B. 1966¹²³ sits in the Illinois Judiciary Committee. If passed, it would increase the cost of gun ownership in Illinois (and, in turn, Chicago), raising the financial hurdle between poorer Chicago residents (who are disproportionately Black and non-white) and gun ownership. Imposing arbitrary costs on people attempting to exercise fundamental rights is something the Supreme Court has recognized as

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

121. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

122. “ordinary military equipment”

123. In that case, an ordinary shotgun.

problematic for decades¹²⁴ and detrimental in particular for members of minority groups seeking to exercise fundamental rights.

At this critical time in American policy decision-making and American race relations, we must be in the business of undoing¹²⁵ rather than perpetuating interference with individuals' exercise of fundamental rights. The Founders recognized that powerful, deadly weapons are necessary to continue to take part in the fierce and dangerous contest between ideas when that contest becomes violent.¹²⁶ Weapons are necessary to defend the views and voices of minority groups from state censorship, interference, and intimidation¹²⁷ of precisely the kind the Framers envisioned. Guns in the hands of Black men should be a symbol of Black agency and participation rather than a fertilizer for white hysteria and fear.

"All too many of the other great tragedies of history—Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name a few—were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece," observed Judge Kozinski of the Ninth Circuit in a powerful dissent.¹²⁸ Unfortunately, Black residents of cities like Chicago and Washington, D.C. will have not even one bullet with which to protect the few against the many and the disenfranchised against the privileged—and that's precisely the way fifty years¹²⁹ of Democratic mayors have preferred it.

Gun rights are fundamental rights,¹³⁰ Constitutional rights,¹³¹ and civil rights. Which means they must be Black rights as well as—and to the same extent as—white rights, and this is where Democratic mayors in cities like Chicago and Washington, D.C. have perennially and comprehensively failed their constituents.

124. Noah Shusterman, *What the Second Amendment Really Meant to the Founders*, THE WASH. POST (22 Feb. 2018).

125. Illinois Senate S.B. 1966, 101st General Assembly, legislation in the Senate Judiciary Committee tentatively titled "Fix the FOID" (2020).

126. *Cf. Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

127. *See id.*, in particular discussion of *Harper's* reversal of *Breedlove v. Suttles*, 302 U.S. 277 (1937).

128. *See generally* Charlton Heston, Speech, reported in *No Freedom Without Right to Own Guns, Actor Charlton Heston Says*, CANADIAN PRESS NEWSWIRE (Apr. 13, 2000).

129. Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 ARIZ. J. INT'L & COMP. L. 483, 483-84 (2000).

130. *Silveira v. Lockyer*, 328 F.3d 567, 569-70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

131. Chicago has not had a mayor who was not a Democrat since 1931; Washington, D.C. has had an uninterrupted series of Democratic mayors since 1961.

