



FORUM: RIGHTS

“Gundamentalism”

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“They talk about gun rights. What about Chris’s right to live?”

—Richard Martinez, after his son Chris was killed in the 2014 Santa Barbara spree shootings

“Your dead kids don’t trump my Constitutional rights.”

—Joe “the Plumber” Wurzebacher, responding to Richard Martinez

Firearms and ballistics are at the center of public debate in the United States today. They are technologies that are associated both with danger (in the form of gun violence) and safety (in the form of claims that firearms offer personal protection). This essay explores our understanding of the role of gun rights in American society through history: an issue which recent Supreme Court rulings have moved to the forefront of political debates in the face of efforts to regulate firearms and stem the tide of gun violence in the United States.¹

The quotations at the start of this article—from a conversation recorded after a deadly shooting spree near the campus of the University of California, Santa Barbara in 2014—appear in Jonathan Lowy and Kelly Sampson’s article, “The Right Not to Be Shot.”² Lowy and Sampson, two leading attorneys working to end the epidemic of gun violence and cross-border gun trafficking, describe two “dueling visions” of gun rights in America. The first is an expansive vision, claiming that the Second Amendment entitles anyone who can legally possess a gun to carry and use it—any way and anywhere. This approach might be termed “gundamentalism,” since it implies that the Second Amendment trumps all other rights.

The second idea is that public safety—or, as Lowy and Sampson put it, “The right to live—the right not to be shot”—trumps individual gun rights. They write: “America’s ‘First Freedom’

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¹Jennifer Tucker, Bart Hacking, and Margaret Vining, eds., *A Right to Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment* (Washington, DC, 2019); Joseph Blocher and Darrell A. H. Miller, *The Positive Second Amendment: Rights, Regulation, and the Future of Heller* (Cambridge, UK, 2018); Joseph Blocher, “New Approaches to Old Questions in Gun Scholarship,” 50 *Tulsa Law Review* 477 (Spring 2015), <https://digitalcommons.law.utulsa.edu/tlr/vol50/iss2/18/> (accessed Jan. 13, 2023); Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford, UK, 2008). For the legal case for expansive gun rights see Stephen P. Halbrook, *America’s Rifle: The Case for the AR-15* (New York, 2021); and Stephen P. Halbrook, *The Right to Bear Arms: A Constitutional Right of the People or of The Ruling Class?* (New York, 2021).

²Jonathan Lowy and Kelly Sampson, “The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties,” *The Georgetown Journal of Law and & Public Policy* 14, no. 1 (Winter 2016): 188–206. See also Scott Jaschik, “Deadly Rampage,” *Inside Higher Ed*, May 27, 2014, <https://www.insidehighered.com/news/2014/05/27/uc-santa-barbara-students-killed-shooting-rampage> (accessed Jan. 4, 2023).

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is *not* the right to firearms; it's the freedom that the Founders, in fact, announced first: the right to life, liberty, and the pursuit of happiness."³ Rights to other freedoms (e.g., speech, assembly, and liberty) may be threatened by unfettered gun use in the United States, an outlier among industrial democracies in its incidents of annual gun-related homicides, suicides, murder-suicides, and accidental deaths. In 2020, annual gun deaths soared past 45,000, the highest since 1994. People of color bear the brunt of the violence: 42 percent of firearm homicide victims in 2020 were Black males between the ages of 15 and 34, a group that accounts for only 2 percent of the population. Although school shootings understandably grab the public's attention, they account for less than 1 percent of the total gun deaths suffered by American children.⁴ This is information that thirty years of federal restrictions on data gathering about gun violence cannot suppress.⁵

These two diverging conceptions of gun rights are also associated with different histories.⁶ Citing the Supreme Court's summer 2022 ruling in *New York State Rifle & Pistol Association, Inc. v. Bruen*, legal scholar Darrell A. H. Miller of Duke University School of Law explains that the rights of American citizens are now contingent on our understanding of history, and that it is incumbent on judges to guard against an "ersatz history" based on "hagiography or invented traditions."⁷ After the Court's decision, Harvard University historian Jill Lepore wrote, "The Court's originalist justification for striking down a New York gun law is more than capricious—it relies on a fundamentally anti-democratic historical record that deliberately excludes women and people of color."⁸

What role did appeals to history play in the recent *Bruen* decision, and how do such appeals continue to impact post-*Bruen* litigation across the country? How accurate are the historical arguments made in these cases? How did the politicization of gun rights in the United States spur the writing of new versions of the past? What is the current state of historical research on guns and society, and what new areas of research are needed?⁹

³Lowy and Sampson, "The Right Not to Be Shot," 189.

⁴Nada Hassanein, "Young Black Men and Teens Are Killed by Guns 20 Times More than Their White Counterparts, CDC Data Shows," *USA Today*, Feb. 25, 2021, <https://www.usatoday.com/story/news/health/2021/02/23/young-black-men-teens-made-up-more-than-third-2019-gun-homicides/4559929001/> (accessed Jan. 7, 2023); Jason E. Goldstick et al., "Current Causes of Death in Children and Adolescents in the United States," *New England Journal of Medicine* 386 (2022), 1955–56. See also Phil B. Fontanarosa and Kirsten Bibbins-Domingo, "The Unrelenting Epidemic of Firearm Violence," *JAMA* 328, no. 12 (Sept. 27, 2022): 1201–3; and Garen J. Wintemute, "The Epidemiology of Firearm Violence in the Twenty-First Century United States," *Annual Review of Public Health* 36 (2015): 5–19.

⁵See Samantha Raphelson, "How the NRA Worked to Stifle Gun Violence Research," *NPR*, Apr. 5, 2018, <https://www.npr.org/2018/04/05/599773911/how-the-nra-worked-to-stifle-gun-violence-research> (accessed Jan. 14, 2023); and Rachel Rouben, "Now the Government Is Funding Gun Violence Research, But It's Year's Behind," *Washington Post*, May 16, 2022, <https://www.washingtonpost.com/politics/2022/05/26/now-government-is-funding-gun-violence-research-it-years-behind/>.

⁶Tucker et al., *A Right to Bear Arms?*

⁷Darrell A. H. Miller, quoted in Jeff Harder, "Center for the Study of Guns and Society Explores the History of Firearms at Inaugural Conference," *The Wesleyan Connection*, Oct. 25, 2022, <https://newsletter.blogs.wesleyan.edu/2022/10/25/center-for-the-study-of-guns-and-society-explores-a-history-of-firearms-at-inaugural-conference/> (accessed Jan. 7, 2023).

⁸Jill Lepore, "The Supreme Court's Selective Memory on Gun Rights," *The New Yorker*, June 24, 2022, <https://www.newyorker.com/news/daily-comment/the-supreme-courts-selective-memory-on-gun-rights> (accessed Jan. 5, 2023).

⁹Darrell A. H. Miller, "Conservatives Sound Like Anti-Racists—When the Cause Is Gun Rights," *Washington Post*, Oct. 27, 2021, <https://www.washingtonpost.com/outlook/2021/10/27/gun-rights-anti-racism-bruen-conservative-hypocrisy/> (accessed Jan. 14, 2023); Carol Anderson, *The Second: Race and Guns in a Fatally Unequal America* (New York, 2021); Caroline E. Light, *Stand Your Ground: A History of America's Love Affair with Lethal Self-Defense* (Boston, 2017); Jonathan M. Metz, "What Guns Mean: The Symbolic Lives of Firearms," <https://www.jonathanmetz.com/what-guns-mean-the-symbolic-lives-of-firearms/>; Kathleen Belew, *Bring the War Home: The White Power Movement and Paramilitary America* (Cambridge, MA, 2018). For a sympathetic discussion

A Brief Overview of the History

“Does the Constitution require the public to be exposed to a risk of lethal violence?”¹⁰ This is not a rhetorical question. On June 23, 2022, the U.S. Supreme Court decided *Bruen*, a case that recast Second Amendment jurisprudence and unleashed a tidal wave of lawsuits challenging existing gun laws in states across America.¹¹ In this controversial and ideologically charged decision, the Supreme Court ruled, for the first time in American history, that the Second Amendment confers a constitutional right to carry a gun outside the home for reasons of self-defense. In another unprecedented move, the Court rejected the use of the standard tools of constitutional analysis, including balancing tests that weigh the social cost of the exercise of the right to bear arms. In the wake of this decision, courts must now confine their analysis to “text, history, and tradition.”¹² Challenges to municipal and state gun regulations across the country—from limits on large capacity magazines (LCMs) to bans on carrying guns in public transport—are currently being litigated under the new, ideologically distorted, *Bruen* framework.¹³

An important part of this new framework is the search for lineal progenitors and analogues of modern gun laws. Proponents of gun rights typically insist that regulations be direct descendants of earlier laws. Governments defending their laws have, more often than not, argued that modern gun violence poses new problems unanticipated by earlier generations and accordingly have focused on locating analogues of earlier laws.

A number of amicus briefs were submitted to the Supreme Court in the *Bruen* case, discussing the complex history of rights and regulations over centuries.¹⁴ The majority decision,

of the rights-centered approach, see David A. Yamane, *Concealed Carry Revolution: Expanding the Right to Bear Arms in America* (Oxford, UK, 2021). For a discussion of alt-right perspectives on guns, see John E. Finn, *Fracturing the Founding: How the Alt-Right Corrupts the Constitution* (New York, 2019). The term “gun culture” might have been introduced by Richard Hofstadter in “America as a Gun Culture,” *American Heritage* 21 (Oct. 1970), 4–10, 82–5. For a new treatment of the history of gun rights activism, see especially Patrick J. Charles, *Vote Gun: How Gun Rights Became Politicized in the United States* (New York, 2023).

¹⁰Lowy and Sampson, “The Right Not to Be Shot,” 189.

¹¹The *Bruen* decision said that guns can be prohibited in “sensitive places” but did not explain what makes a locale sensitive. See Darrell A. H. Miller, “The Next Front in the Fight Over Guns,” *Washington Post*, July 1, 2022, <https://www.washingtonpost.com/outlook/2022/07/01/bruen-guns-rights-carry-sensitive-places/> (accessed Jan. 14, 2023); John Kruzell, “Gun Control Laws Fall at Dizzying Pace After Supreme Court Ruling,” *The Hill*, Oct. 10, 2022, <https://thehill.com/regulation/court-battles/3696299-gun-control-laws-fall-at-dizzying-pace-after-supreme-court-ruling/>; and Jennifer Mascia, “Tracking the Effects of the Supreme Court’s Gun Ruling,” *The Trace*, Aug. 1, 2022, <https://www.thetrace.org/2022/08/nysrpa-v-bruen-challenge-gun-regulations/>. The challenges are ongoing.

¹²Joseph Blocher and Darrell A. H. Miller, “A Supreme Court Head Scratcher: Is a Colonial Musket ‘Analogous’ to an AR-15?” *New York Times*, July 1, 2022, <https://www.nytimes.com/2022/07/01/opinion/guns-supreme-court.html> (accessed Jan. 14, 2023).

¹³Matt Vasilogombros, “Supreme Court’s Gun Rights Decision Upends State Restrictions,” *Pew*, July 8, 2022, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/08/supreme-courts-gun-rights-decision-upends-state-restrictions> (accessed Jan. 4, 2023); William Melhado, “Federal Judge in Texas Rules that Disarming Those under Protective Orders Violates Their Second Amendment Rights,” *The Texas Tribune*, Nov. 14, 2022, <https://www.texastribune.org/2022/11/14/texas-judge-domestic-abusers-second-amendment/> (accessed Jan. 13, 2023); and Martin Austermuhle, “Judge Deals Blow to Lawsuit Seeking to Overturn Gun Ban on Metro in DC,” *NPR*, Jan. 5, 2023, <https://dcist.com/story/23/01/04/judge-tosses-out-lawsuit-seeking-to-overturn-gun-ban-on-metro-in-dc/?emci=0cf71f88-0e8d-ed11-9d7b-00224832e811&emdi=84fe5e30-128d-ed11-9d7b-00224832e811&ceid=22831085> (accessed Jan. 4, 2023).

¹⁴Ellena Erskin, “We Read All the Amicus Briefs in New York State Rifle ... So You Don’t Have To,” *SCOTUSblog* (Nov. 2, 2021), <https://www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-new-york-state-rifle-so-you-dont-have-to/>. Amici Curiae Professors of History and Law in Support of Respondents in the Supreme Court of the United States, *New York State Rifle and Pistol Association, Inc. v. Bruen*, No. 20-843 (filed 09/22), https://www.supremecourt.gov/DocketPDF/20/20-843/193309/20210921191001002_20-843%20bsacProfessorsOfHistoryAndLaw.pdf.

written by Justice Clarence Thomas, brushed aside criticism articulated in a dissent authored by Justice Stephen Breyer, who questioned the Court's foray into this contested historical terrain. The *Bruen* decision represents a doubling down on the originalist doctrine that has emerged as a defining feature of the Roberts Court's jurisprudence. As in its earlier gun rights decision, *District of Columbia v. Heller* (2008), the Justices left it up to lower courts to figure out what was the relevant history. One can appreciate the frustration of Federal Judge Carlton Reeves (Southern District of Mississippi), who complained that the *Bruen* decision requires him to "play historian in the name of constitutional adjudication," adding, "The justices of the Supreme Court, as distinguished as they may be, are not trained historians."¹⁵

How Gun History Was Weaponized

There is great irony in the fact that the Supreme Court, while stressing the importance of "history"—produced a narrative about the past that rests on such thin empirical ground. The legal journals that explore the history of the Second Amendment are not normally peer reviewed and are edited by law students with little training in historical methods. The proliferation of legal journals, which now number over one thousand, exacerbates the problem by multiplying the ways that distorted accounts of the past enter legal scholarship without critical scrutiny from professional historians. More than that, *Bruen* was no accident: rather, it was the result of a decades-long political effort to rewrite historical understanding of the Second Amendment.¹⁶

For more than two hundred years, most legal scholars viewed the Second Amendment as conferring a right "to keep and bear arms" only in the context of a "well-regulated militia."¹⁷ Participation was as least as much an *obligation* as a right conferring a strong claim against government interference. Militia statutes prescribed the type of weapon required by citizens and imposed penalties on those who failed to procure them. Founding-era militias were used to police slaves and put down agrarian protest, not foment resistance against government authority.

Over time, the Founders' vision of a militia proved difficult to realize, and by the 1840s, many critics were bemoaning the inadequacy of this once venerated institution. The legal framework governing firearms evolved, in part in response to the proliferation of more deadly weapons. The invention of breech-loading firearms, metal cartridges, magazines, and other innovations meant that, by the end of the nineteenth century, firearms were over twenty times more lethal than the flintlock muskets and pistols of the Founders' era.¹⁸

The Supreme Court applied the militia-centered, collective view of the right to bear arms well into the twentieth century. It upheld the 1934 National Firearms Act and the 1938 Gun Control Act, which imposed severe restrictions on machine guns, sawn-off shotguns, and silencers. In *United States v. Miller* (1939), the Court found the Second Amendment protected the right to keep and bear firearms only for certain military purposes.¹⁹ This ruling fit with the prevailing understanding of the Second Amendment in legal scholarship at the time. From 1900 to 1959, only twelve studies on the Second Amendment appeared in professional legal

¹⁵Debra Cassens Weiss, "In 'Scorching' Opinion, Federal Judge Considers Appointing Historian to Help Him in Gun Case," *ABA Journal* (Nov. 2, 2022), <https://www.abajournal.com/news/article/in-scorching-opinion-federal-judge-considers-appointing-historian-to-help-him-in-gun-case>.

¹⁶Patrick J. Charles, *Armed in America: A History of Gun Rights From Colonial Militias to Concealed Carry* (New York, 2018).

¹⁷The Second Amendment of the Bill of Rights, ratified in September 1791, reads: "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

¹⁸Darrell A. H. Miller and Jennifer Tucker, "Common Use, Lineage, and Lethality," *UC Davis Law Review* 55, no. 5, 101–19. See also Chris Lawrence, "TLIs and Gun Control," *Dupuy Institute Blog*, Nov. 15, 2022, <http://www.dupuyinstitute.org/blog/2022/11/15/tlis-and-gun-control/> (accessed Jan. 3, 2023).

¹⁹The *Miller* ruling is available at <https://www.oyez.org/cases/1900-1940/307us174>.

journals, each of them understanding the right as being linked to a well-regulated militia.²⁰ Even gun rights proponents acknowledged this privately at the time: In a 1955 internal report for the National Rifle Association (NRA), Jack Basil Jr. (who later became director of the NRA's Legislative Service) acknowledged that "the Second Amendment appears to apply to a collective, not an individual, right to bear arms."²¹

Proponents of expansive gun rights strove to undermine this consensus in both the courts and in public discourse. Although the NRA was best known to the public for its education and safety programs from the 1920s to the 1960s, it lobbied to promote a view of individual firearm ownership as a badge of citizenship essential to public safety and national defense. Nonetheless, the individual rights interpretation was slow to gain wider traction. In 1968, Congress responded to the crime and assassinations of the 1960s by passing the Gun Control Act, which regulated interstate firearm sales and imposed new age and mental health restrictions on gun purchases. Even actor and famed gun rights advocate Charlton Heston—a five-term president of the NRA who, decades later, became famous for saying the government would have to pry his gun from his "cold, dead hands"—joined the public campaign in support of passing the act.²² One additional factor behind the 1968 Gun Control Act was a desire to protect domestic gun manufacturers from cheaper foreign imports.²³

The debate over gun rights and gun control was also impacted by the politics of race. For example, California's Mulford Act was enacted after the Black Panther Party's invocation of the Second Amendment and decision to open carry guns.²⁴ New research has also demonstrated that one important motivating force behind the adoption of federal gun control laws was a desire to protect domestic gun manufacturers against the threat posed by cheaper foreign imports. One of the leading champions of the 1968 Gun Control Act, Senator Thomas Dodd, for example, represented Connecticut, one of the oldest gun manufacturing regions in the nation.²⁵ Racism also shapes resistance to gun control; as Darrell Miller and others have noted, for in its modern Second Amendment jurisprudence, the Court has weaponized race in its effort to radically shift the understanding of Second Amendment rights.²⁶

After passage of the 1968 Gun Control Act, and a 1971 incident in which an NRA member was shot and killed during a raid by the Bureau of Alcohol, Tobacco, Firearms and Explosives, the NRA redoubled its efforts to promote an individual rights reading of the Second Amendment.²⁷ Its view gained ground as the Republican Party shifted to the right, while other legislation removing restrictions on donations to political parties favored industry-promoting groups such as the NRA and the National Shooting Sports Foundation (The Firearm Industry Trade Association).²⁸ By the 1980s, a small group of lawyer-activists

²⁰Robert J. Spitzer, "Lost and Found: Researching the Second Amendment," 76 *Chi-Kent Law Rev* (2000), 384, <https://scholarship.kentlaw.iit.edu/cklawreview/vol76/iss1/10> (accessed Jan. 11, 2023).

²¹Charles, *Armed in America*.

²²*Ibid.*; Ben Garrett, "'From My Cold, Dead Hands': A Profile of Charlton Heston," *ThoughtCo*, July 29, 2021, <http://thoughtco.com/charlton-heston-gun-rights-profile-721331>.

²³Patrick J. Charles, *Vote Gun: How Gun Rights Became Politicized in the United States* (New York, 2023), 248–73.

²⁴Anderson, *The Second; Light, Stand Your Ground*.

²⁵For a useful history on the politics surrounding the importation of cheap foreign imports, as well as domestically produced cheap handguns known as Saturday Night Specials, see Patrick J. Charles, *Vote Gun: How Gun Rights Became Politicized in the United States* (New York, 2023), 248–73.

²⁶Darrel A. H. Miller, "Conservatives Sound Like Anti-Racists - When the Cause is Gun Rights." *Washington Post*, Oct. 27, 2021, <https://www.washingtonpost.com/outlook/2021/10/27/gun-rights-anti-racism-bruen-conservative-hypocrisy/>.

²⁷Arica L. Coleman, "When the NRA Supported Gun Control," *Time*, July 29, 2006, <https://time.com/4431356/nra-gun-control-history/> (accessed Jan. 4, 2023).

²⁸Lewis L. Gould, *Grand Old Party: A History of the Republicans* (New York, 2003).

began publishing a flood of studies in legal journals arguing that the language of the Second Amendment was intended to protect an individual right unconnected to militia service.²⁹

History and historical reenactment were integral to advancing this novel narrative.³⁰ Through the NRA's magazines, supported scholarship, sponsored TV films, and a private museum network, the group tried to impose a monolithic, mythical reading of American history: what I term "gunsplaining" for the masses. In writing the Court's majority decision in the landmark 2008 *Heller* case—which, for the first time, held that the second Amendment protected an individual right to own a firearm for purposes of self-defense—Justice Antonin Scalia drew exclusively from the 1994 book, *To Keep and Bear Arms: The Origins of an Anglo-American Right*. In it, historian Joyce Lee Malcolm argues that the individual right to carry arms can be traced back to the 1689 English Bill of Rights. Malcolm, a historian of early modern England, holds an endowed faculty position at George Mason University funded largely by the NRA.³¹

Scalia's opinion, however, rested on Malcolm's erroneous interpretation of English history.³² As the text of the English Bill of Rights (1689) made clear, this right was restricted both by class and religion and was subject to Parliament's absolute authority to legislate.³³ Common law in England and colonial America recognized that personal security was best protected through a well-ordered society in which the public carrying of dangerous weapons was closely regulated in the interest of public safety.³⁴

Under English common law, the right of armed self-defense was extremely limited. Individuals were required to retreat, not stand their ground. At the time the Second Amendment was enacted, American law built on this heritage. The more aggressive modern

²⁹Charles, *Armed in America*.

³⁰*Ibid.*; Lindsay Livingston, "Performing Race and Belonging in the American West," *Journal of Visual Culture* 17, no. 3 (Dec. 2018), 343–55.

³¹Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge, MA, 1994); Joyce Lee Malcolm, "The Right to Be Armed: The Common Law Legacy in England and America," in *A Right to Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment*, eds. Jennifer Tucker, Bart Hacking, and Margaret Vining (Washington, DC, 2019), 154–66; and Peter Finn, "NRA Money Helped to Reshape Gun Law," *The Washington Post*, Mar. 13, 2013, https://www.washingtonpost.com/world/national-security/nra-money-helped-reshape-gun-law/2013/03/13/73d71e22-829a-11e2-b99e-6baf44e42df_story.html. The links between manufacturing money and law schools would make a fascinating doctoral history topic. See also University of Wyoming Law School: Cameron McWhirter and Zusha Elinson, "New Gun Research Center Funded by Firearms Executive Aims to Diversify Debate: University of Wyoming Initiative Reignites Discussion of Bias in the Field of Study," *Wall Street Journal*, Jan. 29, 2023, <https://www.wsj.com/articles/new-gun-research-center-funded-by-firearms-executives-aims-to-diversify-debate-11674953998>.

³²Cornell, *A Well-Regulated Militia*; Charles, *Armed in America*; Tim Harris, "The Right To Bear Arms in English and Historical Context," in *A Right to Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment*, eds. Jennifer Tucker, Bart Hacking, and Margaret Vining (Washington, DC, 2019), 23–36; Patrick J. Charles, "The Invention of the Right to 'Peaceable Carry' in Modern Second Amendment Scholarship," *University of Illinois Law Review* (July 11, 2021): 204; Lois Schwoerer, *Gun Culture in Early Modern England* (Charlottesville, VA, 2016), 169–70; Priya Satia, "Who Had Guns in Eighteenth Century Britain?," in *A Right to Bear Arms?*, 37–53.

³³Harris, "The Right To Bear Arms"; Priya Satia, "On Gun Laws, We Must Get the History Right," *Slate* (Oct. 21, 2015), <https://slate.com/news-and-politics/2015/10/wrenn-v-d-c-gun-case-turns-on-english-laws-of-1328-and-1689.html> (accessed Jan. 12, 2023).

³⁴Kevin M. Sweeney, "Firearms Ownership and Militias in Seventeenth- and Eighteenth-Century England and America," in *A Right to Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment*, eds. Jennifer Tucker, Bart Hacking, and Margaret Vining (Washington, DC, 2019), 54–71; Priya Satia, "Who Had Guns in Eighteenth-Century Britain?" in *A Right to Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment*, eds. Jennifer Tucker, Bart Hacking, and Margaret Vining (Washington, DC, 2019), 37–53; and Lois B. Schwoerer, "English and American Gun Rights," in *A Right to Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment*, eds. Jennifer Tucker, Bart Hacking, and Margaret Vining (Washington, DC, 2019), 139–53.

view of standing one's ground only emerged later.³⁵ The historical narrative relied on by the Court majority in *Bruen* did not come from professional historians; instead, it came from popular culture. In movies, TV, and video games, the gun is depicted as a magical, sacred totem—like a magic wand—that enables good to conquer evil. In these cultural forms, the gun is portrayed as central to American identity.³⁶ This mythical narrative continues to cloud public debate over gun policy.

Some of the many falsehoods of the Supreme Court's "bad history" include the following:

1. That unfettered use of guns is a sacred American "tradition."³⁷
2. That the Founders wrote the Second Amendment because they wanted citizens to be armed as a check on state power.³⁸
3. That guns were always necessary for replenishing food stocks. For at least two hundred years, most Americans have not relied on hunting as a major way of putting food on the table.³⁹
4. That all guns are constitutionally protected, and all guns are essentially the same. It is not true that "a gun is a gun is a gun": modern semi-automatic weapons are exponentially more lethal than a flintlock musket.⁴⁰

A more recent development is the claim by proponents of expanded gun rights that gun control is inherently racist, classist, and sexist. NRA litigator David Kopel recently described the NRA as an "arsenal of civil rights."⁴¹

The idea that citizens have an unfettered constitutional right to carry weapons in public originated in the antebellum South and its culture of violence and honor.⁴² Miller argues that the right to bear arms has been inextricably bound to racism and white supremacy since its inception: "There is a long tradition, going back to the slave codes, of disarming Blacks and enslaved persons. But equally, there is a long tradition of whites using private personal arms to act as privatized police of Black persons and communities in the slave patrol."⁴³

Carol Anderson and Carl Bogus have documented that at least some of the framers (and ratifiers) of the Second Amendment wanted to ensure that their militias—which doubled as slave patrols—would never be disarmed. During Reconstruction, Klan members blamed the federal government for infringing on their "rights" to armed self-defense when it prosecuted them for terrorism against Black citizens.⁴⁴ Yet to read the arguments advanced by proponents of expanded gun rights in *Bruen*, Miller reflects, "You would think a main reason for regulating guns—both

³⁵Light, *Stand Your Ground*, 188.

³⁶Richard Slotkin, *Gunfighter Nation: The Myth of the Frontier in Twentieth-Century America* (Norman, OK, 1992).

³⁷Cornell, *A Well-Regulated Militia*.

³⁸Mark Frassetto, "The Use and Misuse of History in Second Amendment Litigation," in *A Right to Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment*, eds. Jennifer Tucker, Bart Hacking, and Margaret Vining (Washington, DC, 2019), 202–16.

³⁹R. Douglas Hurt, *American Agriculture: A Brief History* (West Lafayette, IN, 2002).

⁴⁰Dupuy, *Evolution of Weapons and Warfare*; Miller and Tucker, "Common Use, Lineage, and Lethality."

⁴¹Quoted in David Kopel, "A Response to the Recent Vilification of Campaign Against the NRA," "The Volokh Conspiracy" blog, *Reason* (May 27, 2022), <https://reason.com/volokh/2022/05/27/we-reject-your-sick-and-twisted-lies-against-us/> (accessed Jan. 8, 2023). The article provides no proof to support the claim that white- and male-majority NRA clubs were the "arsenal" of the civil rights movement.

⁴²Saul Cornell and Eric M. Ruben, "The Slave State Origins of Modern Gun Rights," *The Atlantic* (Sep. 30, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-origins-of-public-carry-jurisprudence-in-the-slave-south/407809/>; Anderson, *The Second*.

⁴³Darrell H. Miller, quoted in Saralyn Cruikshank, "White Supremacy, Political Violence, and Firearms," *The Hub (JHU)*, Nov. 3, 2022, <https://hub.jhu.edu/2022/11/03/white-supremacy-political-violence-and-firearms/> (accessed Jan. 12, 2023).

⁴⁴Anderson, *The Second*; Carl T. Bogus, "The Hidden History of the Second Amendment," 31 *U.C. Davis L. Rev.* 309 (1998). See also Robert J. Spitzer, *Guns Across America: Reconciling Gun Rules and Rights* (Oxford, UK, 2015);

historically and today—was racial and ethnic bigotry.⁴⁵ While being careful to ensure that gun regulations do not replicate racial oppression (e.g., through unequal enforcement of laws), he concludes that it is essential to be aware of how gun rights are being enlisted to maintain white supremacy.⁴⁶

Toward a Broader History of Firearms

In conclusion, I propose the need for a history of firearms and their social impacts that goes beyond the rights paradigm and the celebration of innovations in gun design and manufacture.⁴⁷ The version of firearms history that contemporary courts, politicians, and others have relied on is drawn largely from corporate archives and a politically skewed account of the past. It does not include records of people on the other side of the gun: the victims and their families, the physicians who heal them, and the impact on society of the pervasive fear of gun violence. A wider range of archives and histories is needed for an integrated history of firearms that considers, among other things, the visual representations of firearms, religious narratives, and the history of emotions.⁴⁸

The study of objects in visual and material culture may be integral to investigating what might be called “the rights question” in the history of guns. For example, [Figure 1](#), by the artist Glenn LaVertu, is part of a group of drawings entitled “Terminal Ballistics” that deal with the physical and emotional trauma of loss from gun violence. In a statement, LaVertu writes: “I started this series of works as a way to redirect the aim from the target/victim to the shooter/audience. They are a way for me to give a voice to the fallen, addressing the killer, and to generate empathy for the people they left behind.”⁴⁹

Bringing history of design, engineering, and consumer safety into the story of rights also offers a fruitful vein of research, for firearms are products, and consumers have rights, including to product safety information. A firearm is a technological object, and it is important to study the way in which changing technologies influence what firearm products are designed, manufactured, marketed, and sold. Courts, all the way up to the Supreme Court, have wrestled with the issue of how to define the category “firearms,” often looking to historians of technology for guidance.⁵⁰ At the same time that design changes in firearm and ballistics technology have increased their lethality exponentially since the 1700s, the term “gun” persists as a shorthand for products as different in design and capacity as flintlock muskets and AR15 rifles. Similarly, the term “bullet” is used to denote products that differ greatly in their capacity to cause extensive tissue damage (from buckshot pellets and soft lead bullets to the controversial Black Talon ammunition, introduced to the police market by Winchester in 1991, and so named for its metal “petals” designed to expand on impact to make wound channels wider). It also encompasses jacketed hollow-point bullets, which are widely marketed and sold in

Noah Shusterman, *Armed Citizens: The Road from Ancient Rome to the Second Amendment* (Charlottesville, VA, 2020).

⁴⁵Miller, “Conservatives Sound Like Anti-Racists.”

⁴⁶See also Belew, *Bring the War Home*; and Light, *Stand Your Ground*.

⁴⁷John Ellis, *A Social History of the Machine Gun* (Baltimore, 1986); Satia, *Empire of Guns*.

⁴⁸Kristin Kobes Du Mez, *Jesus and John Wayne* (New York, 2020); Katie Barclay, “State of the Field: History of Emotions,” *History: The Journal of the Historical Association*, Aug. 5, 2021, <https://onlinelibrary.wiley.com/doi/10.1111/1468-229X.13171>; John Corrigan, *Business of the Heart: Religion and Emotion in the Nineteenth Century* (Berkeley, CA, 2001).

⁴⁹Glenn LaVertu, artist’s statement, <http://www.glennlavertu.com/>.

⁵⁰Weiss, “In ‘Scorching’ Opinion ...”; Shawn Hubler, “In the Gun Law Fights of 2023, a Need for Experts on the Weapons of 1791,” *New York Times*, March 19, 2023, A21; *Hanson v. District of Columbia*, Civil Action No. 2022-2256 (D.D.C. 2023), District Court, District of Columbia, <https://www.courtlistener.com/opinion/9392838/hanson-v-district-of-columbia/>.



Figure 1. Glenn LaVertu, “I Am Loved By Someone” (2020). Materials: crayon, ink and 18k gold leaf on target practice sheet.

the U.S. today as personal protective armor for self-defense. These are designed to fragment on impact, increasing the damaging power of the bullet by decreasing what is sometimes referred to as its “over-penetration” (the bullet’s chance of exiting the body). Furthermore, studies conducted by medical surgeons in laboratory experiments have found that the kinetic energy of a bullet relates directly to its wounding potential.⁵¹

While firearm products do share much in common with other commercial products, such as household appliances and cars, there are many elements that are distinct in terms of how

⁵¹Stephen W. Hargarten, “The Bullets He Carried,” *Western Journal of Emergency Medicine*, Aug. 7, 2020; Donald E. Carlucci and Sidney S. Jacobson, *Ballistics: Theory and Design of Guns and Ammunition* (Boca Raton, FL, 2008).

firearms are manufactured, consumed, represented in media, regulated, and de-regulated.⁵² For example, product liability laws grant specific waivers to the gun industry, and the laws regarding ownership and use are currently in significant flux in the post-*Bruen* landscape.⁵³ Anti-gun violence movements are shifting their focus to the industry itself. The next few years will further another new wave of litigation—now on business rights, ethics, and responsibilities.

⁵²Michael R. Lemov, *Car Safety Wars: One Hundred Years of Technology, Politics, and Death* (Madison, WI, 2015).

⁵³Blocher and Miller, “A Supreme Court Head Scratcher”; Lepore, “The Supreme Court’s Selective Memory on Gun Rights.”