

READY, AIM, FIRE?

DISTRICT OF COLUMBIA v. HELLER

AND COMMUNITIES OF COLOR

Michael B. de Leeuw*
Dale E. Ho**
Jennifer K. Kim***
Daniel S. Kotler****

ABSTRACT

The Supreme Court's recent decision in *District of Columbia v. Heller* held that a municipal ban on handguns is unconstitutional under the Second Amendment, but left open the possibility of reasonable regulations on firearms. Given the outrageous levels of firearms-related violence in many urban areas—violence that disproportionately affects communities of color—the question of what constitutes a reasonable regulation should be an issue of major concern to civil rights activists and lawyers. This article evaluates *Heller* in light of these issues, and argues in favor of a general presumption that local legislatures are best situated to balance the costs and benefits of firearms regulations. Moving forward, municipalities should be afforded broad discretion in enacting such regulations, consistent with the Court's decision in *Heller*.

Densely populated urban municipalities typically have the nation's most restrictive firearms laws, largely as a response to the scourge of firearms-related violence in those communities. African Americans in particular represent a grossly disproportionate percentage of the victims of gun violence: in 2004 in the District of Columbia, for instance, all but two of the 137 firearms-related homicide victims were African Americans. *Hel-*

* Partner, Fried, Frank, Harris, Shriver & Jacobson LLP; J.D., Rutgers School of Law – Newark; B.A., Montclair State University.

** NAACP Legal Defense & Educational Fund, Inc. Fellow, Fried, Frank, Harris, Shriver & Jacobson LLP; J.D., Yale Law School; A.B., Princeton University.

*** Associate, Fried, Frank, Harris, Shriver & Jacobson LLP; J.D., New York University Law School; B.A., Georgetown University.

**** Associate, Fried, Frank, Harris, Shriver & Jacobson LLP; J.D., Tulane University Law School; A.B., Dartmouth College.

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ler, however, will likely herald significant litigation challenging local firearms laws. We argue that if such litigation is successful, it could unnecessarily limit the discretion of urban municipalities to regulate public health and safety, to the detriment of communities of color.

The second half of our article considers a contrary view—put forth by academics like Robert Cottrol and Raymond Diamond—that firearms restrictions do not serve the interests of African Americans. Cottrol and Diamond argue that, historically, firearms restrictions have been enacted with racially discriminatory intent, and furthermore, that the vigorous enforcement of firearms restrictions has racially disproportionate penal consequences rivaling the costs of firearms-related violence itself.

We agree that, on Equal Protection grounds, it may make sense to view certain firearms restrictions with a degree of skepticism. On balance, however, communities of color will not be served by a loosening of firearms restrictions. With respect to the District of Columbia itself, it seems reasonable to trust the judgment of the actual residents of the District—a majority-minority city—on these matters. Skepticism towards laws of general applicability is typically warranted only where the costs imposed by such laws are disproportionately borne by minorities who have little influence in the political process. By contrast, where a minority community supports and enacts a firearms regulation—as was the case with the handgun ban in the District—the presumption should be that the community has adequately weighed the civil liberties costs and possibly racially disproportionate effects of the regulation at issue against its benefits to public safety. To assume otherwise is essentially to privilege the viewpoints of libertarian theorists and Second Amendment enthusiasts over those of the very citizens who live daily with the civil liberties costs of firearms regulations and the risk of victimization by firearms-related violence.

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INTRODUCTION

The Supreme Court’s recent decision in *District of Columbia v. Heller*¹ heralds a new chapter in Second Amendment jurisprudence. For the first time in nearly seventy years, the Supreme Court addressed the facial validity of a statute under the Second Amendment, and, for the first time in its history, the Court found several firearms regulations—most notably, the District of Columbia’s near absolute prohibition on handguns—invalid on Second Amendment grounds. Much of the immediate commentary in the aftermath of *Heller* focused on the revolutionary nature of the Supreme Court’s opinion and the controversial policy and legal issues at stake in the case.² Indeed, *Heller* generated almost 50 amicus briefs from a number of individuals and organizations, showcasing debates among law enforcement officials,³ criminologists,⁴ public health experts,⁵ historians,⁶ and a wide array of other interest groups⁷ over the meaning of the right to keep and bear arms and the impact of gun control laws.

Among these debates was a dispute between the NAACP Legal Defense & Educational Fund, Inc. (LDF) and the Congress of Racial Equality (CORE) concerning the impact of gun control laws on the interests of minority communities.⁸ LDF argued, among other things, that because peo-

1. 128 S. Ct. 2783 (2008).

2. See, e.g., Linda Greenhouse, *Justices, Ruling 5-4, Endorse Personal Right to Own Gun*, N.Y. TIMES, June 27, 2008, at A1 (describing *Heller* as a “landmark ruling”).

3. See, e.g., Brief for District Attorneys as Amici Curiae Supporting Petitioners, *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) (No. 07-290); Brief for the International Law Enforcement Educators and Trainers Association (ILEETA), et al. as Amici Curiae Supporting Respondent, *Heller*, 128 S.Ct. 2783 (No. 07-290).

4. See, e.g., Brief for Professors of Criminal Justice as Amici Curiae Supporting Petitioners, *Heller*, 128 S.Ct. 2783 (No. 07-290); Brief for Criminologists, et al. as Amici Curiae Supporting Respondent, *Heller*, 128 S.Ct. 2783 (No. 07-290).

5. See, e.g., Brief for American Public Health Association, et al. as Amici Curiae Supporting Petitioners, *Heller*, 128 S.Ct. 2783 (No. 07-290); Brief for Association of American Physicians and Surgeons as Amicus Curiae Supporting Respondent, *Heller*, 128 S.Ct. 2783 (No. 07-290).

6. See, e.g., Brief for Jack N. Rakove, et al. as Amici Curiae Supporting Petitioners, *Heller*, 128 S.Ct. 2783 (No. 07-290); Brief for The Cato Institute, et al. as Amici Curiae Supporting Respondent, *Heller*, 128 S.Ct. 2783 (No. 07-290).

7. See, e.g., Brief for The American Jewish Committee, et al. as Amici Curiae Supporting Petitioners, *Heller*, 128 S.Ct. 2783 (No. 07-290); Brief for The Pink Pistols and Gays and Lesbians for Individual Liberty as Amici Curiae Supporting Respondent, *Heller*, 128 S.Ct. 2783 (No. 07-290).

8. See Brief for The NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Petitioners, *Heller*, 128 S.Ct. 2783 (No. 07-290) (hereinafter “LDF Brief”);

ple of color generally—and African Americans in particular—are disproportionately victimized by handgun violence, restrictions on handguns like those of the District of Columbia tend to benefit communities of color.⁹ CORE argued, in contrast, that gun control laws are tainted by a history of racially discriminatory motives and enforcement, and that African Americans would be better served by measures that encourage private gun ownership by law-abiding citizens.

Although CORE persuasively links the early history of firearms regulation with discriminatory intent, there is little reason to think that this history is relevant in interpreting or understanding contemporary gun laws like the District of Columbia's. Today, the most stringent municipal firearms regulations were not imposed by white majorities motivated by racist intentions. Rather, they were typically enacted by local legislatures that represent constituencies that are majority-minority. And with rates of firearms-related violence in many cities in the United States at epidemic proportions, local legislatures would be negligent if they did not effect policies to rein in this terror.

While the *Heller* majority made clear that reasonable regulations of firearms are permissible, it did not provide a clear framework for determining whether particular regulations are reasonable.¹⁰ Moving forward from *Heller*, the fundamental question is not whether firearms can or should be regulated, but rather who should have the primary authority to determine which regulations are reasonable: local communities or lawyers and judges?

It is our view that ordinary citizens who must live with both the danger of firearms-related violence and the civil liberties costs of the enforcement of criminal firearms laws should be given a broad presumption that they are best situated to make the proper cost-benefit assessment with respect to such laws. While *Heller* left many questions unanswered, it is clear that outright bans on handguns are now impermissible. Short of an outright ban, however, there are many different measures that a community could take to address concerns about firearms. These will necessarily depend largely on the particular community and the specific concerns that the community is trying to address. We believe that a community-based approach to determining the reasonableness of firearms regulations is necessary. This is not to say that the balance between civil liberties and public safety will always be struck correctly, but only that, generally speaking, a local community should have broad authority to determine what constitutes a reasonable firearms regulation within its own bounda-

Brief for Congress of Racial Equality (CORE) as Amicus Curiae Supporting Respondent, *Heller*, 128 S.Ct. 2783 (No. 07-290) (hereinafter "CORE brief").

9. The authors of this article contributed to the LDF Brief. The specific opinions expressed in this article, however, should not be attributed to LDF.
10. Cf. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2816-17 (2008) (observing that, "[l]ike most rights, 'the right secured by the Second Amendment is not unlimited'" and that "nothing in our opinion should be taken to cast doubt on [certain] long-standing" firearms regulations).

ries, much like the deference accorded community-based definitions of obscenity in First Amendment jurisprudence.¹¹

Heller, unfortunately, will almost certainly lead to an onslaught of new litigation testing the scope of the Court's newly-established *individual* right to keep and bear arms.¹² Second Amendment absolutists will press an agenda that would substantially limit the discretion of municipalities and other legislative bodies to regulate firearms.¹³ Contrary to CORE, we believe that such a result will be particularly detrimental to communities of color. The first half of this article describes our basic position: the needs of individual communities with respect to public health and safety are different, and, because handguns and other firearms pose unique dangers in urban environments that are not as prevalent in other areas,¹⁴ it is perfectly reasonable for city legislatures in urban areas to enact stringent firearms regulations that are likely unnecessary in other areas. The preservation of discretion to enact such regulations should be part of any civil rights agenda, as people of color are the grossly disproportionate victims of firearms-related violence. Moving forward from *Heller*, municipalities should be afforded broad discretion to tailor firearms regulations according to their individual needs. Part One provides background information and a summary of the Supreme Court's ruling in *Heller*. Part Two describes the District of Columbia's firearms regulations and compares them to other regulations around the country to demonstrate the potentially widespread effects of the *Heller* decision. Part Three describes the prevalence of firearms-related violence—particularly handgun violence—in communities of color.

The second half of this article considers the CORE position. In Part Four, we attempt to present the view of CORE and academics like Robert Cottrol and Raymond Diamond. This position emphasizes the fact that, historically, firearms restrictions have been enacted with racially discriminatory intent, and furthermore that, empirically, the vigorous enforce-

11. See *infra* text accompanying note 140.

12. See, e.g., Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC, Aug. 27, 2008, at 32, 34-35 ("Every time a gun permit is denied, the disappointed applicant will have a potential constitutional claim litigable in the federal courts. . . . The only certain effect of the *Heller* decision will be to increase litigation over gun ownership"); Adam Liptak, *Coming Next, Court Skirmishes in Cities*, N.Y. TIMES, June 27, 2008, at A1.

13. See, e.g., David B. Kopel, *Free Plaxico Burrell: New York City's Gun Law Is Unconstitutional*, WALL STREET J., Dec. 4, 2008. In the wake of an incident in which Plaxico Burrell, a professional football player for the New York Giants, shot himself in the leg, imperiling the Giants' season, Kopel, a policy analyst at the conservative Cato Institute, advocates challenging New York City's handgun laws. Burrell, a resident of New Jersey, accidentally shot himself with a gun that had been lawfully registered in Florida. Kopel argues that New York's handgun laws are suspect in two respects: (1) that they prohibit non-New York State residents from licensing handguns, and (2) that they do not recognize lawfully registered weapons from other jurisdictions. The latter argument, if accepted by a court, would of course eviscerate the ability of any municipality to enact firearms regulations that differ from those of the most lax jurisdiction in the country.

14. See *United States v. Cavera*, 550 F.3d 180, 205 (2d Cir. Dec. 4, 2008) (Raggi, J., concurring) (noting that it is "common sense" that gun use in "a densely populated city poses a heightened risk of harm").

ment of firearms restrictions has racially disproportionate penal effects. Finally, in Part Five, we criticize that view, arguing that while it may be appropriate to view certain efforts to enforce criminal firearms laws with heightened skepticism, communities of color will not be served by a widespread loosening of firearms restrictions that may be heralded by *Heller*. To put it simply, the context surrounding firearms regulations has changed. While early firearms regulations may have been enacted with racially discriminatory intent, today, the most stringent gun control ordinances have been adopted in municipalities where a majority of the electorate is non-white. In keeping with a general posture of deference to local communities in matters of health and public safety, it seems reasonable to presume—but not conclude decisively—that, where people of color not only participate in, but in fact control the legislative process, the electorate has adequately balanced the potentially racially disparate effects of gun control legislation against its benefits to public safety.

I. BACKGROUND ON THE SUPREME COURT'S RULING IN *HELLER*

A. *The Statutes at Issue*

Heller has been described in the media as a case about a ban on handguns,¹⁵ and while this characterization is not entirely incorrect, it oversimplifies the statutes that were at issue. *Heller* involved a challenge to three specific provisions of the District Code: (1) a prohibition on the registration of any handguns after September 24, 1976 by any individuals other than retired police officers;¹⁶ (2) a prohibition on the carrying of any unlicensed weapons;¹⁷ and (3) a requirement that firearms kept in the home be unloaded and disassembled or bound by trigger lock.¹⁸ Taken together, these regulations effectively prohibited the ownership or use of handguns by private citizens in the District. The D.C. Code did not prohibit the ownership or use of rifles or shotguns, with the exception of “sawed-off” shotguns.¹⁹

B. *Procedural History*

Dick Anthony Heller, a “special police officer authorized to carry a handgun while on duty at the Federal Judicial Center,”²⁰ applied to register a handgun for self-defense purposes.²¹ In accordance with D.C. law,

15. See, e.g., Robert Barnes, *Justices Reject D.C. Ban on Handgun Ownership*, WASH. POST, June 27, 2008, at A1.

16. D.C. CODE § 7-2502.02(a)(4) (2001) prohibited the registration of any “[p]istol not validly registered . . . in the District prior to September 24, 1976,” with the exception of pistols owned by certain active and retired police officers.

17. D.C. CODE § 7-2507 (2001) prohibited the “carry[ing] within the District of Columbia either openly or concealed on or about their person, a pistol, without a license.”

18. D.C. CODE § 7-2507 (2001) required that any registered firearms be kept “unloaded and disassembled or bound by a trigger lock or similar device” when not in use.

19. See D.C. CODE § 7-2502.02(a)(1) (2001).

20. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2788 (2008).

21. See *Parker v. District of Columbia*, 311 F.Supp.2d 103 (D.D.C. 2004), *rev'd*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom. District of Columbia v. Heller* 128 S.Ct. 2783 (2008).

his application was denied, and he raised a challenge under the Second Amendment, arguing that the various provisions of the D.C. Code described above unconstitutionally interfered with his individual right to keep and bear arms. The district court dismissed the case, holding “in concert with the vast majority of circuit courts” that the Supreme Court’s decision in *United States v. Miller*²² rejected the notion that there is “an individual right to bear arms separate and apart from Militia use.”²³

A divided panel of the Court of Appeals for the D.C. Circuit reversed.²⁴ First, after parsing the language and history of the Second Amendment, the D.C. Circuit held that “the Second Amendment protects an individual right to bear arms,”²⁵ and rejected the notion that any rights enshrined in the Second Amendment are connected solely to service in a state militia.²⁶ Next, the D.C. Circuit acknowledged that the individual right to own or use firearms may be subject to “[r]easonable restrictions,”²⁷ but held that the District’s firearms regulations were unreasonable on the grounds that any categorical prohibition on a type of “Arm”—consisting of those weapons that are the “lineal descendent[s]” of weapons that were in “common use” by militias during colonial times—is *per se* unconstitutional.²⁸

In so ruling, the D.C. Circuit aligned itself with the Fifth Circuit,²⁹ and against the vast majority of federal and state appellate courts to consider this question, including the First,³⁰ Second,³¹ Third,³² Fourth,³³

22. 307 U.S. 174 (1939).

23. *Parker*, 311 F.Supp.2d at 105.

24. *See Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

25. *Id.* at 395.

26. *Id.* (“Despite the importance of the Second Amendment’s civic purpose, however, the activities it protects are not limited to militia service, nor is an individual’s enjoyment of the right conditioned upon his or her continued or intermittent enrollment in the militia.”).

27. *Id.* at 399.

28. *Id.* at 400 (“Once it is determined—as we have done—that handguns are ‘Arms’ referred to in the Second Amendment, it is not open to the District to ban them.”).

29. In *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the Fifth Circuit became the first Circuit Court to recognize an individual right to own and use firearms for purely private purposes. *Emerson* involved a challenge to a federal statute, 18 U.S.C. § 922(g)(8)(C)(ii), that prohibited the transportation of firearms or ammunition in interstate commerce by persons subject to a protective order that, by its explicit terms, prohibited the use of physical force against an intimate partner or child. Notably, while the Fifth Circuit devoted the bulk of its analysis to finding that there indeed is an individual right to own and use firearms for purely private purposes under the Second Amendment, it did not find the law in question unconstitutional under the Second Amendment.

30. In *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942), the First Circuit, focusing on the Second Amendment’s first clause, rejected a criminal defendant’s Second Amendment claim on the grounds that the defendant had produced no evidence that he “was or ever had been a member of any military organization” and that he acted “without any thought or intention of contributing to the efficiency of the well regulated militia”

31. The Second Circuit has not directly addressed the issue of whether the Second Amendment protects an individual right to possess or use firearms. In *United States v. Toner*, 728 F.2d 115, 128-29 (2d Cir. 1984), however, the Second Circuit, citing *Miller*, held that firearm restrictions are subject only to rational basis review

Sixth,³⁴ Seventh,³⁵ Eighth,³⁶ Ninth,³⁷ Tenth,³⁸ and Eleventh Circuits,³⁹ as

and, applying that standard, upheld a statute that prohibited gun ownership by undocumented aliens.

32. In *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996), the Third Circuit rejected a criminal defendant's argument that, because he was associated with an informally organized militia, his possession of a machine gun was protected by the Second Amendment. Then-Judge Alito dissented from the opinion, but only on the grounds that a federal prohibition on machine guns exceeded congressional authority under the Commerce Clause. *See id.* at 292 (Alito, J., dissenting). Then-Judge Alito observed that he "would view this case differently if Congress had made a finding that intrastate machine gun possession, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce." *Id.*
33. In *Love v. Peppersack*, 47 F.3d 120 (4th Cir. 1995), the Fourth Circuit, relying on the first clause of the Second Amendment, rejected a Second Amendment claim brought by a citizen who had been denied an application to purchase a handgun. The Fourth Circuit concluded that "the Second Amendment preserves a collective, rather than individual, right" that "must bear a 'reasonable relationship to the preservation or efficiency of a well-regulated militia.'" *Id.* at 124 (quoting *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974)).
34. In *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976), the Sixth Circuit rejected a Second Amendment claim on the grounds that the Second Amendment "applies only to the right of the State to maintain a militia and not the individual's right to bear arms . . ." *Id.* at 106 (quoting *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971)).
35. In *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), the Seventh Circuit rejected a Second Amendment challenge to 18 U.S.C. § 922 (g)(9), which prohibits individuals convicted of domestic violence from owning firearms, holding that the Second Amendment "inures not to the individual but to the people collectively, its reach extending so far as is necessary to protect their common interest in protection by a militia." *Id.* at 710.
36. In *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992), the Eighth Circuit did not explicitly hold that the Second Amendment does not protect an individual right, but held that, regardless of whether such a right exists, it cannot apply where the defendant's possession and use of a machine gun was not "reasonably related to the preservation of a well regulated militia" because the purpose of the Amendment was to restrain federal interference with the State militias. Like the Third Circuit in *Rybar*, the Eighth Circuit ruled that membership in an informal private militia was insufficient to trigger any protection under the Second Amendment. *Id.*
37. In *Silveira v. Lockyer*, 312 F.3d 1092 (9th Cir. 2002), the Ninth Circuit, relying on an analysis of the text of the Second Amendment, the historical context of ratification, and relevant Supreme Court precedent, rejected the notion that the Second Amendment protects an individual right to possess or use firearms.
38. In *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977), the Tenth Circuit upheld a conviction for the knowing possession of an unlicensed machine gun, on the grounds that the defendant had shown no connection to the State militia. The Tenth Circuit based its analysis on the purpose of the Amendment, which it concluded was to preserve the effectiveness and assure the continuation of the state militia. The Tenth Circuit rejected the argument that, because "militia" under Kansas law was defined to include all able-bodied men between the ages of twenty-one and forty-five, defendant was effectively a member of a "militia" for Second Amendment purposes. *Id.* at 387.
39. In *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997), the Eleventh Circuit rejected a criminal defendant's Second Amendment claim on the grounds that he failed to demonstrate "a reasonable relationship between his possession of . . . machineguns and pipe bombs and 'the preservation or efficiency of a well regulated militia.'" *Id.* at 1272 (quoting *United States v. Miller*, 307 U.S. 174, 177 (1939)). As in *Oakes*, the Court rejected an argument based on the definition of "militia" under State law (in this case, under Georgia law). *Id.* at 1274.

well as the majority of State appellate courts (and the courts of the District itself).⁴⁰

C. *The Supreme Court's Ruling*

By a vote of five to four, the Supreme Court affirmed, determining that the Second Amendment protects an individual right to keep and bear firearms.⁴¹ The Court, however, declined to articulate the full scope of the Second Amendment right, holding simply that the Second Amendment “necessarily takes certain policy choices off the table,” including “the absolute prohibition of handguns held and used for self-defense in the home.”⁴² The Court did not articulate the standard of scrutiny (*e.g.*, rational basis, intermediate scrutiny or strict scrutiny) for Second Amendment challenges to gun control laws.

The majority, however, cautioned that its ruling does not threaten many long-standing firearms restrictions, such as “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”⁴³ The Court gave no guidance as to when, how, and under what circumstances government might impose such reasonable restrictions. What exactly the Second Amendment prohibits, then, remains an open question.⁴⁴

Although the Supreme Court did not adopt the D.C. Circuit’s “lineal descent” language, it largely adopted the categorical reasoning contained in the lower court’s opinion. While we will not analyze the opinion in close detail, a brief summary is useful for our purposes here. Writing for the majority, Justice Scalia began with the simple proposition that “Arms” are defined as “weapons of offence, or armour of defence.”⁴⁵ He then rejected the notion that the right to Keep and Bear Arms enshrined in Second Amendment might apply only to Eighteenth Century weapons as “bordering on the frivolous,” writing that “the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”⁴⁶ Following the D.C. Circuit’s simple logic, the Court reasoned that once it is

40. *See, e.g.*, *Commonwealth v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980); *Harris v. State*, 432 P.2d 929, 930 (Nev. 1967); *Burton v. Sills*, 248 A.2d 521, 526 (N.J. 1968); *In re Cassidy*, 51 N.Y.S.2d 202, 205 (N.Y. App. Div. 1944); *State v. Fennell*, 382 S.E.2d 231, 232 (N.C. Ct. App. 1989); *Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976); *Masters v. State*, 653 S.W.2d 944, 945 (Tex. App. 1983); *State v. Vlacil*, 645 P.2d 677, 679-80 (Utah 1982); *Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987); *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 269 (Ill. 1984).

41. *See* *District of Columbia v. Heller*, 128 S.Ct. 2783, 2786 (2008).

42. *Id.* at 2822.

43. *Id.* at 2816-17.

44. *Cf.* Posner, *supra* note 12, at 34 (“The other restrictions that a government may want to impose are up for grabs. It may take years for the dust to settle—many years of lawsuits that our litigious society does not need.”).

45. *Heller*, 128 S.Ct. at 2791 (quoting 1 *DICTIONARY OF THE ENG. LANGUAGE* 107 (4th ed. 1773)).

46. *Id.* at 2791-92

determined that handguns are within the meaning of the term “Arms,” such weapons cannot be prohibited altogether: “[t]he handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for [the] lawful purpose” of self-defense.⁴⁷ The Court, however, did not hold that all “Arms” are to be exempt from absolute prohibition. It limited its ruling only to those sorts of weapons protected that are “in common use at the time.”⁴⁸ The Court left intact the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’”⁴⁹ such as military-grade machine guns. Where the line falls between “dangerous and unusual weapons” and those that are “in common use” is anyone’s guess, but the bottom line of the Court’s ruling is that certain categories of “common” weapons may not be subject to absolute prohibition.

In sum, the majority opinion opens more questions than it answers—it does not articulate a standard of review, does not define what makes a regulation “reasonable,” and does not articulate a test for what constitutes a “dangerous and unusual” weapon that might be subject to absolute prohibition. By failing to provide clear standards and guidelines, the Court invites a spate of new litigation and years of uncertainty, which, set against the reality of handgun violence in many of the nation’s cities,⁵⁰ feels cavalier.

II. HANDGUN PROHIBITIONS AROUND THE COUNTRY

States and municipalities around the country have experimented with a variety of firearms regulations. Until *Heller*, they had done so with almost complete autonomy. In particular, densely-populated urban municipalities, like the District of Columbia, tend to have the most restrictive firearms regulations in the country. The decision in *Heller*, however, took the District’s firearms regulations “off the table.” In assessing the likely impacts of the Supreme Court’s decision in *Heller*, it is useful to review the history of the District’s prohibition on handguns and the state of similar municipal laws around the country.

A. *The District’s Ban on Handguns*

Only three years after the federal Home Rule Act granted the District some measure of local autonomy,⁵¹ the District’s legislature, the District Council, approved the Firearms Control Act of 1975, Bill No. 1-164. In doing so, the District Council’s Committee on the Judiciary and Criminal Law issued a report explaining its decision as motivated by alarming national and local statistics concerning handgun-related violence.⁵² The

47. *Id.* at 2817.

48. *Id.* (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

49. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 148-49 (1769)).

50. See *infra* text accompanying footnotes 82-136.

51. See District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 774 (1973); Note, *Democracy or Distrust? Restoring Home Rule for the District of Columbia in the Post-Control Board Era*, 111 HARV. L. REV. 2045, 2045 (May 1998).

52. Comm. on the Judiciary and Criminal Law, Council of the District of Columbia, Rep. No. 1-164 (Apr. 21, 1976) 102a-103a

Committee referred to a panoply of national statistics on handguns: as of 1976, handguns were used in 54% of all murders, 60% of robberies, and 26% of all assaults.⁵³ The Committee also cited FBI data showing that handguns were used in the vast majority of killings of police officers.⁵⁴ The Committee found that, although a wide variety of firearms were used in the commission of armed crimes, the majority of such crimes involved handguns: from 1974 to 1975 in the District, a handgun was used in 88% of armed robberies and 91% of armed assaults;⁵⁵ in 1974, handguns were involved in 155 of the record 285 murders in the District,⁵⁶ and every rapist in the District who used a firearm to facilitate his crime used a handgun.⁵⁷

These statistics concerning handgun violence, to which the District legislature was responding when it enacted the handgun ban, must be considered within larger historical trends concerning handgun ownership. Handguns were relatively uncommon in the United States until the 1960s and 1970s; at mid-century, the firearms industry primarily manufactured long guns for hunters and sport shooters. Handguns accounted for approximately 13% of domestic firearms production in 1950 and constituted only 23% of all guns available on the domestic market throughout the entire 1950s.⁵⁸ This situation began to change in the 1960s as handgun production rose dramatically, outpacing shotgun production for the first time by 1968; by the end of the 1960s, handguns constituted a plurality of the firearms market.⁵⁹ Of course, fluctuating trends in violent crime rates certainly have many causes, and we by no means attempt to ascribe rising crime rates solely to the fact that large numbers of handguns were sold after the 1950s. But it is undeniable that this period was marked by a proliferation of handguns and that the widespread availability of handguns is a relatively new phenomenon. This development posed new challenges for the regulation of public health and safety in the second half of the twentieth century.

These challenges are particularly acute in urban areas, where the density of urban communities magnifies the public health and safety dangers posed by handguns which, unlike other firearms, are portable and easy to conceal. As the District Council noted, the risks to public safety posed by the criminal use of handguns are uniquely heightened in a “totally urban” environment like the District and the enactment of the prohibition on handguns “reflect[ed] a legislative decision” that handguns “have no legitimate use in the purely urban environment of the District of Columbia.”⁶⁰ Thus, the District Council enacted the handgun ban in response to what was at the time a relatively new problem: the widespread use of

53. *Id.* at 102a

54. *Id.*

55. *Id.*

56. *Id.*

57. Petition for a Writ of Certiorari at 4, *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) (No. 07-290), 2007 WL 2571686 (citing Transcript, Evening Council Session, 11:4-5, June 15, 1976).

58. TOM DIAZ, *MAKING A KILLING: THE BUSINESS OF GUNS IN AMERICA* 83 (1999).

59. *Id.* at 84.

60. Comm. on the Judiciary and Criminal Law, *supra* note 52 at 112a–111a.

handguns in the commission of violent crime in urban areas.⁶¹ The District's ban remained in place for over thirty years, until *Heller*.

B. Other Municipal and State Firearms Prohibitions and Regulations

Several municipalities have handgun laws and other firearms regulations that are similar to those of D.C.⁶² The Court's holding in *Heller* that a municipality has no discretion to prohibit handguns could have effects far beyond the District of Columbia.

We note, however, that *Heller* did not directly address the issue of whether handguns may be prohibited by non-federal governmental entities. Because it concerned only the District of Columbia's firearms regulations, *Heller* did not provide an occasion to examine the question of whether the individual right to own and possess firearms protected by the Second Amendment is incorporated as to the States by the Due Process Clause of the Fourteenth Amendment. Although in several cases pre-dating modern incorporation doctrine the Supreme Court expressly held that the Second Amendment did not apply to the laws of state governments,⁶³ there is good reason to believe that today's Court will extend *Heller* beyond the context of federal laws. While the doctrinal and institutional issues raised by a dispute over incorporation are beyond the scope of this article,⁶⁴ we note that because they pre-date the development of

61. We note, however, that while the total prohibition on handgun ownership and use in the District is relatively new, the District has had firearms regulations dating back two centuries. See, e.g., Brief of the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae in Support of Petitioners at 18–19, *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) (No. 07-290) (citing Town of Georgetown Ordinance of Oct. 24, 1801 and Act of the Corporation of the City of Washington of Dec. 9, 1809).

62. See *infra* text accompanying footnotes 68-73.

63. See *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875). *Presser* and *Cruikshank* can be seen as consistent with the Court's broader position at the time—announced in *Barron v. Baltimore*, 32 U.S. 243 (1833)—that the Bill of Rights did not apply to the states. Modern incorporation doctrine can be traced to *Gitlow v. New York*, 268 U.S. 652 (1925), which held that the First Amendment applies to the States via the Due Process Clause of the Fourteenth Amendment, and post-dates by several decades all of the Supreme Court cases that considered the applicability of the Second Amendment to the States.

64. The test for whether a provision of the Bill of Rights has been incorporated against the States by the Due Process clause of the Fourteenth Amendment is typically couched in terms of "fundamental fairness." See, e.g., *Betts v. Brady*, 316 U.S. 455, 465 (1942) (holding that the test for incorporation is whether a right is a "fundamental right, essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment"). The fundamental fairness test, generally applied in the context of criminal procedure, would appear to be inapplicable in the context of the Second Amendment's right to keep and bear arms. In determining the applicability of the incorporation doctrine to the Second Amendment, a future court might instead ask whether the right to keep and bear arms protected by the Second Amendment is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Powell v. Alabama*, 287 U.S. 45, 67 (1932).

modern incorporation doctrine,⁶⁵ the early Second Amendment cases are of limited precedential value. One can easily imagine that in the wake of *Heller*, the next important Second Amendment case will present the question of whether the individual right to own and use firearms is incorporated by the Fourteenth Amendment as a limitation on the power of the States to regulate firearms. Indeed, on the day *Heller* was announced, gun rights advocates announced their immediate intention to challenge gun control laws in a variety of municipalities.⁶⁶

Assuming that the Supreme Court would conclude that the Second Amendment is applicable to the States,⁶⁷ the principles set forth in *Heller* could have immediate and wide-reaching consequences. A number of other municipalities have experimented with handgun bans, laws that certainly would not survive scrutiny in a new Second Amendment jurisprudence. At least ten municipalities, including San Francisco,⁶⁸ Oak-

65. The *Heller* majority noted that the *Cruikshank* opinion assumed that even the First Amendment did not apply to the States (*Heller*, 128 S. Ct. at 2813 n.23), an assumption that is clearly no longer valid in light of *Gitlow*.

66. See, e.g., Liptak, *supra* note 12; Anahad O'Connor, *Gun-Control Supporters Show Outrage*, N.Y. TIMES, June 27, 2008, available at nytimes.com/2008/06/27/washington/27React.html (noting that "[i]f there was any doubt that other [firearms] bans would be in peril, the National Rifle Association quickly put those questions to rest when it announced shortly after the ruling that it would file a flurry of lawsuits challenging restrictions in San Francisco, Chicago, and several Chicago suburbs"); Don Babwin, *Gun Ruling Has Chicago Thinking It's Next*, CHI. TRIB., June 26, 2008.

67. If the Court were to extend the right in *Heller* to apply to state action under the Fourteenth Amendment, such a development would in some sense be ironic, as the more conservative members of the court would be in the position of expanding a constitutional right on the basis of a doctrine towards which they have expressed some skepticism. For instance, Justice Scalia, concurring in *Albright v. Oliver*, 510 U.S. 266 (1994), noted his grudging acceptance of the incorporation doctrine despite its conflict with his textualist principles: "our decisions have included within the Fourteenth Amendment certain explicit substantive protections of the Bill of Rights—an extension I accept because it is both long established and *narrowly limited*. . . ." *Id.* at 275 (emphasis added). Similarly, Justice Thomas has sought to limit the scope of the incorporation doctrine in the context of the Establishment Clause of the First Amendment. Concurring in the judgment in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), a case concerning the constitutionality of a mandatory requirement that schoolchildren recite the Pledge of Allegiance, Justice Thomas made clear his position that the Establishment Clause should be understood as prohibiting the federal government from establishing religion, while permitting a state government to do so: "I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation." *Id.* at 45. Given Justice Thomas' position that provisions of the Bill of Rights which concern the proper apportionment of power between the federal and state governments should not be incorporated by the Fourteenth Amendment, it would be ironic indeed if he were to hold that the Second Amendment, which was once widely understood merely as prohibiting federal intrusions into the state militias, constrains the powers of state governments.

68. Proposition H, passed with fifty-eight percent of the vote in 2005 (see Cecilia M. Vega, *Measures: Voters Take Stand Against Guns, Recruiting at Schools*, S.F. CHRON. Nov. 9, 2005, at B3), would have prohibited San Francisco residents from possessing handguns, but it was immediately enjoined by pending litigation. In early 2008, a California appellate court ruled that Proposition H was preempted by State regulations on handgun ownership and use (see *Fiscal v. San Francisco*, 70 Cal. Rptr. 3d 324 (2008)), a decision that was subsequently upheld by the State Supreme Court.

land,⁶⁹ Chicago and many of its neighboring municipalities,⁷⁰ Memphis,⁷¹ Toledo,⁷² and Cambridge,⁷³ have at least at one time enacted handgun regulations comparable to those of the District. These laws would clearly be unconstitutional under a reading that extends *Heller* to municipal and State governments. As explained below in Part III, the municipalities with handgun prohibitions are like D.C. in many ways: they are urban areas with high concentrations of minority residents, and, because they are densely populated, they are uniquely vulnerable to handgun violence. The policy issue presented here is thus not whether handguns themselves are good or bad, but rather whether urban municipalities ought to be able to impose more stringent regulations given the unique dangers handguns pose in urban environments.

Finally, although this article is primarily concerned with the effects of handgun violence, we note that *Heller* could ultimately have even wider consequences if the ruling is extended to cover a broader category of weapons. The Supreme Court's ruling in *Heller* was based largely on the premise that any ban on a particular category of "common" weapons is unconstitutional under the Second Amendment. The Court held that any weapons that qualify as "[A]rms"—that is, as any "weapons of offence, or armour of defence,"⁷⁴ that are in "common use at the time"⁷⁵—are protected under the Second Amendment from absolute prohibition, unless they are "dangerous and unusual weapons."⁷⁶ Of course, modern handguns—which are compact, easy to conceal, accurate, and in some cases semiautomatic—are themselves quite "dangerous." In the recent Virginia Tech shootings, for instance, a single individual using two handguns discharged over 170 rounds in nine minutes, killing thirty people and wounding twenty-five more.⁷⁷ It is not entirely clear why handguns, at least in some contexts, should not be considered sufficiently "dangerous" to warrant absolute prohibition, while other weapons may be regulated with impunity.

Bob Egelko, *State High Court Shoots Down S.F. Handgun Ban*, S.F. CHRON. April 10, 2008, at B3.

69. See OAKLAND, CAL., MUNICIPAL AND PLANNING CODES §§ 9.36.400–.440 (2007) (prohibiting "compact handguns"). The current status of the Oakland municipal handgun ban is unclear in the wake of the California Supreme Court decision in *Fiscal*. See *supra* note 68.

70. See, e.g., CHICAGO, ILL., MUNICIPAL CODE §§ 8-20-030(k), 8-20-40, 8-20-50 (2008); EVANSTON, ILL., CITY CODE § 9-8-2 (2007); HIGHLAND PARK, ILL., CITY CODE §§ 134.001–.099 (2008); MORTON GROVE, ILL., VILLAGE CODE §§ 6-2-1–3 (2007); OAK PARK, ILL., VILLAGE CODE §§ 27-1-1, 27-2-1 (2007); WINNETKA, ILL., VILLAGE CODE § 9.12.020 (2008); VILLAGE OF WILMETTE, ILL., CODE OF ORDINANCES § 9-13 (2008).

71. MEMPHIS, TENN., CODE OF ORDINANCES OF MEMPHIS § 10-32-2 (2007).

72. TOLEDO, OHIO, ch. 549.01(c), 549.25 (2007) (banning certain handguns).

73. CAMBRIDGE, MASS., MUNICIPAL CODE §§ 9.16.20–.50 (2007).

74. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791 (2008) (quoting 1 DICTIONARY OF THE ENG. LANGUAGE 107 (4th ed. 1773)).

75. *Id.* at 2815 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

76. *Id.* at 2817 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES, 148 – 49 (1769)).

77. Reed Williams & Shawna Morrison, *Police: No Motive Found*, ROANOKE TIMES, Apr. 26, 2006, at A1.

Regulations prohibiting the possession and use of other categories of weapons are not uncommon, and it is possible that the Supreme Court's opinion might apply to other categorical weapons bans. For instance, in addition to the municipalities listed above, seven states, Puerto Rico, and at least eleven other municipalities have enacted bans on "assault weapons"⁷⁸ or semi-automatic weapons.⁷⁹ While some "assault weapons" would certainly seem to be "dangerous" or "uncommon" and therefore fall outside of the rule laid down in *Heller*, it is unclear how they could be distinguished from contemporary semiautomatic handguns. There are many other examples of categorical prohibitions on specific types of weapons. At least nineteen states, the District of Columbia, Puerto Rico, and the federal government have prohibited armor-piercing or "cop-killer" bullets.⁸⁰ Including assault weapon bans, at least thirty-six states, the District of Columbia, Puerto Rico, and the federal government have adopted categorical bans on various types of heavy weaponry, including machine guns, rocket launchers, and chemical and biological weapons.⁸¹

78. Federal statutes have defined the term "assault weapon" as encompassing semi-automatic rifles, certain semi-automatic handguns and shotguns containing one of several enumerated features (e.g., weapons that are above a certain weight, or that have certain types of magazines), and other specifically enumerated weapons, such as an "uzi." See 18 U.S.C. § 921(a)(30) (enacted 1994, repealed 2004).

79. See CAL. PENAL CODE §§ 12275–12289.5 (West 2008); CONN. GEN. STAT. §§ 53-202a–j, m–o (2007); HAW. REV. STAT. §§ 134-1, 134-4(e) (2007); MD. CODE ANN., CRIM. LAW §§ 4-301–4-303 (West 2008); MASS. GEN. LAWS ch. 140 §§ 121, 131M (2008); N.J. STAT. ANN. tit. 2C:39-1w, 39-5f, 2C: 58-12 (2008); N.Y. PENAL LAW §§ 265.00(21–22), 265.10, 265.20(16) (McKinney 2008); P.R. LAWS ANN. tit. 25, § 456m (2005); AURORA, ILL., CODE OF ORDINANCES, § 29-49 (2008); CHICAGO, ILL., MUNICIPAL CODE §§ 8-20-030(h), 8-20-40, 8-20-50 (2008); SOUTH BEND, IND., CODE OF ORDINANCES §§ 13-94–13-99 (2008); ALBANY, N.Y., CITY CODE §§ 193-13–193-16 (2007); BUFFALO, N.Y., CHARTER AND CODE OF THE CITY §§ 180-1(B), (F) (2008); NEW YORK, N.Y., ADMINISTRATIVE CODE §§ 10-301(16), 10-303.1 (2007); ROCHESTER, N.Y. CODE OF THE CITY §§ 47-5B, F (2007); CINCINNATI, OHIO, ADMINISTRATIVE CODE § 708-37 (2008); CLEVELAND, OHIO, CHARTER OF THE CITY §§ 628.01-628.99 (2007); COLUMBUS CITY, OHIO, CITY CODES §§ 2323.11(G), 2323.31 (2008); DAYTON, OHIO, CODE OF ORDINANCES §§ 138.24.–138.99. (2006); TOLEDO, OHIO, MUNICIPAL CODE §§ 549.01(x), 549.23, 549.25 (2008).

80. See, e.g., 18 U.S.C. §§ 921(a)(17)(B), 922(a)(7)-(8), 929 (2008); ALA. CODE § 13A-11-60 (2008); CAL. PENAL LAW § 12320 (West 2008); CONN. GEN. STAT. § 53-202l (2008); D.C. CODE §§ 7-2501.01(13a), 7-2505.02 (2008); FLA. STAT. § 790.31 (2008); HAW. REV. STAT. § 134-8(a) (2008); 720 ILL. COMP. STAT. 5/24-2.1 (2008); IND. CODE § 35-47-5-11 (2008); KY. REV. STAT. ANN. §§ 237.060(7), 237.080 (West 2007); LA. REV. STAT. §§ 40:1810–12 (2008); ME. REV. STAT. ANN. tit. 17-A, § 1056 (2008); MICH. COMP. LAWS § 750.224c (2008); MISS. CODE ANN. § 97-37-31 (2008); N.J. REV. STAT. ANN. § 2C:39-3f. (West 2008); N.Y. PENAL LAW §§ 265.00(18), 265.01(8) (McKinney 2008); OKLA. STAT. ANN. tit. 21, § 1289.19–.22 (2008); OR. REV. STAT. § 166.350 (2007); 18 PA. CONS. STAT. § 6121. (2007); P.R. LAWS ANN. tit. 25, § 455(j), 458j, 459a (2005) ; R.I. GEN. LAWS §§11-47-20.1 (2008); TX. PENAL CODE §§ 46.01(12), 46.05(a)(7) (Vernon 2007). Wilmington, Delaware has prohibited armor-piercing bullets, although Delaware does not have a state-wide ban. See WILMINGTON, DELAWARE, CITY CODE § 36-156 (2008).

81. See, e.g., 18 U.S.C. 922(o) (2008) (machine guns); ALASKA STAT. § 11.61.200(a)(3), (h)(1) (2008) (rockets, grenades, noxious gas, etc.); ARIZ. REV. STAT. §§ 13-3101(8), 13-3102(A)(3) (2008) (rockets, grenades, mines, automatic firearms, nunchaku, etc.); ARK. CODE ANN. §§ 5-73-104, 5-73-108, 5-73-201–5-73-317 (2008) (machine guns, explosives, metal knuckles, etc.); COL. REV. STAT. § 18-12-109 (2008) (chemical, biologi-

The fact that *Heller* lacks a clear standard makes it difficult to predict what sorts of regulations will survive a new Second Amendment jurisprudence. While it is difficult to see any federal court holding that there is a constitutional right to chemical, biological, or nuclear weapons, it seems clear that the expansive nature of the Supreme Court's ruling threatens to undermine many weapons prohibitions, and could also affect a multitude of other restrictions on the use and possession of firearms, such as concealed weapons laws. The constitutional rule articulated in *Heller* threatens to undermine a wide range of firearms regulations around the country.

III. RACE AND HANDGUN VIOLENCE

Handgun violence is rampant in many of the nation's cities, and, as detailed below, the brunt of that violence is borne by people of color. The statistics cited below illustrate two basic points. First, the possibility of a loosening of firearms restrictions around the country in the wake of *Heller* should be of serious concern to civil rights activists and lawyers. Second, because handguns pose unique dangers in urban areas, the enactment of more stringent firearms regulations in urban municipalities constitutes a reasonable legislative response to a localized problem. Moving forward, a rational Second Amendment jurisprudence should account for the different characteristics of various communities, and in particular, the distinctive features of densely-populated urban areas.

cal, and radiological weapons); DEL. CODE ANN. tit. 11, § 1444 (2008) (bombs, machine guns, etc.); FL. STAT. §§ 790.161, 790.221 (2008) (destructive devices, machine guns); GA. CODE ANN. §§ 16-11-120–16-11-125 (2008) (rocket launchers); 720 ILL. COMP. STAT. § 5/24-1 (2008) (blackjacks, metal knuckles, switchblades, machine guns, bombs, grenades, etc.); IOWA CODE § 724.1–724.3 (2007) (machine guns, grenades, rockets, ballistic knives); LA. REV. STAT. ANN. §§ 40:1751–52 (2008) (machine guns); ME. REV. STAT. ANN. tit. 17-A, §§ 1051 (2008) (machine guns); MICH. COMP. LAWS § 750.224 (2007) (machine guns, bombs, blackjacks, poison gas); MINN. STAT. § 609.67 (2007) (machine guns); MO. REV. STAT. § 571.020 (2008) (explosives, machine guns, gas guns, switchblades, etc.); NEB. REV. STAT. §§ 28-1203, 28-1213, 28-1220 (2008) (machine guns, bombs, grenades, etc.); NEV. REV. STAT. § 202.350 (2007) (switchblades, blackjacks, nunchaku, machine guns, etc.); N.C. GEN. STAT. § 14-288.8 (2008) (weapons of “mass death and destruction,” including incendiary, explosive poison gas, or radioactive bombs, missiles grenades, etc.); N.D. CENT. CODE § 62.1-05-01 (2008) (machine guns and bombs); OR. REV. STAT. § 166.382 (2007) (bombs, grenades, rockets); 18 PA. CONS. STAT. § 7306 (2007) (incendiary devices); R.I. GEN. LAWS §11-47-42 (2008) (blackjacks, “Kung-Fu” weapons, daggers, etc.); S.C. CODE ANN. § 16-23-710 (2007) (nuclear weapons); S.D. CODIFIED LAWS §§ 22-1-2(8), (13), 22-14-6, 22-14A-4 (2008) (machine guns, explosives, etc.); TENN. CODE ANN. § 39-17-1302 (2008) (machine guns, switchblades, etc.); TX. PENAL CODE ANN. §§ 46.01(9), 46.05(2) (Vernon 2007) (machine guns); VA. CODE ANN. § 18.2-288–96 (2008) (machine guns); VT. STAT. ANN. tit. 13, §§ 1603–1606 (2008) (explosive, incendiary, or poison gas bombs, grenades, etc.); WASH. REV. CODE § 9.41.190 (2008) (machine guns); WIS. STAT. § 941.26 (2008) (machine guns). *See also supra* note 75 (listing assault weapon bans); Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives, ATF P 5300.5 State Laws and Published Ordinances – Firearms (2005 - 26th Edition), <http://www.atf.gov/firearms/statelaws/26thedition/index.htm> (providing a survey of state and local firearms laws).

A. General Nationwide Statistics

It is not surprising that most studies have found a correlation between rates of firearms ownership and levels of gun violence.⁸² The vast majority of this gun violence involves the use of handguns.⁸³ Although “rifles and shotguns outnumber handguns two to one,” handguns account for the majority of killings, wounds, and gun-related crime.⁸⁴ For instance, from 1990 to 1997, of the 160,000 homicides committed in the United States, more than half of them involved a handgun. The 89,000 handgun homicides during the same period are greater than the number of homicides committed with all other weapons combined.⁸⁵

While the evidence is not conclusive, criminological research has found that the high rate of handgun homicides in the United States is due, at least in part, to the high rate of handgun ownership in the United

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82. The availability of firearms contributes to the alarming statistics on gun violence, as it is “a combination of the ready availability of guns and the willingness to use maximum force in interpersonal conflict [that] is the most important single contribution to the high U.S. death rate from violence.” F.E. ZIMRING & G. HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* 122–23 (1997). For example, a person living in a home with a gun is almost three times more likely to die by homicide and five times more likely to die by suicide. Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 *NEW ENGLAND J. MED.* 1084, 1084–91 (1993); Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 *NEW ENGLAND J. MED.* 467 (1992). Given its prevalence, gun violence also adds significant direct and indirect costs to America’s criminal justice and health care systems, while reducing the nation’s overall life expectancy. See generally PHILLIP COOK & JENS LUDWIG, *GUN VIOLENCE: THE REAL COSTS* (Oxford Univ. Press 2002) (estimating medical expenditures relating to gun violence, with costs borne by the American public because many gun victims are uninsured and cannot pay for their medical care); Linda Gunderson, *The Financial Costs of Gun Violence*, 131 *ANNALS OF INTERNAL MED.* 483 (1999) (noting that the American public paid about eighty-five percent of the medical costs relating to gun violence); Jean Lemaire, *The Cost of Firearm Deaths in the United States: Reduced Life Expectancies and Increased Insurance Costs*, 72 *J. OF INS. AND RISK* 359 (2005) (concluding, among other things, that the elimination of all firearm deaths would increase the male life expectancy more than the eradication of all colon and prostate cancers).
83. The FBI reports that, in 2006, handguns were used in 7795 homicides, or 76.6% of murders involving firearms and 52% of all reported murders in the United States. See FEDERAL BUREAU OF INVESTIGATION (FBI), *UNIFORM CRIME REPORTS 2006, EXPANDED HOMICIDE DATA TABLE 7* (2007), available at http://www.fbi.gov/ucr/cius2006/offenses/expanded_information/data/shrtable_07.html. See also VIOLENCE POLICY CENTER, *UNSAFE IN ANY HANDS: WHY AMERICA NEEDS TO BAN HANDGUNS* (2000), available at <http://www.vpc.org/studies/unsafe.htm> (citing FBI, *SUPPLEMENTARY HOMICIDE REPORT DATA (1978-1997)*); Garen J. Wintemute, Stephen P. Teret et al., *The Choice of Weapons in Firearm Suicides*, 78 *AM. J. PUB. HEALTH* 824 (1988); U.S. GEN. ACCOUNTING OFFICE, *ACCIDENTAL SHOOTINGS: MANY DEATHS AND INJURIES CAUSED BY FIREARMS COULD BE PREVENTED* (1991), available at <http://archive.gao.gov/d20t9/143619.pdf>.
84. See also VIOLENCE POLICY CENTER, *UNSAFE IN ANY HANDS: WHY AMERICA NEEDS TO BAN HANDGUNS* (2000), available at <http://www.vpc.org/studies/unsafe.htm> (citing FBI, *SUPPLEMENTARY HOMICIDE REPORT DATA (1978-1997)*).
85. *Id.* (citing FBI, *SUPPLEMENTARY HOMICIDE REPORT DATA (1990-1997)*). Similarly, from 1996 to 2000, 79.5 percent of all gun-related murders in the country were committed with handguns. FBI, *UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES 2000*, Table 2.10 *Victims, types of weapons used, 1996-2000*, available at <http://www.fbi.gov/ucr/00cius.htm>.

States.⁸⁶ A recent study revealed that a ten percent increase in handgun ownership correlates with a two percent increase in homicides.⁸⁷ Suicide rates are also largely a function of the availability of firearms. Multiple studies have confirmed that “gun ownership [is] . . . the strongest correlate of the rates of suicide and homicide by guns.”⁸⁸ The Injury Control Research Center has found that a 10 percent reduction in firearm ownership in the United States would translate into a 2.5 percent reduction in the overall suicide rate, or about 800 fewer deaths per year.⁸⁹ In addition, handguns are used in an extraordinary percentage of the country’s well-publicized shootings, including the large majority of mass shootings. A handgun was used in 74 percent of these mass shootings as the only or primary weapon.⁹⁰ Of course, other factors aside from handgun ownership most certainly influence rates of violence. But relevant empirical work tends to show that the widespread availability of handguns in the U.S. probably contributes to the high levels of firearms-related violence experienced nationally.

Gun violence disproportionately afflicts African Americans. Firearm homicide is the leading cause of death for fifteen to thirty-four year-old

86. Matthew Miller, MD. et al., *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988-1997*, 92 AM. J. OF PUB. HEALTH 1988 (2002) (surveying studies establishing the correlation between firearm availability and homicide).

87. *Id.* (citing Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086, 1095-98 (2002)). Another study examined the relationship between handgun sales and homicide rates in California from 1972 to 1993 and after controlling for other risk factors, it concluded that “4,810 fewer 15- to 34-year-olds would have died of homicide if handgun sales had remained at their [lower] 1972 sales level . . . through 1992” Susan Sorenson & Richard Berk, *Handgun Sales, Beer Sales, and Youth Homicide, California, 1972-1993*, 22 J. PUB. HEALTH POL’Y 182, 189-90 (2001).

88. David Lester, *Research Note: Gun Control, Gun Ownership, and Suicide Prevention*, 18 SUICIDE AND LIFE-THREATENING BEHAV. 176 (1988). “[H]omes with one or more handguns were associated with a risk of suicide almost twice as high as that in homes containing only long guns.” Arthur Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 N. ENG. J. Med. 467, 470 (1992). Research going back 40 years shows that “the incidence of firearm suicide runs in close parallel with the prevalence of firearms in a community.” Scott Anderson, *The Urge to End It All*, N.Y. TIMES MAGAZINE, July 6, 2008, available at <http://www.nytimes.com/2008/07/06/magazine/06suicide-t.html>. For example, one 2007 study grouped the 15 states with the highest rate of gun ownership alongside the six states with the lowest and found that the more than three times greater prevalence of firearms in the “high gun” states translated into a more than three times greater prevalence of firearm suicides, which in turn translated into an annual suicide rate nearly double that of the “low gun” states. *Id.* Similarly, a 2004 study of seven Northeastern states found that the 3.5 times greater rate of gun suicides in Vermont than in New Jersey exactly matched the difference in gun ownership between the two states (42 percent of all households in Vermont opposed to 12 percent in New Jersey). *Id.*

89. See Anderson, *supra* note 88. Due to the element of impulsivity in firearm suicide, “means restriction” can provide an effective method of reducing the incidence of firearm suicide: “The goal is to put more time between the person and his ability to act.” *Id.*

90. JOSH SUGARMANN, EVERY HANDGUN IS AIMED AT YOU: THE CASE FOR BANNING HANDGUNS 22, 156 (2001). In 62 percent of these incidents, the handguns were purchased legally. *Id.*

African Americans.⁹¹ Although African Americans comprise only thirteen percent of the United States population, they suffered almost twenty-five percent of all firearms-related deaths and fifty-three percent of all firearm homicides during the years 1999 to 2005.⁹² Overall, the number of African American children and teenagers killed by gunfire since 1979 is more than ten times the number of African American citizens of all ages lynched throughout American history.⁹³

With respect to handguns specifically, African Americans again suffer disproportionately. From 1987 to 1992, African American males were victims of handgun crimes at a rate of 14.2 per 1,000 persons, compared to a rate of 3.7 per 1,000 for white males.⁹⁴ During the same period, African American women were victims of gun violence at a rate nearly four times higher than white women.⁹⁵ Overall, African American males between sixteen and nineteen years old had the highest rate of handgun crime victimization, at a rate of 40 per 1,000 persons, or four times that of their white counterparts. Similarly, for African American males between 20

91. THE CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC), WISQARS LEADING CAUSES OF DEATH REPORTS (1999-2004), <http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html>. For African American families, the chance of their male children dying from a gunshot wound is 62 percent higher than the chance of dying in a motor vehicle crash, which is the leading cause of death for Americans of all other races. THE CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC), WISQARS INJURY MORTALITY REPORTS, <http://webapp.cdc.gov/sasweb/ncipc/mortrate9.html> (Data is for the year 1998. The crude rate of mortality for male African American children (0-19 yr old) in firearm deaths is 19.49 and in motor vehicle accidents it is 12). Motor vehicle traffic is the leading cause of death for whites 5-44 years old; for American Indians/Alaskan Natives 1-44 years old; and for Asians/Pacific Islanders and other races 1-34 years old. CDC, WISQARS LEADING CAUSES OF DEATH REPORTS (1999-2004), <http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html>. Thus, the hypothetical African American family faces at least a 1 in 20 chance that one of their sons will be shot while growing up. Cook & Ludwig, *supra* note 82, at 89.

92. CDC, WISQARS INJURY MORTALITY REPORTS (1999-2005), available at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html. If all Americans were killed with firearms at the same rate as African American males between the ages of 15 and 24, there would be 276,843 firearm homicide victims annually in the United States. U.S. DEP'T OF JUSTICE, WORKING WITH VICTIMS OF VIOLENCE (July 2001), available at http://www.ojp.usdoj.gov/ovc/publications/bulletins/gun_7_2001/gun2_2_01.html. These figures are based on 1997 CDC numbers and a total population of 267,636,061. More recent statistics show that between 1999 and 2005, firearm homicide rates in the United States were 15.1 for African Americans and 2.18 for whites. According to a 2007 Bureau of Statistics report, among African American homicide victims, 77 percent were killed with a firearm in 2005, compared to 60 percent of white homicide victims. Erika Harrell, *Bureau of Justice Statistics Special Report: Black Victims of Violent Crime* 3 (Aug. 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/bvvc.pdf>. In addition, African American robbery victims are more likely than their white and Hispanic counterparts to face an offender with a firearm. *Id.* at 4.

93. CHILDREN'S DEFENSE FUND, PROTECT CHILDREN, NOT GUNS 1 (2007), available at www.childrensdefense.org/gunreport.

94. U.S. DEP'T OF JUSTICE, BUREAU OF JUST. STAT., CRIME DATA BRIEF, GUNS AND CRIME: HANDGUN VICTIMIZATION, FIREARM SELF-DEFENSE, AND FIREARM THEFT (Apr. 1994), available at www.ojp.usdoj.gov/bjs/pub/ascii/hvfsdaft.txt.

95. *Id.*

and 24 years old, the rate (29 per 1,000 persons) was three times that of whites in the same age group (9 per 1,000 persons).⁹⁶

B. *Statistics in Key Municipalities*

Although gun violence is a national issue, the vast bulk of it is concentrated in densely-populated urban communities.⁹⁷ The highest rates of gun violence in the country are in the hyper-segregated, high poverty areas of inner cities.⁹⁸ Poor neighborhoods and those with demographic characteristics that contribute to a lack of social control and stability—for example, having many more children, adolescents, and young adults than older individuals or family structures—are more susceptible to gun homicide.⁹⁹ Indeed, half of all homicides occur in America's 63 largest cities, which house only 16 percent of the country's population. Most are committed with handguns, often obtained illegally.¹⁰⁰ In addition to these economic and demographic features, the prevalence of drugs in urban environments contributes to the high rate of gun violence in those areas. In the mid-1980s, as crack cocaine became the drug of choice in urban areas, drug dealers widely distributed crack in small single-hit quantities by recruiting large numbers of young distributors.¹⁰¹ Some crack cocaine dealers armed themselves with guns,¹⁰² and once some dealers acquired guns, many of their peers did as well.¹⁰³ It is in this context that cities like the District enacted restrictive firearms regulations to try to stem unacceptable levels of firearms-related deaths and injuries.

1. *The District of Columbia*

Gun violence is rampant in the District. From 1999 to 2005, there were 1,035 firearm homicides in the District, amounting to an approximate rate of 26 firearm homicide victims for every 100,000 individuals, a figure that is more than six times the overall national average.¹⁰⁴ Firearm-related

96. *Id.*

97. See Presentation by Lawrence W. Sherman, *Reducing Gun Violence: What Works, What Doesn't, What's Promising* (Apr. 5, 2000) at Nat'l Institute of Justice, Research Forum: Perspectives on Crime and Justice Lecture (Mar. 2001), available at <http://www.ncjrs.gov/pdffiles1/nij/184245.pdf>.

98. *Id.*

99. Columbia Univ., Office of External Affairs, Health Scis., *Jeffrey Fagan Compares Gun Violence Among Urban Youth To An Infectious Disease Epidemic*, COLUMBIA UNIV. NEWS, Mar. 6, 2000, available at <http://web.archive.org/web/200502/4220225/> <http://www.columbia.edu/cu/news/00/03/gunViolence.html>.

100. Sherman, *supra* note 97, at 75.

101. Alfred Blumstein, *Youth Violence, Guns, and the Illicit Drug Industry*, 86 J. OF CRIM. L. AND CRIMINOLOGY 30 (1995).

102. JOSEPH F. SHELEY & JAMES D. WRIGHT, *IN THE LINE OF FIRE: YOUTH, GUNS AND VIOLENCE IN URBAN AMERICA* (1995).

103. See David Hemingway et al., *Gun Carrying Among Adolescents*, 59 L. & CONTEMP. PROBS. 39-53 (1996). Furthermore, handgun suicide is even more of a threat in a densely urban environment, such as that of the District. Studies have established that "the more urban the environment, the more likely a handgun is to be the firearm of choice in a suicide." Sugarmann, *supra* note 90, at 36.

104. The national firearm death rate is 4.01 per 100,000. CDC, WISQARS, INJURY MORTALITY REPORTS, *supra* note 92.

homicide, in particular, is the leading cause of violence-related deaths for all individuals between 10 and 54 years old¹⁰⁵ and the leading cause of death altogether for individuals between 10 and 34 years old.¹⁰⁶ The vast majority of this violence is perpetrated with handguns—more than 80 percent of all homicides in the District of Columbia are committed with illegal handguns.¹⁰⁷

Although African Americans suffer from a disproportionate share of gun violence nationally, these disparities are significantly larger in the District. In 2005 alone, all but two of the 142 firearm homicide victims in the District, and all but six of the 154 firearm deaths overall, were African-American.¹⁰⁸ African Americans make up approximately sixty percent of the District's population, but comprise ninety-four percent of its homicide victims.¹⁰⁹ Between 1999 and 2005, African Americans in the District died from firearm use at a rate 14.9 times higher, and suffered from firearm homicide at a rate 24.7 times higher than did whites.¹¹⁰

2. *Chicago and Oakland*

As discussed above, total bans on handguns are relatively uncommon, but the municipalities that have enacted such bans did so in response to the uniquely high rates of gun violence in those cities. For instance, in Chicago, 75.4 percent of the murders committed in 2004 involved firearms, a rate that is more than ten percent higher than that of the nation.¹¹¹ Among all types of firearms, from 1982 to 1995, handguns were the most widely used firearm as a murder weapon in Chicago, responsible for nearly nine times as many homicides as were rifles and shotguns combined.¹¹² This violence is felt most acutely by Chicago's African-American community. Between 1991 and 2004, 76.4 percent of murders committed against African Americans in Chicago involved firearms, in

105. *Id.*

106. *Id.*

107. *D.C. Mayor Addresses Blow to Handgun Ban* (National Public Radio (NPR) broadcast Mar. 13, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=7867355>).

108. CDC, WISQARS, INJURY MORTALITY REPORTS, *supra* note 92.

109. D.C. DEP'T OF HEALTH, CENTER FOR POLICY, PLANNING, AND EPIDEMIOLOGY, STATE CENTER FOR HEALTH STATISTICS, RESEARCH AND ANALYSIS DIV., HOMICIDE IN THE DISTRICT OF COLUMBIA, 1995-2004, at 5 (Feb. 1, 2007), available at [http://doh.dc.gov/doh/lib/doh/services/administration_offices/schs/pdf/5yrs_homicides_1995-2004_\(final\).pdf](http://doh.dc.gov/doh/lib/doh/services/administration_offices/schs/pdf/5yrs_homicides_1995-2004_(final).pdf).

110. CDC, WISQARS, INJURY MORTALITY REPORTS, *supra* note 92. The vast majority of these deaths were the result of handgun violence. See *D.C. Mayor Addresses Blow to Handgun Ban*, *supra* note 107 (noting that 80 percent of homicides in the District are committed with handguns).

111. See MEGAN ALDERDEN & TIMOTHY LAVERY, CHI. POLICE DEP'T, 2004 MURDER ANALYSIS 56 (2004), available at http://www.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/04MurderRpt.pdf; CDC, WISQARS, INJURY MORTALITY REPORTS, *supra* note 92 (in 2004 number of homicide deaths was 17,357 and number of firearm homicide deaths was 11,624).

112. See CAROLYN REBECCA BLOCK & RICHARD L. BLOCK, HOMICIDES IN CHICAGO, 1965-1995 (1998), available at <http://www.icpsr.umich.edu/cgi-bin/SDA/NACJD/hsda?nacjd+06399-0001>.

contrast to less than half of murders committed against whites.¹¹³ Between 1965 and 1995, 35.5 percent of homicides committed against African Americans in Chicago involved non-automatic handguns.¹¹⁴

The city of Oakland has enacted a ban on “compact handguns,” although like Washington, D.C. it suffers from a flood of handguns from outside its jurisdiction.¹¹⁵ Like the District and Chicago, Oakland also has high rates of gun violence. And, as in the District and Chicago, African Americans in California suffer racial disparities in firearms-related deaths. From 1999 to 2005, whites in California had a firearm death rate of 9 per 100,000 people, while African Americans had a rate almost three times as high (24.38 per 100,000 people).¹¹⁶ The racial gap for firearm homicides was even wider; 20.86 per 100,000 for African Americans, or six times that of whites (3.58 per 100,000 people).¹¹⁷ During 2005, African Americans comprised only seven percent of California’s population but accounted for thirty-four percent of its firearm homicide victims.¹¹⁸

Generally speaking, those concerned with the welfare of communities of color should be supportive of robust efforts to curtail gun violence in those communities. But these statistics also make clear why city legislatures in places like Oakland and Chicago would enact restrictive firearms regulations. The modern problem of gun violence is not a problem felt equally across the nation. Cities like the District, Oakland, and Chicago face far worse levels of firearms-related violence than that experienced by the nation as a whole. In response, it is perfectly reasonable that the legislatures in those municipalities might seek to impose tougher restrictions on firearms than might be necessary in other locales.

C. *The Effectiveness of Handgun Bans and Other Firearms Regulations*

Stripped of context, the statistics cited above could be taken as evidence that restrictive firearms laws do not work. A closer look, however, strongly suggests that rates of firearm homicides and suicides might be even worse without the gun regulations in place in these cities. Urban environments have conditions and characteristics that make them especially prone to handgun violence, and while this means that rates of firearms violence tend to be higher in urban environments, it also means that these are exactly the types of areas that could most benefit from stringent firearm regulations. Indeed, the enactment of the handgun ban in the District thirty years ago was accompanied by an abrupt decline in firearm

113. See ALDERDEN & LAVERY, *supra* note 111.

114. See BLOCK & BLOCK, *supra* note 112.

115. See OAKLAND, CAL., MUNICIPAL AND PLANNING CODES §§ 9.36.400–440 (2007) (prohibiting “compact handguns”). See also Barbara Grady and Harry Harris, “Relaxation on gun control, unlicensed sales contribute to gun violence in Oakland,” OAKLAND TRIBUNE (June 25, 2008), available at http://ojdp.ncjrs.org/pubs/gun_violence/profile05.html.

116. CDC, WISQARS, INJURY MORTALITY REPORTS, *supra* note 92.

117. *Id.*

118. *Id.*

homicides in the District, but not elsewhere in the Metropolitan area.¹¹⁹ In the approximately eleven years after the law took effect, gun-related homicides decreased by twenty-five percent, and gun-related suicides decreased by twenty-three percent.¹²⁰ A comprehensive study of the District's ban concluded that alternative explanations appeared implausible, and the results of the study strongly indicated that the District's ban, rather than a general reduction in the crime rate, "reduced gun-related suicides and homicides substantially and abruptly."¹²¹ Although there was a rise in violent crimes in the District from 1980 to 1997, the entire nation experienced an increase in violent crimes during this period, largely due to the emergence of the crack cocaine market and related gang activity.¹²² Thus, as the study of the District's handgun ban concluded, "[i]t is reasonable to assume that the restrictions on access to guns in the [D]istrict continued to exert a preventative effect even as homicide rates were driven up by conflict over drugs and other factors."¹²³ Other studies have also linked the reduction of handgun sales to a reduction in homicide rates. For example, one study found that the 1990 Maryland law banning the sale of so-called "Saturday Night Special" handguns was associated with an approximately eight percent reduction in firearm homicide rates in Maryland, translating to about forty lives saved per year.¹²⁴

We acknowledge, of course, that the empirical evidence concerning the effectiveness of gun control laws is not unequivocal.¹²⁵ Nevertheless, the studies, on balance, tilt in favor of the conclusion that the District's handgun ban resulted in a decrease in gun-related homicides and suicides.¹²⁶ Thirty years after enacting the handgun ban, the District has the

119. Colin Loftin et al., *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENGLAND J. MED. 1615 (1991) [hereinafter "Loftin Study"].

120. *See id.* at 1617.

121. *Id.* at 1618, 1620.

122. *See* JAMES A. FOX & MARIANNE W. ZAWITZ, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf>; Loftin Study, *supra* note 119, at 1620.

123. Loftin Study, *supra* note 119, at 1620.

124. Daniel Webster et al., *Effects of Maryland's Law Banning "Saturday Night Special" Handguns on Homicides*, 155 AM. J. EPIDEMIOLOGY 406 (2002).

125. One study, for instance, has concluded that allowing citizens without criminal records or histories of significant mental illness to carry concealed handguns deters violent crimes. *See* John R. Lott et al., *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997). The Lott study also found that if the rest of the country had adopted right-to-carry concealed handgun provisions in 1992, at least 1,414 murders and over 4,177 rapes would have been avoided. *Id.*

126. For example, the findings of a separate study contradicted those of the Lott Study, concluding that the crack cocaine market had a greater impact in poor, urban areas, which are primarily located in states that do not have "shall-issue" laws (i.e. laws allowing concealed weapons permits to almost anyone who applies). Thus, the Lott Study attributed smaller crime increases in states with shall-issue laws to the enactment of those laws "when wholly separate forces were really the explanation." *See* JENS LUDWIG AND PHILIP J. COOK, *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* (2003), Chapter 8, *The Impact of Concealed-Carry Laws* 289. If one extends Lott's statistical model by five years, and applies it to the period in the mid-

lowest suicide rate in the nation.¹²⁷ The District has guns in only five percent of its homes, the lowest percentage in the nation.¹²⁸ The District has a lower suicide rate than that of any state in the United States, with just 33 suicides (a rate of 5.67 per 100,000 people) in 2005.¹²⁹ Approximately ten of these suicides were committed with a firearm.¹³⁰

Research from other parts of the country shows that the District's low suicide rate can be attributed at least in part to its handgun ban. In California, the leading cause of death for a person during the first year after a handgun purchase was suicide; handgun buyers were at more than a four-fold increased risk of suicide during that first year.¹³¹ Among members of a large health maintenance organization in the state of Washington, the purchase of a handgun from a licensed gun dealer was associated with an almost two-fold (1.9) increased risk of suicide.¹³² Studies on suicide have concluded that "[p]ublic policy initiatives that restrict access to guns (especially handguns) are associated with a reduction of firearm suicide and suicide overall"¹³³ Thus, restrictive firearms laws can constitute an effective tool for reducing both firearm homicides and suicides by limiting the availability and ownership of handguns. Even if handgun restrictions cannot eliminate handgun violence, it seems reasonable to conclude that, without such restrictions, handgun violence and its consequent racially disproportionate effects could worsen.

Of course, even apart from its apparent unconstitutionality, the District's ban on handguns was far from a perfect solution. Even though handguns were illegal to purchase in the District, the absence of regional regulations permitted guns to flow into the District from neighboring jurisdictions.¹³⁴ Lenient gun regulations in adjacent jurisdictions can limit the impact of local gun laws, as shown by a recent study of twenty-five cities across the continental United States, which concluded that the "potential benefits from comprehensive state gun control measures appear to be diminished by the lack of such controls in other states" because "proximity to people living in states with weak gun laws increased the propor-

1990s when high crime rates reversed, "suddenly shall-issue laws are associated with uniform *increases* in crime." *Id.* at 289-90 (emphasis in original).

127. CDC, WISQARS LEADING CAUSES OF DEATH REPORTS (1999-2005), *supra* note 91.

128. Catherine A. Okoro et al., *Prevalence of Household Firearms and Firearm-Storage Practices in the 50 States and the District of Columbia: Findings from the Behavioral Risk Factor Surveillance System, 2002*, 116 PEDIATRICS 370 (2005).

129. CDC, WISQARS INJURY MORTALITY REPORTS, *supra* note 92.

130. *Id.*

131. Garen J. Wintemute et al., *Mortality Among Recent Purchasers of Handguns*, 341 N. ENG. J. MED. 1583 (1999).

132. Peter Cummings et al., *The Association Between Purchase of a Handgun and Homicide or Suicide*, 87 AM. J. PUB. HEALTH 974 (1997).

133. *Youth Suicide by Firearms Task Force, Consensus Statement on Youth Suicide by Firearms*, 4 ARCHIVES OF SUICIDE RES. 89, 90 (1998) (emphasis added).

134. This situation may be changing. Following the shootings at Virginia Tech, the State of Virginia is considering legislative restrictions on gun sales. See Anita Kumar, *Kaine to Push Background Checks at Gun Shows*, WASH. POST, Jan. 9, 2008, at B5.

tion of a city's crime guns originating from out-of-state gun dealers."¹³⁵ For example, in the District, of the 991 successfully traced firearms that police recovered in 2006, "more than half originated in Maryland or Virginia and illegally made their way into the District."¹³⁶

Obviously, the influx of guns from neighboring jurisdictions with more permissive gun control laws will influence the effectiveness of attempts to regulate the availability of guns, but research shows what economists would predict: out-of-state, illegally imported guns carry higher prices, which—to some degree—reduces demand for these guns.¹³⁷ Thus, despite the availability of guns in neighboring jurisdictions, strict in-state gun regulations still likely produce some reduction of the demand for and the availability of guns.¹³⁸ Municipal firearms regulations, therefore, must be seen as one part of the solution to the unacceptable levels of injuries and fatalities from gun violence in many communities across the nation. More effective enforcement efforts and measures that promote greater economic and educational opportunity would also likely affect this problem; however, the fact that local firearm regulations alone do not solve the deep and serious problem of gun violence does not mean that such regulations have no ameliorative effect. States and localities must have flexibility to assess their public health and safety needs and to determine the best means of achieving them. Accordingly, the degree of appropriate gun regulation should vary from place to place.

This proposition—that the propriety of firearms regulations might vary from place to place—is more than just an observation about good policy. It also points in the direction of a rational Second Amendment jurisprudence, in which the determination of the reasonableness of a challenged firearms regulation could take into account the local context¹³⁹ in which the regulation is enacted. A test for constitutional validity that takes into account the characteristics and standards of a local community would not be unprecedented; the Court, for instance, considers such factors in its obscenity jurisprudence under the First Amendment.¹⁴⁰

135. D.W. Webster, J.S. Vernick, & L.M. Hepburn, *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 INJ. PREVENTION 184, 188 (2001).

136. METRO. POLICE DEP'T, WASH., D.C., ANNUAL REPORT ON GUNS IN THE DISTRICT OF COLUMBIA 5 (2006), available at http://mpdc.dc.gov/mpdc/lib/mpdc/publications/2006_AR_Guns_in_DC.pdf.

137. Philip J. Cook et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 72 (1995); see also *United States v. Cavera*, 550 F.3d 180, 196 (2d Cir. Dec. 4, 2008) (noting the "considerable support" for the proposition that "the existence and enforcement of strict gun laws in a particular jurisdiction is likely to make the cost of getting a gun in that jurisdiction higher than in a jurisdiction with lax anti-gun laws").

138. Cook, *supra* note 137, at 79.

139. Cf. *United States v. Cavera*, 550 F.3d at 198-209 (Raggi, J., concurring) (agreeing with the District Court's determination that "local circumstances" such as population density justify treating crimes involving firearms trafficking differently in different jurisdictions).

140. In the First Amendment context, the Court considers local community standards in determining the constitutional validity of a challenged obscenity regulation. See, e.g., *Miller v. California*, 413 U.S. 15, 30, 32 (1973) ("our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articu-

Whatever jurisprudence emerges from *Heller*, courts should recognize the diverse needs of individual localities, and should embrace—to the extent possible, and consistent with constitutional principles—the ability of local governments to enact a wide range of regulations on firearms.¹⁴¹

IV. THE CONGRESS OF RACIAL EQUALITY (CORE) ARGUMENT

Given the gun violence statistics described above, we strongly believe in affording municipalities wide discretion to enact firearms regulations as one tool to curtail firearms-related violence in the places are the most vulnerable—poor urban environments. The vastly disproportionate impact of firearms-related violence should be of particular concern for civil rights activists and lawyers. There is an alternative view, however, propounded by the Congress of Racial Equality (CORE) and by individuals such as Robert Cottrol and Raymond Diamond. This view, described below, invokes the history of firearms regulations and argues that today's gun control laws are motivated by racism, and serve primarily to disarm people of color in order to assuage the irrational fears of the white majority.¹⁴²

A. *The Racist History of Early Firearms Regulations*

According to Cottrol and Diamond, essentially all gun control laws are rooted in a majority population's attempts to reinforce political inequality. For example, early English gun control laws enforced strict class distinctions, and, from time to time, disarmed Catholics or Protestants, depending on which group was in power.¹⁴³ When the English Bill of Rights eventually declared a formal right to use arms for defensive pur-

lated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. . . . It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”)

141. A number of conservative jurists have raised these same issues. J. Harvie Wilkinson III, *Of Guns, Abortion, and the Unraveling of the Rule of Law* (Abstract), — VA. L. REV. — (2009), Forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265118. Judge Posner argues in favor of deference to local legislatures on gun control issues and the need for local variation:

[H]ad the Supreme Court upheld the District of Columbia gun ordinance, it would not have been outlawing the private possession of guns. It would merely have been leaving the issue of gun control to the political process. . . . Constitutional interpretations that relax rather than tighten the Constitution's grip on the legislative and executive branches of government are especially welcome when there are regional or local differences in relevant conditions. . . . *Heller* gives short shrift to the values of federalism, and to the related values of cultural diversity, local preference, and social experimentation.

Posner, *supra* note 12, at 34. Similarly, Wilkinson argues that “*Heller* encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot box and seek to press their political agenda in the courts.” Second Amendment enthusiasts, however, are already advancing an agenda that would effectively eliminate local discretion in firearms regulation. *See supra* note 13.

142. *See* CORE Brief, *supra* note 8.

143. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 321-23 (1991).

poses, it expressly limited that right to Protestants.¹⁴⁴ More recently in the United States, New York's 1911 Sullivan Law, requiring handgun owners to have a license issued at the discretion of the police, was enacted largely out of fear of immigrants.¹⁴⁵ Striking down a prohibition on openly carrying unlicensed pistols, the Supreme Court of North Carolina explained that such gun control would leave "the people . . . completely at the mercy of" "great corporations [who] under the guise of detective agents or private police, terrorize their employees by armed force."¹⁴⁶

More relevant to our discussion, Cottrol and Diamond argue that gun control in America served as a major tool in the oppression of African Americans. States varied in the gun control schemes that they imposed on African Americans, but many Southern states used regulations on firearms during the Nineteenth Century as a means to reinforce racial inequality. For example, although some Southern states such as Kentucky did not restrict African American access to weapons,¹⁴⁷ other states such as Texas forbade slaves from using firearms, and Mississippi denied firearms to both slaves and free African Americans.¹⁴⁸ Often, gun control laws restricted free African Americans more severely than slaves, who were presumed to be under the close supervision of their white masters. For example, an 1825 Florida statute provided for white citizen patrols to "enter into all negro houses and suspected places" to search for and seize weapons; but the following section of the same statute actually expanded the conditions under which slaves were allowed to carry firearms.¹⁴⁹ Several states restricted African-American access to firearms in the aftermath of the 1831 Nat Turner rebellion.¹⁵⁰ After the Civil War, restrictions on firearms were used to leave newly freed slaves powerless in the face of terrorism by the Klan. During discussions of anti-Klan legislation in 1871, Massachusetts Representative Benjamin F. Butler referred to outrages by "armed confederates" against African Americans. Butler explained that "in many counties they have preceded their outrages upon him by disarming him, in violation of his rights as a citizen to 'keep and bear arms' which the Constitution expressly says shall never be infringed."¹⁵¹

After the ratification of the Fourteenth Amendment in 1868, states experimented with various facially neutral schemes to achieve the same discriminatory ends. These laws were upheld on various constitutional challenges despite their discriminatory purposes. For example, some state supreme courts upheld restrictions on concealed weapons, a restric-

144. *Id.*

145. Robert J. Cottrol & Raymond T. Diamond, "Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity—the Redeemed South's Legacy to a National Jurisprudence?, 70 CHI.-KENT L. REV. 1307, 1333-34 (1995); CORE brief, *supra* note 8, at 21-22.

146. CORE brief, *supra* note 8, at 20 (citing *State v. Kerner*, 181 N.C. 574, 578, 107 S.E. 222, 225 (1921)).

147. Cottrol & Diamond, *supra* note 143, at 336.

148. *Id.* at 336-337.

149. *Id.*

150. *Id.* at 338.

151. CORE brief, *supra* note 8, at 14 (quoting H.R. Rep. No. 37-41, at 3 (1871)).

tion that was generally applied only against African Americans.¹⁵² Other courts held that the right to bear arms only applied to military grade weapons,¹⁵³ enabling states to pass laws that purported to regulate only the quality or type of weaponry permitted, but which often had the intended effect of limiting arms to individuals wealthy enough to afford particularly expensive weaponry.¹⁵⁴ Judges sometimes expressly noted the racially discriminatory purposes of gun control laws: e.g., “the race issue [in Southern states] has intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions.”¹⁵⁵ Another judge explained:

I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in the turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and sawmill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied.¹⁵⁶

The majority in *Heller* noted this history as well, observing that the disarming of African Americans after the Civil War concerned some members of Congress.¹⁵⁷ Commentators during the period often characterized these efforts to disarm African Americans as infringing on their right to keep and bear arms.¹⁵⁸

In 1876, just eight years after the Fourteenth Amendment’s ratification, the U.S. Supreme Court issued its opinion in *United States v. Cruikshank*,¹⁵⁹ which essentially gave a green light to the disarming of African Americans. Federal prosecutors charged William Cruikshank and others with violating the civil liberties of two African-American men by forcibly disarming them as part of a campaign to intimidate them and prevent them from voting. The Supreme Court held that, although Congress was authorized to enact legislation to enforce the Fourteenth Amendment, Congress could only prevent *states*, but not private *individuals*, from denying

152. Cottrol & Diamond, *supra* note 145, at 1329 (citing *Nunn v. State*, 1 Ga. 243 (1846); *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840); Cottrol & Diamond, *supra* note 143, at 355).

153. Cottrol & Diamond, *supra* note 145, at 1330-31 (citing *Fife v. State*, 31 Ark. 455 (1876)); *Wilson v. Arkansas*, 33 Ark. 557 (1878)).

154. Cottrol & Diamond, *supra* note 145, at 1333.

155. Cottrol & Diamond, *supra* note 143, at 355 (quoting *State v. Nieto*, 130 N.E. 663, 669 (Ohio 1920) (Wanamaker, J. dissenting)).

156. *Id.* (quoting *Watson v. Stone*, 4 So. 2d 700, 703 (Fla 1941) (Buford, J., concurring)).

157. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2810-11 (2008).

158. *Id.* (citing S. HALBROOK et al., FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 at 19 (1998); H.R. Rep. No. 30-39, pt. 2, at 229 (1866) (Proposed Circular of Brigadier General R. Saxton); Cong. Globe, 39th Cong. (1st Sess. 1866) at 362, 371 (Sen. Davis); H.R. Rep. No. 37-41, at 7-8 (1871) (Rep. Butler)).

159. 92 U.S. 542 (1876).

citizens equal protection of the law. As part of its rationale, the Court explained that the Bill of Rights placed restrictions only on the Federal Government,¹⁶⁰ and that its provisions did not protect an individual's rights from infringements by other parties, including state governments.¹⁶¹ After *Cruikshank*, African Americans were left with no remedy against deprivations nominally committed by individuals, but which states winked at and made no effort to prevent.

B. *African Americans and the Use of Firearms for Self-Defense.*

Cottrol and Diamond contrast nineteenth century gun control efforts in the South with the experience in Northern states, where, although severe racism was also present, African Americans were permitted to organize private militia for self-defense.¹⁶² African Americans in Providence, for example, formed the African Greys in 1821, and African Americans in Pittsburgh, although they did not form a specifically African American militia, joined an interracial peacekeeping force to stop an incipient riot.¹⁶³ In the 1841 Cincinnati riot, a White mob destroyed African American-owned property and then descended on the African American residential area, but were repulsed by armed African Americans.¹⁶⁴

Cottrol and Diamond also argue that the use of firearms for self-defense purposes is not a relic of the nineteenth century, but has served African Americans in more recent times. For instance, in spite of the emphasis on non-violence often associated with the 1960s civil rights movement, Cottrol and Diamond claim that some civil rights workers in the 1960's routinely carried handguns and relied on both personal arms and organized armed collective defense to ensure their safety, forming groups such as the Deacons for Defense and Justice.¹⁶⁵ Today, as the Supreme Court has held that the police have no constitutional obligation to prevent crime, Cottrol and Diamond posit that African-American communities suffering from high crime rates might be better served by providing for their own defense.¹⁶⁶

C. *Discriminatory Enforcement of Firearms Laws*

Cottrol and Diamond also see parallels between the variety of discriminatory gun controls developed during Reconstruction and contemporary gun licensing requirements and other restrictions. For instance, contemporary "Saturday Night Special" laws ban the sale of cheap, low quality handguns, but place no restrictions on the sale of more expensive firearms,¹⁶⁷ which again limits the access of many African Americans to fire-

160. This view has, of course, been rejected through the modern doctrine of incorporation. See *supra* text accompanying notes 63-65.

161. *Cruikshank*, 92 U.S. at 549-51.

162. Cottrol & Diamond, *supra* note 143, at 341-42.

163. *Id.* at 341.

164. *Id.* at 342.

165. *Id.* at 356-57.

166. CORE Brief, *supra* note 8, at 28 (citing *Bower v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)).

167. Cottrol & Diamond, *supra* note 145, at 1334.

arms. Moreover, because gun possession laws are difficult to enforce, Cottrol and Diamond argue that enforcement of such laws heightens the risk of unlawful searches and other civil liberties violations in minority communities: “when laws are difficult to enforce, enforcement becomes progressively haphazard until at last the laws are used only against those who are unpopular with the police.”¹⁶⁸

Generally speaking, Cottrol and Diamond are correct that some gun laws are disproportionately enforced against minorities and the poor.¹⁶⁹ For instance, a recent study by Bonita Gardner, a former Executive Assistant U.S. Attorney for the Eastern District of Michigan, found substantial racial disparities in the administration of Project Safe Neighborhoods (“PSN”), a broad \$1.5 billion federal program to curtail gun crimes.¹⁷⁰ Although PSN is comprised of various individual initiatives, its centerpiece involves the discretionary referral of certain firearms violations for federal prosecution in some high-crime jurisdictions, in order to maximize the sentences of defendants facing gun charges. In doing so, the object of PSN is to enhance the deterrent effect of criminal firearms laws and to facilitate plea bargaining.¹⁷¹

Although there are over twenty federal firearms crimes, nearly all of the referrals for federal prosecution pursuant to PSN involved one of two federal charges: “felons-in-possession” violations under 18 U.S.C. § 922(g) and possession of a firearm “during and in relation to any crime of violence or drug trafficking” under 18 U.S.C. § 924(c).¹⁷² PSN, therefore, does not target federal crimes concerning the “supply side” of the illegal firearms market perpetrated by gun merchants, such as illegal gun trafficking, selling to minors, or background check violations, but rather focuses on “demand side” firearms offenses that are perpetrated by the users of firearms.¹⁷³ This choice in emphasis, combined with PSN’s geographic focus on urban areas that are frequently home to communities of color,¹⁷⁴ yields substantial racial disparities: the vast majority of defendants—in some jurisdictions as high as 80-90%—prosecuted under PSN and its precursor, Project Exile, have been African-American.¹⁷⁵ These racial patterns have proven so substantial that they have been noticed by

168. See CORE Brief, *supra* note 142, at 34 (internal quotations and citations omitted).

169. *Id.* at 34.

170. Bonita R. Gardner, *Separate and Unequal: Federal Tough-On-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305 (Spring 2007).

171. *Id.* at 317.

172. *Id.* at 312.

173. PSN virtually ignores “supply side” firearms crimes despite the fact that enforcement efforts in this area could have tremendous effects, as “just over one percent of the federally licensed firearms dealers (“FFLs”) in America are linked to more than fifty-seven percent of the guns recovered in crime and traced.” *Id.* at 312-13. Gardner argues that PSN is ineffective to a large extent because it only targets street-level crime. *Id.* at 342.

174. PSN targets all thirty of the cities with the largest populations of African Americans, and forty-four of the fifty-four largest cities that are more than 30 percent African-American. *Id.* at 316.

175. *Id.* at 317 (noting that African Americans constitute 80 percent of the PSN referrals in the Southern District of New York, almost 90 percent in the Eastern District of Michigan, and over 90 percent in the Southern District of Ohio).

district courts.¹⁷⁶ Gardner concludes that PSN, and by implication any initiative to vigorously enforce demand-side criminal firearms laws in urban environments, inappropriately and unfairly singles out African-American communities.¹⁷⁷ These concerns are serious, and should give pause to anyone who considers criminal gun control laws to be unambiguously beneficial to communities of color.

V. RESPONSES TO THE CORE / COTTROL AND DIAMOND ARGUMENT

Although Cottrol and Diamond add an important perspective to the debate over gun control, the fact that early firearms regulations grew in part out of racist motives is simply not relevant to contemporary gun control laws, for several reasons. First, the context surrounding gun control laws has changed dramatically—early firearms restrictions were often adopted within the context of *de jure* segregation as a means of reinforcing racial inequality; contemporary gun control laws, by contrast, have typically been enacted with the participation and support of minority communities. Second, the proposition that a greater prevalence of firearms would improve public safety in minority communities is dubious at best. While there is admittedly mixed data on the effectiveness of gun control laws at reducing firearms-related violence, there is absolutely no reliable data showing an inverse relationship between rates of gun ownership and incidence of violent crime in urban areas. And finally, although we take seriously Cottrol and Diamond’s argument about racially disparate enforcement of facially neutral firearms laws, this point speaks more to the way that existing criminal firearms laws are enforced and the penalties that are sought by prosecutors, rather than to the *per se* desirability of such laws. A change in priorities with respect to the enforcement of criminal firearms laws, rather than the wholesale abandonment of such laws, is the proper response to concerns about racially disproportionate enforcement. Each of these points is discussed in further detail below.

A. Contemporary Firearms Regulations in the Context of the Racist History of Nineteenth Century Gun Laws

Cottrol and Diamond’s historical work is impressive, and the history it reveals is genuinely disturbing. The historical relationship between gun rights and racial justice, however, is not entirely one-sided. Some have

176. See, e.g., *United States v. Jones*, 36 F.Supp.2d 304, 312 (E.D. Va. 1999) (observing that “there is little doubt that Project Exile [the precursor to PSN] has a disparate impact on African American defendants”).

177. Gardner, *supra* note 169, at 342-43. We note that Gardner does not indicate the racial demographics of gun sellers who might be affected by a shift in emphasis to the enforcement of supply-side firearms laws. Gardner does note, however, that gun dealers are often substantially geographically removed from the urban communities where demand-side gun laws are ultimately enforced. For example, Georgia is a leading supplier of guns used in crimes to Alabama, Connecticut, Florida, Massachusetts, New Jersey, South Carolina, Tennessee, New York, North Carolina, Michigan, Pennsylvania, Washington, D.C., and Maryland. *Id.* at 313-14. While we cannot state so conclusively, we might presume that a shift to supply side enforcement would reduce the enforcement impacts on the African American communities currently affected by PSN.

argued, for instance, that the ratification of the Second Amendment itself was in large measure a concession to Southern states to preserve their autonomy vis-à-vis the national army, and to protect from federal interference their “well regulated militias,” a major function of which was the suppression of slave rebellion and the maintenance of slavery in the South during colonial and post-revolutionary times.¹⁷⁸ Given our country’s long history of slavery and segregation, it is perhaps unsurprising that many institutions—whether the well-regulated militia, or the nineteenth century system of gun control in the South—served at some point to maintain and promote racial inequality.

In being tarnished by racism, nineteenth century gun control laws were not in any sense unique—the nineteenth century in America was, after all, a period of slavery for sixty years, followed almost immediately by four decades of segregation. Racism infected many if not most of the institutions of the time. The 1870s, for instance, saw the birth of the labor movement in the U.S., and the earliest labor unions restricted membership on the basis of race and supported discriminatory government policies such as the Chinese Exclusion Act.¹⁷⁹ But the racist history of nineteenth century gun laws does not justify the conclusion that contemporary firearms regulations are therefore also racist in origin or intent, any more than the racist history of the early American labor movement compels the conclusion that contemporary trade unions are a tool of white supremacy.

The historical context has changed. The firearms regulations at issue in *Heller*, for instance, were enacted and enforced under different circumstances and for different purposes than the nineteenth century gun laws discussed by Cottrol and Diamond. Simply put, there is absolutely no evidence of similar discriminatory intent in the enactment of the District’s firearms laws. White terrorism of the sort inflicted by the Klan or lynch mobs no longer constitutes the primary form of violence committed against African Americans nationally or in the District.¹⁸⁰ And the District’s demographics and history belie the suggestion that its municipal firearms regulations are tools of white oppression or are motivated by irrational white prejudice.

Some background on the history of the District is instructive. Although slave codes applied, as Cottrol and Diamond point out, for a time in D.C. through the initial application of Virginia and Maryland law to the District,¹⁸¹ those laws are not related to the District’s current system of government and its contemporary firearms regulations. Starting in 1801, Congress permitted Georgetown, Alexandria, and Washington City to govern themselves with varying degrees of autonomy as independent cit-

178. See generally Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998).

179. See Elly Leary, *Crisis in the U.S. Labor Movement: The Roads Not Taken*, 57 MONTHLY REV. 2 (June 2005).

180. As acknowledged in Cottrol & Diamond, *supra* note 143, at 319.

181. CORE Brief, *supra* note 8, at 6-8.

ies within the District.¹⁸² In 1846, Alexandria reverted to Virginia.¹⁸³ In 1871, motivated at least in part by fear of the District's increasing African-American electorate, Congress reconfigured D.C. government to merge the remaining cities and to radically reduce home rule.¹⁸⁴

Some have argued that the District was denied home rule for over a century because of Congressional resistance to permitting a largely African-American city (after 1960, a majority African-American city) to govern itself.¹⁸⁵ In the early 1940s, for instance, the Senate District of Columbia Committee, which controlled the District, was chaired by Theodore "The Man" Bilbo, a Mississippi Senator who stated that "[w]hen once the flat-nosed Ethiopian, like the camel, gets his proboscis under the tent, he will overthrow the established order of our Saxon civilization,"¹⁸⁶ and further declared, "I call on every red-blooded White man to use any means to keep the niggers away from the polls[;] if you don't know what that means you are just plain dumb."¹⁸⁷ After the Senate finally refused to seat Bilbo in 1947, the Senate repeatedly passed home rule legislation for D.C., only to have the legislation die in the House District of Columbia Committee each time,¹⁸⁸ as the Committee was chaired during that period by the segregationist South Carolina Rep. John McMillan.¹⁸⁹ In 1973, however, the House Committee became chaired for the first time by an African American, Rep. Charles Diggs (D-MI),¹⁹⁰ and finally, on December 24, 1973, the Home Rule Act became law.¹⁹¹ The majority African American D.C. electorate soon elected an African American mayor and a City Council presided over by an African American Chairman.¹⁹²

182. Council of the District of Columbia, History of Self-Government in the District of Columbia, www.dccouncil.us/history; NAT'L ASS'N TO RESTORE PRIDE IN AMERICA'S CAPITAL, BACKGROUND BRIEFING REPORT, THE DISTRICT OF COLUMBIA AS A NATIONAL CAPITAL AND THE DISTRICT OF COLUMBIA AS A PLACE TO LIVE: A HISTORY OF LOCAL GOVERNANCE TO PRESENT DAY, available at <http://www.narpac.org/ITXGU03A.HTM> [hereinafter NARPAC].

183. Council of the District of Columbia, *supra* note 182; NARPAC, *supra* note 182.

184. *See* NARPAC, *supra* note 182.

185. *See* Interview of Eleanor Holmes Norton, Delegate to Congress for the District of Columbia, (Aug. 6, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/discussion/2007/08/02/DI2007080201351.html?tid=informbox>.

186. Robert L. Fleegler, *Theodore G. Bilbo and the Decline of Public Racism, 1938-1947*, J. MISS. HIST. 9 (quoting Senator Theodore G. "The Man" Bilbo).

187. *Id.* at 1 (quoting Senator Theodore G. "The Man" Bilbo).

188. *Id.* at 23-25; E. SCOTT ADLER, *WHY CONGRESSIONAL REFORMS FAIL: REFLECTION AND THE HOUSE COMMITTEE 197* (Chi. Press 2002). The Senate had finally had enough of Bilbo's particularly vocal racism. After the 1947 election but before the Senate's Democratic majority was replaced by Republicans, the Senate Special Committee to Investigate Senatorial Campaign Expenditures considered charges that Bilbo's racist threats had prevented African Americans from voting; the Committee voted 3-2, on strict party lines, to exonerate Bilbo. *See* Fleegler, *supra*, at 22-24. After the Republican majority took office in January, 1947, they, with significant Democratic support, refused to seat Bilbo. *See* Fleegler, *supra* note 167, at 24.

189. ADLER, *supra* note 188, at 197; NARPAC, *supra* note 182.

190. *See* Council of the District of Columbia, *supra* note 182; NARPAC, *supra* note 182.

191. D.C. CODE § 1-201.01 (2008).

192. Respectively, Walter Washington and Sterling Tucker. *See* NARPAC, *supra* note 182, at 16.

Passage of the Firearms Control Act was one of the first acts of the District Council after the establishment of home rule.¹⁹³ It was enacted by a majority African-American City Council,¹⁹⁴ which itself was elected by an overwhelmingly majority African-American electorate.¹⁹⁵ More recently, the District's gun laws have been enforced by a majority African-American Metropolitan Police Force,¹⁹⁶ which has been overseen by African-American Police Chiefs for twenty-eight of the thirty-three years since the gun control laws were passed.¹⁹⁷

The District's firearms regulations were not pushed through by a fearful, paternalistic, or deliberately oppressive minority. Polling data shows overwhelming (around 75 percent) support for the gun control laws among D.C. residents, both when the laws were enacted¹⁹⁸ and today.¹⁹⁹ In the 1975 survey, a large majority of both African Americans and whites supported the ban, with 66 percent of African Americans supporting a total ban on the sale of handguns, and 10 percent more supporting limits

193. The first version of gun control laws was introduced in the D.C. Council on February 11, 1975. Petition for Writ of Certiorari 99a, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). The final version was approved by the mayor on July 23, 1976. Petition for Writ of Certiorari 116a, *Heller*, 128 S. Ct. 2783 (No. 07-290).

194. See *infra* Appendix, Table 1.

195. Race and Ethnicity Demographics:

<i>a. In 2006</i>			
Location	White	African American	Total
United States	221,331,507	37,051,483	299,398,485
Washington, D.C.	200,395	322,105	581,530

U.S. CENSUS BUREAU, 2006 AMERICAN COMMUNITY SURVEY, http://factfinder.census.gov/servlet/DTable?_bm=Y&-geo_id=01000US&-ds_name=ACS_2006_EST_G00_&-redoLog=false&-mt_name=ACS_2006_EST_G2000_B02001.

<i>b. In 1970</i>			
Location	White	African American	Total
United States	177,748,975	22,580,289	203,211,926
Washington, D.C.	209,272	537,712	756,510

U.S. CENSUS BUREAU, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC ORIGIN, 1970 TO 1990, FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES, <http://www.census.gov/population/www/documentation/twps0056.html>.

196. Current Washington, D.C. Police Force Racial Demographics:

a.	African American:	2,415
b.	Caucasian:	1,152
c.	Total:	3,900

METRO. POLICE DEP'T, WELCOME TO WASHINGTON, D.C., http://dcpolice.jobs/diversity_statistics.aspx and <http://dcpolice.jobs/faqs.aspx#diversity>.

197. See *infra* Appendix, Table 2.

198. See Georgetown University, Press Release (April 8, 1975); Survey (conducted Feb. 24 – March 2, 1975) (on file with the Harvard Blackletter Law Journal). The survey is reported in *Has DC's Handgun Ban Prevented Bloodshed?*, CBS NEWS, Mar. 14, 2008, available at <http://www.cbsnews.com/stories/2008/03/14/supremecourt/printable3941010.shtml>.

Question: "A bill has been proposed that would outlaw the sale of handguns in the District. Do you agree, or disagree with this proposal?"

on the sale of handguns.²⁰⁰ In the District, at least, far from being a tool for oppression of African Americans by Whites, the handgun ban was a means chosen by an African-American electorate to prevent violence against its own members. Ironically, although Cottrol and Diamond characterize gun control laws as a racist imposition by a white majority, the *Heller* decision effectively silenced the democratic will of a majority African-American electorate.

Other municipalities that have or have had firearms regulations comparable to those of the District also feature demographics that belie a characterization of these laws as motivated by racist intent. Memphis, for example, is 61.4% African-American.²⁰¹ Similarly, Chicago²⁰² and Oakland²⁰³ are majority-minority cities with African-American pluralities. Of course, the mere fact that these cities²⁰⁴ have largely African-American

	Outlaw Sale	Allow Limited Sale	No Restrictions on Sale	Not Sure
	72%	8%	14%	6%
African American	66%	10%	17%	7%
White	84%	5%	7%	4%
Male	64%	11%	18%	7%
Female	79%	7%	11%	3%

199. See Washington Post Poll of D.C. Residents, Questions 29-30, WASH. POST, Jan.3-8, 2008, available at <http://www.washingtonpost.com/wp-srv/metro/politics/district/fentyoneyear/011308dcpoll.html>:

29. What do you think is more important - to protect the rights of Americans to own guns, or to control gun ownership?

	Protect rights	Control ownership	No opinion
1/8/08	18	79	3
4/22/07*	32	60	8

*National survey by the Pew Research Center

30. District law bans private handgun ownership and requires that rifles and shotguns kept in private homes be unloaded or have a trigger lock. Do you support or oppose this law? IF SUPPORT: Is that strongly or somewhat support? IF OPPOSE: Is that strongly or somewhat oppose?

	Support			-Oppose-			No opin.
	NET	Strongly	Somewhat	NET	Somewhat	Strongly	
1/8/08	76	60	16	23	8	15	1

200. Survey, *supra* note 197.

201. See U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: TENNESSEE (2000), http://www2.census.gov/census_2000/datasets/demographic_profile/Tennessee/.

202. See U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: CHICAGO (2000), <http://censtats.census.gov/data/IL/1601714000.pdf> (plurality as compared to non-Latino Whites or Latinos).

203. See U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: OAKLAND (2000), <http://censtats.census.gov/data/CA/1600653000.pdf>.

204. Of course, not all majority or plurality African-American cities have handgun bans. Baltimore, MD, for example, is 64.3% African-American, and has no such ban. U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: BALTIMORE (2000), <http://censtats.census.gov/data/MD/05024510.pdf>; BALTIMORE CITY CODE art. 19.59 (addressing weapons regulations). Detroit, Michigan, with an 81.6% African-American population, has no gun ban, but does have mandatory education and

electorates does not establish conclusively that the firearms regulations in those cities are free from invidious motives, or that they unequivocally serve the interests of African American communities. These demographics, however, cast doubt on the notion that restrictive municipal firearms regulations are motivated by racist intent. Whatever merits an individual right to use firearms for private purposes may have, it is simply inapposite to compare the District's firearms regulations to Jim Crow. Unlike early firearms restrictions, which were adopted during a time of widespread African American disenfranchisement, most contemporary firearms laws were adopted in the context of greater minority participation in the electoral process. The nation's most stringent municipal firearms regulations have been adopted in majority-minority jurisdictions, generally with the overwhelming support of minority constituents. Rather than a means of perpetuating racial inequality, most contemporary gun control laws are a product of the exercise of political power by minority communities.

B. *The Efficacy of Gun Ownership for Self-Defense Purposes*

Cottrol and Diamond's point that minority communities might be better served by arming themselves for self-defense can be interpreted in at least two ways. First, Cottrol and Diamond could simply be suggesting that African Americans living in crime-ridden urban environments might be better off carrying their own handguns than relying on an ineffectual police force. Ultimately, such a recommendation is premised on a simple re-packaging in racial terms of the suspect notion that there might be an inverse relationship between rates of gun ownership and crime. While there will of course always be some debate as to whether gun ownership might deter or prevent crime, it is indisputable that criminal gun use is far more common than the successful lawful use of guns in self-defense.²⁰⁵ According to the National Crime Victimization Survey (NCVS), there were on average 64,615 self-defensive uses of guns per year by crime victims from 1987 to 1990, compared with more than 800,000 persons victimized by an offender with a gun in 1990.²⁰⁶ Moreover, estimates of defensive firearms uses cited by gun control opponents may significantly overestimate the number of self-defense encounters that occur.²⁰⁷ For an

licensing. U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: DETROIT (2000), <http://censtats.census.gov/data/MI/1602622000.pdf>; DETROIT CITY CODE § 38-10-2. This diversity of schemes illustrates the ability of localities to tailor regulatory schemes to their particular values and problems.

205. DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 58-59, 64-78 (2004).

206. David McDowall & Brian Wiersema, *The Incidence of Defensive Firearm Use by US Crime Victims, 1987 Through 1990*, 84 AM. J. PUB. HEALTH 1982, 1983 (1994).

207. Telephone surveys have estimated that firearms are used as often as 2.5 million times per year to prevent an actual or threatened criminal attack. See Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995). Telephone surveys may be, however, an ill-suited methodology for estimating defensive gun use, potentially overestimating estimates by orders of magnitude. See David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430 (1997); PHILIP J. COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY ON FIREARMS OWNERSHIP AND USE

individual, keeping a handgun in a home makes it far more likely that someone who lives in that home will die from homicide or suicide.²⁰⁸ Conversely, the notion that high rates of gun ownership may deter crime²⁰⁹ has been thoroughly debunked.²¹⁰

Second, Cottrol and Diamond may be arguing that efforts to enhance public safety might be most effective via organized efforts among groups of private citizens. Cottrol and Diamond acknowledge that violent self-defense efforts are generally ineffective on an individual level but must be organized²¹¹—an ironic concession for advocates of the individual rights interpretation of the Second Amendment.²¹² Yet even the historical examples cited by Cottrol and Diamond of organized efforts among private citizens to use violent means of self-defense yielded only limited or short-term success. In Chester County, South Carolina, for example, an African-American militia patrolled roads that were regularly terrorized by Klansmen, and while the militia successfully repulsed a series of increasingly severe Klan assaults in 1871, ultimately, hundreds of white men from as far away as North Carolina, including Confederate veterans, succeeded in driving off the militia, whom the sheriff eventually placed in protective custody. In the end, the Klan was free to continue its raids essentially unfettered.²¹³ Similarly, in the Cincinnati Riots of 1841, armed African Americans defending themselves from a White mob were eventually overwhelmed once the mob procured heavier armament (a cannon).²¹⁴ And during Reconstruction, efforts to suppress white supremacist violence were only successful when the government—in that case, the Union Army—played an active role in peacekeeping.²¹⁵

71 (1996). In fact, many purportedly “defensive” uses of guns reported in surveys may in fact reflect aggressive or even illegal conduct by the respondent. See David Hemenway et al., *Gun Use in the United States: Results from Two National Surveys*, 6 *INJ. PREVENTION* 263 (2000).

208. Arthur L. Kellerman et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, *supra* note 82, at 1084; Arthur L. Kellerman et al., *Suicide in the Home in Relation to Gun Ownership*, 327 *NEW ENG. J. MED.* 467 (1992).

209. See, e.g., John R. Lott & David Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 *J. LEGAL STUD.* 1 (1997).

210. See, e.g., Ian Ayres & John J. Donohue III, *Shooting Down the ‘More Guns, Less Crime’ Hypothesis*, 55 *STAN. L. REV.* 1193 (2003); Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 *J. LEGAL STUD.* 209 (1998).

211. See Cottrol & Diamond, *supra* note 143, at 341, 353-54.

212. The concession is particularly ironic because *Heller* only protects genuinely private uses of arms, expressly declaring that organized groups of arms-bearers may be prohibited. Attempting to distinguish *Heller* from *Presser v. Illinois* (1886), Justice Scalia reasoned that *Presser* merely “held that the right to keep and bear arms was not violated by a law that forbade ‘bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law.’ This does not refute the individual-rights interpretation of the Amendment; no one supporting that interpretation has contended that States may not ban such groups.” *District of Columbia v. Heller*, 128 S.Ct. 2783, 2813 (quoting *Presser v. Illinois*, 116 U.S. 252, 264-265 (1886)).

213. ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* 356 (1971).

214. Cottrol & Diamond, *supra* note 143, at 342.

215. David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 *TUL. L. REV.* 387, 485 (1999).

There may be something to be said for Cottrol and Diamond's instinct that if local governments cannot provide sufficient protection for minority communities, perhaps those communities ought to take matters into their own hands. Empirically, however, it is simply not the case that higher levels of gun ownership have translated into less crime. The fact of high levels of firearms-related crime in urban areas highlights the need for more effective anti-crime efforts by state and local governments, not for armed vigilantism. And while gun control efforts may seem paternalistic to some, the paternalism charge is more appropriately directed toward those who would use the courts to displace firearms regulations adopted by democratic institutions.

C. *Disproportionate Enforcement*

Cottrol and Diamond's final point, concerning the disproportionate impact of criminal firearms laws on African Americans, is perhaps the most serious and troubling concern that they raise. Even if, as we posit, the majority of criminal firearms laws, including municipal handgun prohibitions, are not motivated by invidious intent, the possibility that such laws could be or are in fact enforced in a racially discriminatory manner should give pause to civil rights advocates. We examine these concerns in more detail below, but conclude that such concerns do not go to the desirability of criminal firearms laws *per se*, but rather to how such laws are enforced. On balance, municipal regulations on handguns advance the interests of minority communities.

As discussed above, there are strong reasons to be concerned about the discriminatory enforcement of some criminal firearms laws. There are, however, at least three possible responses to such concerns. First, these concerns do not go to the *per se* desirability of most criminal firearms laws, but rather to how such laws are enforced. Certainly, with respect to any criminal laws, there is something extremely troubling about, for example, the widespread geographic and racial disparities exhibited by the administration of programs such as Project Safe Neighborhoods ("PSN"). More specifically, the racial disparities exhibited in programs like PSN point to the failure of pursuing demand-side firearms prosecutions while failing to enforce supply-side firearms laws vigorously. There is also reason to doubt the efficacy of the central piece of PSN, as at least one statistical study has shown that federal referrals for prosecution of firearms charges—and the enhanced punishments such referrals entail—have little deterrent effect on the rate of gun crime.²¹⁶ But these observations merely call into question how the laws on the books are enforced, and how resources are allocated in the enforcement of those various laws. The fact that enhanced penalties for defendants charged with certain gun

216. See Andrew V. Papachristos, Tracey L. Meares, & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago* 40-41 (U. Chicago L. & Econ., Olin Working Paper No. 269, Columbia Pub. L. Research Paper No. 05-97), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=860685. However, as discussed below, we note that the Papachristos study does show that certain aspects of PSN—other than federal prosecutions—have had measurable effects on rates of firearms violence in Chicago. See *infra* text accompanying notes 220-223.

crimes may result in troubling racial disparities does not compel the conclusion that laws such as the District's handgun prohibition are undesirable in themselves. Nor does it exclude the possibility that, as discussed below, other strategies to enforce criminal firearms prohibitions or to encourage compliance with such laws could be more effective.

Second, to the extent that the enforcement of criminal firearms laws occurs in a racially discriminatory manner, the most appropriate avenue to challenge such action is the traditional vehicle for rooting out racial discrimination: the Equal Protection Clause of the Fourteenth Amendment, or, where the actions of the federal government are at issue, the Due Process Clause of the Fifth Amendment. Wherever there is a colorable assertion that any criminal laws are racially discriminatory in origin or application, the Fifth and Fourteenth Amendments provide effective mechanisms for rooting out such discrimination.²¹⁷ Indeed, in response to the racial disparities in the administration of PSN, Gardner does not advocate repeal of federal criminal firearms laws, but rather suggests formulating some sort of Equal Protection challenge to the federal referrals of firearms prosecutions pursuant to PSN.²¹⁸

Third, while concerns about the disparate enforcement of criminal firearms laws are serious and legitimate, ultimately we must acknowledge that there may in fact be some tradeoff: there may be some adverse penal consequences that will accompany any greater efforts to enforce demand-side firearms laws in urban areas. As we have argued above, the modern scourge of handgun violence is, generally speaking, largely an urban problem.²¹⁹ We agree with Gardner that there is little justification for treating *defendants* differently based on geography—as evidence

217. See *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (administration of a criminal law may be “directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive” that the system of enforcement and prosecution amounts to “a practical denial” of equal protection of the laws) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)); see also *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in the selection of the grand jury violates Equal Protection); *Batson v. Kentucky*, 476 U.S. 79 (1986) (invalidating the use of race as a factor in the exercise of peremptory challenges).

218. Of course, there are substantial difficulties in formulating an equal protection challenge to PSN, which Gardner acknowledges. Generally speaking, an Equal Protection claim requires proof of discriminatory intent, namely, that the “decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.” *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (internal quotation marks omitted). *McCleskey* ended the notion that statistics showing the overall discriminatory effect of the enforcement of a particular law or the imposition of a particular penalty could be actionable on Equal Protection grounds, and held that an Equal Protection claim can only be made where there is some proof of discriminatory purpose in an individual case. See *id.* at 292-93, 296-97. As a way around *McCleskey*, Gardner proposes an Equal Protection challenge premised on the notion that the geographic focus on urban areas in the administration of PSN constitutes a proxy for race. Gardner, *supra* note 169, at 334-37 (comparing the geographical line-drawing for prosecutorial decisions to impermissible racial gerrymandering). Gardner argues that “geographic line-drawing can, under certain circumstances, be considered tantamount to racial line-drawing, and constitute a constitutionally-impermissible classification.” *Id.* at 337.

219. See *supra* text accompanying notes 97-103.

shows that the enhanced punishments meted out under PSN have had little deterrent effect²²⁰—but there may be a strong reason to enact certain *regulations*—such as enhanced restrictions on handgun registration or usage—in some areas (e.g., cities), but not necessarily in others (e.g., rural areas, where handguns do not pose as much of a danger). Such municipal prohibitions are the types of laws most likely to be immediately affected by *Heller*.

While we disagree with the punitive approach embodied in the federal referrals under PSN, we also note that PSN consists of several other strategies to combat gun violence, including enhanced efforts to seize illegally-owned guns, and public outreach programs known as “offender notification forums.”²²¹ One preliminary study by Papachristos, Meares, and Fagan found that the combination of these different strategies has had profoundly positive effects in Chicago, concluding that PSN was largely responsible for a 35% drop in the homicide rate in the precincts where PSN was implemented.²²² While much of this success was due to PSN’s community-based efforts to change social norms about gun violence, at least some of this success could be attributed to law enforcement techniques: the Papachristos study found that the firearms homicide rate for a police beat dropped up to 18% for every 100 guns recovered.²²³

We certainly do not endorse the unduly harsh and disproportionate sentences meted out via the federal referrals under PSN. But we accept that there may be some adverse penal consequences as a result of more vigorous efforts to enforce gun laws. The authority to make the tough decisions regarding those tradeoffs, however, should rest with the very communities that are themselves forced to deal with both the consequences of gun violence and the effects of police enforcement. In acknowledging the racially disproportionate effects of the enforcement of many criminal firearms laws, we should not get sidetracked from the real issue at the heart of the *Heller* decision: whether municipalities should have the authority to decide for themselves what sorts of firearms regulations are appropriate in their own communities.

220. See Papachristos et al., *supra* note 216, at 40-41. *But see* United States v. Cavera, 550 F.3d at 200-09 (2d Cir. Dec. 4, 2008) (Raggi, J., concurring) (agreeing with district court’s determination that the heightened risks posed by gun trafficking in densely-populated areas justifies an upward departure from the federal sentencing guidelines for a defendant convicted of firearms trafficking crimes that affect urban environments). We note that *Cavera* concerned violations of firearms trafficking laws, and that, as a policy matter, we do not endorse an application of enhanced penalties to demand-side firearms violations.

221. Offender notification forums are bi-monthly meetings, attended by community members and law enforcement personnel, to which offenders with a history of gun violence and gang participation were invited. The meetings involved explanations of the consequences of subsequent gun violations for repeat offenders, presentations by ex-offenders who have managed to avoid repeat offenses, and discussions of the choices that offenders can make in order to avoid re-offending, including information regarding various social services and community programs in areas such as substance abuse assistance, temporary shelter, job training, mentorship and union training, education and GED courses, and behavior counseling. *Id.* at 10-12.

222. *Id.* at 2, 37-40.

223. *Id.* at 40.

In some sense, this debate over the propriety of firearms laws echoes the debate over criminal procedure initiated by Dan Kahan and Tracey Meares.²²⁴ Generally speaking, efforts to enforce criminal laws will always involve some sort of tradeoff between civil liberties and public order. The revolution in criminal procedure brought about by the Warren Court was driven largely by the unspoken premise that this tradeoff had been made unfairly—that, due to “institutionalized racism,”²²⁵ “communities could not be trusted to police their own police.”²²⁶ The question that Kahan and Meares pose, however, is whether that premise is still true today to such an extent that we should generally be suspicious of vigorous law enforcement efforts in urban communities. We would argue analogously that, although some early firearms restrictions were undoubtedly motivated by invidious intent, today’s municipal firearms regulations have been adopted with the support of communities of color, and therefore should not be treated with the same level of skepticism that we might normally accord criminal laws that have some racially disproportionate impacts.

Kahan and Meares were principally concerned with “community policing” law enforcement practices, for instance, (a) discretionary policing efforts such as the vigorous enforcement of anti-loitering laws; and (b) generalized practices such as warrantless weapons searches in public housing developments. While the general thrust of Warren-era criminal procedure doctrine might counsel skepticism towards such practices, Kahan and Meares note that the fundamental premise behind such skepticism—that racism is at the root of such aggressive police practices—might no longer hold true:

Whereas in the 1960s such strategies were being used to reinforce the exclusion of minorities from the nation’s political life, today are being adopted at the behest of those same groups, whose political representatives see them as essential to combating inner-city crime. Although civil liberties groups purport to be representing inner-city residents generally when they challenge community policing strategies, their lawsuits are often opposed by inner-city residents themselves.²²⁷

The Warren-era revolution in criminal procedure was motivated in part by the fact that this tradeoff between civil liberties and public order was being made without the participation of minority communities and that the civil liberties costs were being unfairly imposed upon those communities. If today, by contrast, controversial law enforcement practices are being adopted by or with the consent of those communities themselves, then such skepticism might not be warranted:

224. See Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998).

225. *Id.* at 1156.

226. *Id.* at 1153.

227. *Id.* at 1160. Kahan and Meares note that, today, in urban municipalities, “African-American citizens are no longer excluded from the political process, and in fact exercise significant power in the nation’s inner-cities. They are *using* that power to obtain more effective law enforcement.” *Id.* at 1167.

If the coercive incidence of a particular policy is being visited on a powerless minority, the theory requires courts to make an independent assessment of whether the order benefits outweigh the liberty costs. . . . But when a community can be seen as *internalizing* the coercive incidence of a particular policy, courts are much less likely to second-guess political institutions on whether the tradeoff between liberty and order is worthwhile. This explains the deference courts afford to *generally applicable laws* . . .²²⁸

At bottom, Kahan and Meares propose that we evaluate the civil liberties costs imposed by law enforcement efforts according to a process theory of democracy. Where law enforcement efforts are adopted without the input of minority communities and where those communities are made to bear the brunt of those practices, skepticism is warranted. But where the minority community itself is the author of such enforcement efforts, such skepticism is not justified. This solution may seem unsatisfying in some respects; after all, shouldn't the principles distinguishing what constitutes a permissible police practice from what does not be unchanging and universal? Yet the only alternative to analyzing law enforcement efforts according to a democratic process theory is to substitute one's own judgment for that of the community that has adopted the practices at issue. That might be warranted where the political process is closed off to racial minorities, but not if those minorities have an opportunity to participate, or even control the process itself.

Similarly, we contend that those concerned with civil liberties and the racially disproportionate impacts of criminal firearms laws should not treat the kinds of laws that will be affected by *Heller*—namely, municipal laws that regulate certain types of weapons—with skepticism. As noted above, the District's handgun ban was adopted shortly after the District, a majority-minority city, was finally granted home rule. It was adopted not in the context of the *exclusion* of African Americans from political life, but rather as a direct consequence of the exercise of political power *by* African Americans. To argue that the District's firearms laws are suspect because of their adverse consequences for civil rights is to substitute one's own judgment on that matter for that of the District's average citizens—the majority of whom are African-American.²²⁹

This is not to say that urban residents or minority citizens can never be wrong about the proper tradeoff between security and liberty.²³⁰ But in

228. *Id.* at 1172. Cf. Posner, *supra* note 12, at 34 (“The proper time for using loose construction to enlarge constitutional restrictions on government action is when the group seeking the enlargement does not have good access to the political process to protect its interests . . . like gun advocates . . . do”).

229. Accord Kahan & Meares, *supra* note 224, at 1177 (“The civil libertarians and judges who maintain that the average inner-city resident is not competent to make that judgment are necessarily saying that *they* are.”). Even Project Safe Neighborhoods, in its Chicago iteration, was developed as part of a coordinated effort between law enforcement, other government bodies, and various community-based organizations. See Papachristos et al., *supra* note 216, at 9.

230. Witness, for instance, the initial support of the Congressional Black Caucus for federal sentencing disparities with respect to crimes involving crack on the one hand and powder cocaine on the other. See, e.g., Randall Kennedy, *Is Everything Race?*,

choosing whether to accord deference to a particular viewpoint on what constitutes the proper tradeoff in urban communities, it seems reasonable to give deference to the views of the average inner-city resident over those of the Second Amendment civil libertarian.²³¹ Generally speaking, urban crime patterns constitute “a condition that is itself both a vestige of racism and a continuing barrier to the integration of African Americans into the social and economic mainstream.”²³² As discussed previously, the impacts of these crime patterns are felt overwhelmingly by African Americans.²³³ While we acknowledge the racial discrimination that occurs in the context of enforcing many criminal laws of all kinds, given the ravaging effects of gun violence in African American communities and the support for laws such as handgun bans in urban areas, it almost seems perverse to single out for condemnation municipal firearms laws adopted by or with the support of African American communities. There is something condescending about the suggestion that communities of color that adopt stringent firearms regulations have somehow been duped into supporting racist policies. The more reasonable view is that the citizens of cities like the District of Columbia are the best-situated decision makers to weigh the racially disproportionate effects of both firearms-related violence and the enforcement of criminal firearms laws.

CONCLUSION

Assuming that its ruling will be extended to non-federal actors, *Heller* represents a significant challenge to communities of color, and to everyone concerned with or affected by handgun violence. The United States’ rate of firearms violence, which vastly outstrips that of any other developed nation, is already heavily concentrated in urban municipalities, and

THE NEW REPUBLIC, Jan. 1, 1996, at A18 (noting that “eleven of the then twenty black members of the Congress supported” the 1986 Anti-Drug Abuse Act, which codified the infamous 100-to-1 crack to powder cocaine sentencing disparity); Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FL. ST. U. L. REV. 935, 943 n.59 (2001) (citing Stephen Breyer, *Federal Sentencing Guidelines Revisited, An Address Before the University of Nebraska College of Law* (Nov. 18, 1998)), in 11 FED. SENTENCING REP. 180, 180 (1999) (noting that a majority of members of the Congressional Black Caucus supported mandatory minimum sentences for drug crimes in the 1980’s).

231. See Kahan & Meares, *supra* note 224, at 1177 (“The most obvious reason to credit the average inner-city resident’s assessment of the new community policing is that she is the one whose interests are most directly affected” by both the heightened risk of crime victimization and the “pinch” of criminal law enforcement.).

232. *Id.* at 1154. See also *id.* at 1163 (“Well into the 1960s, white political establishments withheld effective law enforcement from minority communities at the same time that they used the police to oppress them. Because crime, through a variety of social mechanisms, tends to reinforce itself, the high crime rates that afflict minority communities today are directly related to this historical under-enforcement of criminal law. Indeed, because crime disrupts so many social institutions, many African-American citizens see rampant crime as one of the most substantial impediments to improving their economic and social status. This sentiment translates into a demand within the African-American community for higher levels of law enforcement.”).

233. See *supra* text accompanying notes 91-96.

any weakening of firearms regulations in those areas could have devastating consequences.

To be sure, the history of early firearms regulation is tainted by this country's history of slavery and Jim Crow. Even today, many efforts to enforce criminal firearms laws have the effect of perpetuating racial inequalities. The question, however, is whether these disparities counsel a reevaluation of criminal firearms laws. We conclude that they do not, because such disparities go to the manner in which criminal firearms laws are enforced and to our enforcement priorities, not to the desirability of gun control generally. While staunch civil libertarians may argue to the contrary, we conclude that, as urban dwellers are the overwhelmingly disproportionate victims of firearms-related violence in this country, citizens living in a given city are the best judges of whether, on balance, certain firearms regulations are desirable in that city. The Court's ruling in *Heller* is ominous because it threatens to make federal judges, and not ordinary citizens in urban areas, the decision makers as to what sorts of firearms regulations are reasonable.

APPENDIX

Table 1: Race & Gender of D.C. City Councilors in 1976

Name	Term of Service on Elected City Council	Race & Gender
Arrington Dixon <i>See Keith Boykin, The Black Superdelegates: A guide to the 100+ African Americans Who May Decide the Election, THE DAILY VOICE, May 12, 2008, available at http://thedailyvoice.com/voice/2008/05/the-black-superdelegates-000555.php.</i>	1974-1982	African American Male
Marion Barry <i>See Kira Marchenese and Sascha Segan, Marion Barry: Making of a Mayor, WASH. POST, May 28, 1998, available at http://www.washingtonpost.com/wp-srv/local/longterm/library/dc/barry/barry.htm.</i>	1974-1978, 1992-1994, 2004-present	African American Male
David Clarke <i>See David Clarke, 53; Led City Council in Washington, THE N.Y. TIMES, Mar. 29, 1997, available at http://query.nytimes.com/gst/fullpage.html?res=9C05E7DC133AF93AA15750C0A961958260.</i>	1974-1996	White Male
Rev. Douglas Moore <i>See RON RAMDIN, MARTIN LUTHER KING, JR., 59 (2005) http://books.google.com/books?id=GXC0pCB13BYC&printsec=frontcover#PPA59,M1.</i>	1974-1978	African American Male
Nadine Winter <i>See James Wright, Black Women Absent on New District of Columbia Council, THE AFRO-AMERICAN NEWSPAPERS, Sept. 28, 2006, available at http://news.newamericamedia.org/news/view_article.html?article_id=3d181420c1815665e3c73e964df4efbe.</i>	1974-1991	African American Female
Willie Hardy <i>See GILBERT HAHN, JR, THE NOTEBOOK OF AN AMATEUR POLITICIAN: AND HOW HE BEGAN THE D.C. SUBWAY, 13 (2002). http://books.google.com/books?id=6mZWVFsxFg8C&pg=PA13&lpg=PA13&dq=%22willie+hardy%22+%26+district+of+columbia+%26+city+council+source=web&ots=KVlo7QBhj&sig=w0zP60JsQzrZ4x2roUhJXejiGuU&hl=en&sa=X&oi=book_result&resnum=1&ct=result#PPA13,M1</i>	1974-1981	African American Female
John Wilson <i>See Frank Lynn, A Congressman Gets Entangled in Rent Dispute, THE N.Y. TIMES, July 17, 1981, available at http://query.nytimes.com/gst/fullpage.html?res=9A05EFD91F38F934A25754C0A967948260&sec=&spn=&pagewanted=all.</i>	1974-1993	African American Male
Wilhelmina Rolark <i>See Sonsyrea Tate, Rev. Joseph Lowery and Marion Barry to Speak at the Funeral of Civil Rights Activist and Attorney Wilhelmina J. Rolark, THE WASH. INFORMER, Feb. 16, 2006, available at http://www.washingtoninformer.com/A1RolarkDies2006Feb16.html.</i>	1976-1993	African American Female

Polly Shackleton**1974-1986****White Female**

See Interview with Stephen J. Spingarn, Attorney, U.S. Treasury Dept., 1934-41; Asst. to the Attorney General of the United States, 1937-38; Special Asst. to the Gen. Counsel, Treasury Dept., 1941-42; Comdg. Officer, 5th Army Counter Intelligence Corps, 1943-45; Asst. Gen. Counsel, Treasury Dept., 1946-49; Alternate Member, President's Temp. Comm. on Employee Loyalty, 1946-47; Dep. Dir., Office of Contract Settlement, 1947-49; Asst. to the Special Counsel of the President, 1949-50; Administrative Asst. to the President, 1950; and Commissioner, Federal Trade Commission, 1950-53, in Washington, D.C. (Mar. 21, 1967). <http://www.trumanlibrary.org/oralhist/sping2.htm>.

Sterling Tucker**1974-1980****African American Male**

See JOAN STEINAU LESTER, *FIRE IN MY SOUL: THE LIFE OF ELEANOR HOLMES NORTON*, 249 (2004). http://books.google.com/books?id=ASUqv7f5yKsC&pg=PA249&lpg=PA249&dq=%22sterling+tucker%22+%26+district+of+columbia+%26+city+council+black&source=web&ots=XN_GjgN45J&sig=BDIMQKNlsagN3gy3WYijS5AGiKk&hl=en&sa=X&oi=book_result&resnum=6&ct=result.

Julius Hobson**1974-1977****African American Male**

See Catherine Maddison, Panel on Perspectives on African-American Protests, Politics, and Inter-Racialism: Beyond Black Power: African American Protest and Politics, 1965-1975 (Nov. 8, 2005), available at <http://www.sasa.org.uk/papers/publication/catherinemaddison.pdf>.

William Spaulding**1974-1987****African American Male**

National Visionary Leadership Project: Visionary Heritage Fellows Program Conference 2007, <http://www.visionaryproject.org/nvlpmembertier/edoutreach1/vhfponference07.asp>; see also Valca Valentine, *D.C. Constituents, Colleagues Honor Ex-Council Member; Good to be Thanked, Spaulding Replies*, *The Wash. Post*, Mar. 9, 1987, at D1.

Rev. Jerry A. Moore**1974-1984****African American Male**

Washington Afro-American Staff, *Ministers Endorse Schwartz for Mayor*, *WASH. AFRO-AMERICAN*, Oct. 23, 1998.

Table 2: Race & Gender of Metropolitan Police Chiefs

The following table indicates each Chief of the Metropolitan Police Department since Burtell Jefferson, the first African-American Police Chief; their dates of service; race; and gender. For a list of names and dates of service, see Metropolitan Police Department: Police Chiefs – Past and Present, http://mpdc.dc.gov/mpdc/cwp/view,a,1230,q,540347,mpdcNav_GID,1529,mpdcNav,—31458—.asp. A specific citation for the race and gender of each Chief is listed after each entry in the table below.

Name	Dates of Service	Race & Gender
Cathy L. Lanier <i>See Allison Klein & Sari Horwitz, Fenty's Pick for Police Chief Has Made a Swift Ascent," WASH. POST, Nov. 21, 2006, at A21.</i>	Jan. 2007 – present	White woman
Charles H. Ramsey <i>See Joy Bennet Kinnon, Top black cops: African-American chiefs take the helm in metropolitan America, EBONY, Oct. 1998, available at http://findarticles.com/p/articles/mi_m1077/is_n12_v53/ai_21225417/pg_1.</i>	April 1998 – Dec. 2006	African American man
Sonya Proctor (Interim) <i>See Ken Cummins, Loose Lips: Proctor's Friday the 13th Massacre, WASH. CITY PAPER, Feb. 27 - Mar. 5, 1998 (Vol. 18, #9), available at http://www.washingtoncitypaper.com/display.php?id=14509.</i>	Nov. 1997 – April 1998	African American woman
Larry Soulsby <i>See Jonetta Rose Barras, Soulsby on Ice: MPD Chief Larry Soulsby has finally run out of denials, WASH. CITY PAPER, Nov. 28 - Dec. 4, 1997 (Vol. 17, #48), available at http://www.washingtoncitypaper.com/display.php?id=14000.</i>	July 1995 – Nov. 1997	White man
Fred Thomas <i>See Jason Cherkis and Kevin Diaz, Black Victim, Black Cop, Black County: Prince Jones Jr. struggled to define his own life. A P.G. County cop ended up doing it for him., WASH. CITY PAPER, Sep. 22 - 28, 2000 (Vol. 20, #38), available at http://www.washingtoncitypaper.com/display.php?id=20399.</i>	Dec. 1992 – July 1995	African American man
Isaac Fulwood <i>See Wil Haygood, Locked Up Inside: Isaac Fulwood's Feelings as Parole Commissioner Couldn't Be More Personal, WASH. POST, Dec. 18, 2005 at D01.</i>	July 1989 – Sept. 1992	African American man
Maurice T. Turner, Jr. <i>See Wolfgang Saxon, Maurice Turner, 57, Former Police Chief in Nation's Capital (obituary), N.Y. TIMES, June 18, 1993, at D16, available at http://query.nytimes.com/gst/fullpage.html?res=9F0CE6D71139F93BA25755C0A965958260.</i>	July 1981 – July 1989	African American man
Burtell M. Jefferson <i>See Brian Williams & J. Edward Kellough, Leadership with an Enduring Impact: The Legacy of Chief Burtell Jefferson of the Metropolitan Police Department of Washington, D.C., PUBLIC ADMIN. REV., Nov.-Dec. 2006, at 813.</i>	Jan. 1978 – June 1981	African American man

