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Title
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Permalink
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Journal
UCLA Criminal Justice Law Review, 7(1)

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Publication Date
2023

DOI
10.5070/CJ87162084

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THE SUPREME COURT'S SECOND AND FIFTEENTH AMENDMENT HYPOCRISY COULD SHOOT DOWN VOTING RIGHTS . . . AND PEOPLE

Kelly Sampson

Table of Contents

I. Introduction

Throughout history, minoritized Americans, particularly Black people, seeking to vote have faced two main obstacles: 1) discriminatory policies, and 2) armed intimidation and violence. When discriminatory policies, such as poll taxes and literacy tests could not keep minoritized people from the polls, brute force, such as Billy clubs, bombs, and guns stepped in. Given that discriminatory policies and armed violence can, and do, disenfranchise minoritized voters, the Supreme Court's Second Amendment and voting rights cases are connected.

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Specifically, the Supreme Court's contradictory approaches to the Voting Rights Act and the Second Amendment threaten to deter minoritized Americans from safely and effectively voting. When considering the Voting Rights Act, the Court's conservative wing bases opinions on its myopic version of the present. But when considering the Second Amendment, the Court's conservative wing does the exact opposite, basing opinions on its myopic version of the past.

Contrasting the reasoning in *Shelby County v. Holder*, 570 U.S. 529 (2013), with the Court's seminal Second Amendment decision in *District of Columbia v. Heller*, 54 U.S. 570 (2008) exemplifies the difference. In *Shelby County* the Court considered the constitutionality of the Voting Rights Act (VRA) provision that empowered Congress to place certain jurisdictions under federal oversight.[1] The Court decided that the VRA's constitutionality hinged on social conditions that, in its judgement, no longer existed. The Court accordingly proclaimed "[o]ur country has *changed*, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem *speaks to current conditions*."[2] The *Shelby County* majority's claim that "current conditions" constrain legislation contradicts that same majority's[3] reasoning in *District of Columbia v. Heller*.[4] In *Heller*, the majority relied on dubious historical analysis[5] to decide, for the first time, that the Second Amendment encompasses an individual right to keep a handgun in the home. The Court opined that "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."[6] In other words, the Court relies on its version of history to expand access to firearms while relying on its version of the present to reduce access to voting. The contrast between *Heller* and *Shelby County* is no aberration. Indeed, the Court consistently applies a "living constitution" framework to the Fifteenth Amendment while applying questionable "originalism" to the Second Amendment. *New York State Rifle & Pistol Association v. Bruen7* (Bruen) is the latest example.

The *Bruen* majority invalidated New York's firearms licensing law on the basis of its supposed conflict with historical tradition, stating: "[t]he test that we set forth in *Heller* and apply today requires courts to assess whether *modern firearms* regulations are consistent with the Second Amendment's text and *historical understanding.*"[8] The Court's disparate

1. Shelby County v. Holder, 570 U.S. 529, 536 (2013).
2. *Id.* at 557 (emphasis added).
3. Justices Alito, Kennedy, Roberts, Scalia, and Thomas were the majority in both *Shelby County* and *District of Columbia v. Heller*.
4. District of Columbia v. Heller, 554 U.S. 570 (2008).
5. Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss"*, 56 UCLA L. Rev. 1095, 1107 (2009).
6. *Heller*, 554 U.S. at 634–35.
7. New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 32, 36–38 (2022).
8. *Id.* at 2131 (emphasis added).

standards for voting rights and the right to keep and bear arms enables legislatures to expand access to guns while constraining access to ballots. Second Amendment expansion and voting rights contraction will particularly harm minoritized Americans. Research shows that looser gun laws lead to more gun-related deaths,[9] and gun homicide disproportionately kills Black, Hispanic/Latino, and Native Americans.[10] Black, Hispanic/Latino, and Native people likewise bear the brunt of voter suppression laws.[11] This means that the Supreme Court's insistence on expanding the right to keep and bear arms, while shrinking the right to vote, conspires to silence Americans of color whether denying them ballots or subjecting them to bullets.

Part II of this paper discusses the ways in which structural barriers, such as discriminatory public/social policies, and physical barriers, such as armed violence, have kept minoritized Americans from participating in electoral politics. Part III of this paper argues that the Supreme Court's diverging approaches to cases involving the Fifteenth Amendment, the Voting Rights Act, and the Second Amendment effectively uphold and reinforce structural barriers to democracy and enable armed political violence. Part IV discusses the implications of the Court's treatment of firearms and voting in the context of heightened political tension, voter suppression, and Second Amendment extremism. Part V concludes with suggestions for how to course correct.

II. Structural and Physical Barriers to Democracy

In popular American lore, the "Founding Fathers" zealously sought democracy for all. If only that were true. But, as scholar Mary Anne Franks writes, "[t]he men who drafted the Constitution did so in proceedings that were unauthorized, secret, and devoid of participation by women, nonwhite men, and white men without property."[12] The "Founding Fathers," perhaps unsurprisingly, created a country without universal suffrage.[13] And without universal suffrage, the white, land-holding men

9. Lois K. Lee et al., *Firearm Laws and Firearm Homicides: A Systematic Review*, 177 JAMA Internal Med. 106 (2017).
10. Ari Davis et al., A Year in Review: 2020 Gun Deaths in the U.S., The Johns Hopkins Center for Gun Violence Solutions 18–19 (2022) https://publichealth.jhu.edu/sites/default/files/2022–05/2020-gun-deaths-in-the-us-4–28–2022-b.pdf [https://perma.cc/D5QF-5VLP].
11. Sarina Vij, *Why Minority Voters Have a Lower Voter Turnout: An Analysis of Current Restrictions*, ABA Human Rights Mag. (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/why-minority-voters-have-a-lower-voter-turnout [https://perma.cc/3PTP-X3KG].
12. Mary Anne Franks, The Cult of the Constitution 8 (2019).
13. *See, e.g.*, From John Adams to James Sullivan, 26 May 1776, in Nat'l. Archives: Founders Online, https://founders.archives.gov/documents/Adams/06–04–02–0091 [https://perma.cc/8AMV-SE3G] ("Depend upon it, sir, it is dangerous to open So fruitfull a Source of Controversy and Altercation, as would be opened by attempting to alter the Qualifications of Voters. There

who could vote excluded women, nonwhite men, and white men without propery from the political process. Yet, the disenfranchised resisted, overcoming structural barriers,[14] such as pretextual poll taxes and literacy tests, as well as physical[15] violence in order to vote.

Accordingly, Americans today who are not wealthy, white, Protestant, or male owe their voting rights not to the "Founding Fathers" but to the ordinary people who risked or lost their lives to expand and protect the franchise.[16] It is because of their efforts that the Constitution now includes several amendments that expand to, or protect the right to vote of, people whom the Constitution once ignored or subjugated The Fifteenth Amendment, for example, passed during Reconstruction, forbids federal and state governments from denying a citizen the right to vote based on "race, color, or previous condition of servitude."[17]

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will be no End of it. New Claims will arise. Women will demand a Vote. Lads from 12 to 21 will think their Rights not enough attended to, and every Man, who has not a Farthing, will demand an equal Voice with any other in all Acts of State. It tends to confound and destroy all Distinctions, and prostrate all Ranks, to one common Levell.");Robert Yates's Version, [18 June 1787] in Nat'l. Archives: Founders Online, https://founders.archives.gov/documents/Hamilton/01–04–02–0098–0004 [https://perma.cc/3U3Q-NHSX]

> All communities divide themselves into the few and the many. The first are the rich and well born, the other the mass of the people. The voice of the people has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct, permanent share in the government. They will check the unsteadiness of the second, and as they cannot receive any advantage by a change, they therefore will ever maintain good government. Can a democratic assembly, who annually revolve in the mass of the people, be supposed steadily to pursue the public good? Nothing but a permanent body can check the imprudence of democracy.

14. Allison Keyes, *Recalling an Era When the Color of Your Skin Meant You Paid to Vote*, Smithsonian Mag. (Mar. 18, 2016), https://www.smithsonianmag.com/smithsonian-institution/recalling-era-when-color-your-skin-meant-you-paid-vote-180958469 [https://perma.cc/7M7T-B4FA].

15. *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 218–19 (2009) (Thomas, J., concurring in part and dissenting in part)

> The rebellion against the enfranchisement of blacks in the wake of ratification of the Fifteenth Amendment illustrated the need for increased federal intervention to protect the right to vote. Almost immediately following Reconstruction, blacks attempting to vote were met with coordinated intimidation and violence . . . A soon-to-be victorious mayoral candidate in Wilmington, North Carolina, for example, urged white voters in an *1898* election-eve speech: "Go to the polls tomorrow and if you find the negro out voting, tell him to leave the polls, and if he refuses kill him; shoot him down in his tracks."

(internal citation omitted).

16. *Voting Rights: A Short History*, Carnegie Corp. of N.Y. (Nov. 18, 2019), https://www.carnegie.org/our-work/article/voting-rights-timeline [https://perma.cc/XD7Y-DJUU].

17. U.S. Const. amend. XV, § 1.

Anti-democratic public policies, however, such as gerrymandering, which dilutes votes, or laws disenfranchising people with felony convictions, threaten the Fifteenth Amendment's ideal.[18]

While the country's political *system* is nominally more inclusive today, political *power*, or the capacity to directly shape government, is not. At the time of writing, forty-five out of forty-six presidents have been white; all have been male. There have only been six Black governors in American history, and of those five, only three were elected and all were men.[19] Research shows that, despite the country's increasingly diverse population, "every single state in the country has a legislature that is disproportionately white." These disparities result, at least in part, from the legacy of legal barriers and physical violence that still conspire to suppress political participation today. In the Jim Crow era, lynch mobs stepped in where poll taxes failed. Today, AR-15-toting mobs step in where gerrymandering fails. While the tools have changed, the intent is the same: excluding minoritized Americans from participating in our democracy.

Take the case of the "Tennessee Three" as an example. After a mass shooting at Covenant School in Nashville, Tennessee left three children and three adults dead, thousands of Tennesseans went to the state Capitol to protest for new gun laws.[20] Tennessee House Republicans, however, used their supermajority to keep gun violence off the legislative agenda.[21] Nonetheless, three Democratic members, Justin Jones, Justin Pearson, and Gloria Johnson continued speaking about gun violence on the floor and led the public in anti-gun violence chants.[22] In response, the Republican supermajority expelled Representatives Jones and Pearson, who are Black and represent two of the state's most diverse cities, but not Johnson who is white.[23] Indeed, Representative Johnson, when asked why she alone survived the vote, said "I think it's pretty clear. I'm a a

18. *E.g.*, Rebecca Harrison Stevens et al., *Handcuffing the Vote: Diluting Minority Voting Power Through Prison Gerrymandering and Felon Disenfranchisement*, 21 St. Mary's L.J. Race & Soc. Just. 195, 196–98 (2019).
19. Gillian Brockell, *The five Black governors who came before Maryland's Wes Moore*, Wash. Post (Jan. 18, 2023), https://www.washingtonpost.com/history/2023/01/18/black-governors-history-wes-moore [https://perma.cc/T382–6AHZ].
20. Cara *Tabachnick and Kathryn Watson, Hundreds protest at Tennessee Capitol for tighter gun control after Nashville shooting, CBS (Mar. 30, 2023), https://www.cbsnews.com/news/nashville-shooting-protests-tennessee-capitol-gun-control* [https://perma.cc/GSP3-EES4].
21. Andy Sher, *'Stay on the bill, sir': What led to the ouster votes for the Tennessee Three*, Chattanooga Times Free Press (Apr. 16, 2023), https://www.timesfreepress.com/news/2023/apr/16/stay-on-the-bill-sir-what-led-to-the-ouster-votes [https://perma.cc/U2BX-LBC9].
22. *Id.*
23. Maria Luisa Paul, *Congressional Black Caucus holds emergency meeting after Tenn. Expulsions*, Wash. Post (Apr. 7, 2023), https://www.washingtonpost.com/nation/2023/04/07/tennessee-expulsion-jones-pearson-racism [https://perma.cc/XNB7-BTPJ].

60-year-old white woman and they are two young Black men."[24] Notably, Tennessee House Republicans were only able to attain the supermajority needed to control the legislative agenda and expel two young, black lawmakers, because of racist policy measures such as partisan gerrymandering.[25] In other words, anti-democratic measures empowered the Tennessee House to suppress Black lawmakers as they advocated for gun violence prevention policies on behalf of their diverse constituents. This is an object-lesson in the interplay between voter suppression and gun violence prevention.

As such, the Supreme Court's Second Amendment and Voting Rights jurisprudence is alarming. The Court has rolled back voter protections while liberalizing public firearm carry. The Court's decisions reducing voting access and voter protection, combined with its decisions expanding firearm access, preserve a political hierarchy that protects those already in power—namely the white, wealthy, and elite—in two key ways: disenfranchisement and violence.

First, the Supreme Court has systematically dismantled laws designed to protect minority voters, thereby empowering states to pass restrictive voting laws. For example, after *Shelby County*, states, previously monitored by the VRA, began making changes that discriminated against Black and Brown voters, such as purging eligible voters, closing polling places, and implementing unnecessarily strict voter ID laws.[26] Maricopa County, Arizona, which is 31 percent Latino, closed 171 polling places between 2012 and 2019.[27] Georgia's 2018 gubernatorial election, in which then Secretary of State Brian Kemp, who is white, vied with Stacy Abrams, who is Black, is another example of post-*Shelby* voter suppression. Data shows that then Secretary Kemp improperly purged thousands of eligible voters from voting rolls, a disproportionate number of whom lived in districts that overwhelmingly turned out for Abrams.[28] These are only two examples of voter suppression policies enacted after *Shelby County*.[29] Even so, minoritized voters' strong political organizing, get-out-the-vote campaigns, such as those used to deliver the 2020

24. *Id.*
25. Zack Beauchamp, *A study confirms it: Tennessee's democracy really is as bad as the expulsions made you think*, Vox (Apr. 7, 2023), https://www.vox.com/policy/2023/4/7/23673998/tennessee-expulsions-state-democracy-measure [https://perma.cc/FEH3-RCYY].
26. The Leadership Conf. Educ. Fund, Democracy Diverted: Polling Places Closures and the Right to Vote 6 (2019) https://civilrights.org/democracy-diverted [https://perma.cc/44CW-SUML].
27. *Id.* at 17.
28. Angela Caputo et al., *After the Purge: How a massive voter purge in Georgia affected the 2018 election*, APMReports (Oct. 29, 2019), https://www.apmreports.org/story/2019/10/29/georgia-voting-registration-records-removed [https://perma.cc/D5ZB-PGA6].
29. *The Impact of Voter Suppression on Communities of Color*, Brennan Ctr. for Just. (Jan. 10, 2022), https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color [https://perma.cc/2MNQ-95L2].

Presidential election to Joe Biden, have allowed Black and Brown voters to overcome.[30] Yet, as we have seen, where voter suppression policies fail, political violence has historically filled the gap.[31]

This violence is why the Supreme Court's differing treatment of voter protection laws, and the Second Amendment is so dangerous. The Court's miserly interpretation of voter protection laws is in stark contrast to its recent indulgence toward the Second Amendment. In *Bruen*, the Court decided that the Second Amendment encompassed the right to carry firearms in public in case of "confrontation."[32] While *Bruen* did not define confrontation outright, the majority opinion and Justice Alito's concurrence suggest that carrying guns in case of "confrontation" means Americans should assume everyone, everywhere is armed and therefore arm themselves too. Alito's *Bruen* concurrence dubiously equates firearms with protection for people in vulnerable groups, such as women.[33] Justice Alito is mistaken[34] in positing that a firearm can turn a vulnerable person invulnerable, but he is not alone. Gun industry marketing has popularized the notion that firearms are an equalizer, transforming whoever holds them into the ultimate defender.[35] But mythologizing firearms

30. Yair Ghitza & Jonathan Robinson, *What Happened In 2020*, Catalist (May 10, 2021) https://catalist.us/wh-national [https://perma.cc/9LMW-ZAJK].

31. Consider, for instance, the Colfax massacre, which occurred on April 13, 1873. The 1872 Louisiana Gubernatorial election took place during the era known as "Reconstruction"—a brief period after the Civil War in which Southern Black men enjoyed the right to vote. White Democratic operatives attempted to intimidate and threaten Black voters. Despite their efforts, Black voters turned out to help the Republicans win a narrow victory. Republican lawmakers assumed their rightful offices throughout the state, including in Colfax. In response, hundreds of white, Democratic men, many of them affiliated with white supremacist groups such as the Ku Klux Klan, descended on Colfax, vowing to "take back" the Courthouse from the duly elected Republicans. In response, area Republicans, most of them Black men, rallied to defend the Colfax Courthouse from the white mob. Almost immediately, though, the Republicans realized they were outnumbered and chose to surrender. The white mob ignored their signal, choosing instead to unleash cannon and rifle fire. "All told, approximately 150 African Americans were killed, including 48 who were murdered after the battle. Only three whites were killed, and few were injured in the largely one-sided battle of Colfax." *See e.g.* Michael Stolp-Smith, *The Colfax Massacre*, BlackPast (Apr. 7, 2011) https://www.blackpast.org/african-american-history/colfax-massacre-1873 [https://perma.cc/9Q8R-9FUR].

32. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2134 (2022).

33. *Id.* at 2159 (Alito, J., concurring).

34. Melinda Wenner Moyer, *Will a Gun Keep Your Family Safe? Here's What the Evidence Says*, The Trace (Apr. 7, 2020), https://www.thetrace.org/2020/04/gun-safety-research-coronavirus-gun-sales [https://perma.cc/GD9T-KDK2].

35. *See e.g.*, Jennifer Carlson, *The Equalizer? Crime, Vulnerability, and Gender in Pro-Gun Discourse*, 9 Feminist Criminology 59 (2014); Lisa Hagen, *Guns Make Some Women Feel Safe, from What?*, WAMU: Guns & Am. (Aug. 13, 2019), https://wamu.org/story/19/08/13/guns-make-some-women-feel-safe-from-what [https://perma.cc/NN5U-XEHW]; Devin Hughes & Evan DeFilippis, *Gun-Rights Advocates Claim Owning a Gun Makes a Woman Safer. The Research Says They're Wrong*, Trace (May 2, 2016), https://www.thetrace.org/2016/05/

as "equalizers" does not protect vulnerable people; it hurts them. As scholar Mary Anne Franks writes, "gun use worsens existing disparities" and self-defense laws were primarily designed to protect "white men's prerogative to use violence both inside and outside the home.[36] Sociologist Jennifer Carlson similarly observed that the NRA "aggressively promotes guns to women even as it opposes other initiatives that would protect women against crime, such as the Violence Against Women Act, to protect the gun rights of men accused of domestic violence."[37] Likewise, author Jonathan Metzl observed that "mainstream society reflexively codes white men carrying weapons in public as patriots, while marking armed black men as threats or criminals."[38] Firearms cannot overcome entrenched social inequities like discrimination, sexism, and racism. Claiming, for instance, that mere gun ownership can secure equity for people facing economic, health, and political disparities is ridiculous. Adding guns to the status quo does not promote equity; it does exactly the opposite. The intersection of firearms and political participation further illustrates how wrong Alito's *Bruen* concurrence was.

Consider, for example, the January 6, 2021, insurrection, in which an almost entirely white mob sought to overturn the 2020 election on the basis that votes cast by minoritized Americans were "illegitimate." In the 2020 election, minoritized Americans overcame manifold structural barriers, such as poll closures leading to excessive wait times, restrictive voter ID laws, and limitations on early voting[39] designed to suppress their vote, and cast their ballots, giving Joe Biden the votes he needed to win the presidency.[40] In response, then-President Donald Trump and his allies claimed that the 2020 election was illegitimate because, according to them, the Black and Brown Americans who voted for Joe Biden were,

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gun-ownership-makes-women-safer-debunked [https://perma.cc/KRC6–3WUA]; Mike Spies, *The Shoddy Conclusions of the Man Shaping The Gun-Rights Debate*, New Yorker (Nov. 3, 2022), https://www.newyorker.com/news/a-reporter-at-large/the-shoddy-conclusions-of-the-man-shaping-the-gun-rights-debate [https://perma.cc/Z95T-853H]; Tat Bellamy-Walker, *Guns Are Traumatizing Black America. Advocates Demand Investment, Support*, NBC News (May 19, 2022, 2:07 PM), https://www.nbcnews.com/news/nbcblk/guns-are-traumatizing-black-america-advocates-demand-investment-suppor-rcna28770 [https://perma.cc/5KPF-JE7Q]; Adam P. Romero et al., Gun Violence Against Sexual and Gender Minorities in the United States: A Review of Research Findings and Needs 54–56 (2019).

36. Franks, *supra* note 12, at 81.
37. Carlson, *supra* note 35, at 61.
38. Joseph Pierre, 159 *The Psychology of Guns: Risk, Fear, and Motivated Reasoning*, 5 Palgrave Commc'n, 1, 3 (2019).
39. LDF Thurgood Marshall Inst., Democracy Defended (2021) https://www.naacpldf.org/wp-content/uploads/LDF_2020_DemocracyDefended-1–3.pdf [https://perma.cc/Y3PX-FB6].
40. Rashawn Ray, *How Black Americans Saved Biden and American Democracy*, Brookings (Nov. 24, 2020), https://www.brookings.edu/blog/how-we-rise/2020/11/24/how-black-americans-saved-biden-and-american-democracy [https://perma.cc/DT9H-ZX4J].

themselves, illegitimate.[41] President Trump and his enablers focused their initial ire on majority minority cities: Philadelphia, Detroit, and Milwaukee.[42] Claiming "fraud," Trump and his allies went on to bring over 50 baseless lawsuits nationwide. Courts dismissed them all.[43] After Trump and his allies failed to overturn the election at the polls and in the courts, the January 6th mob was the last resort. In other words, discriminatory laws and policies failed to disenfranchise Black and Brown voters in 2020 so, white reactionaries resorted to brute force, attacking Congress and the Vice President as they attempted to certify the election.[44] The armed mob's firearms, and the fear they inspired, hindered law enforcement's response, allowing the mob to breach the Capitol.[45] Firearms, and the power thereof, almost enabled a white mob to override Black and Brown Americans' political voices and would have disrupted the entire electoral process.

The January 6th mob's attempt to interfere with the political process was not an anomaly. Self-appointed "militia" members wielding assault-style rifles in the Michigan State Capitol, commandeered it for the day.[46] A self-appointed sentry in Kenosha, Wisconsin shot three people with a semi-automatic rifle, killing two of them.[47] Armed "watchers" intimidated elections officials as they processed ballots.[48]

41. Emily Badger, *The Cities Central to Fraud Conspiracy Theories Didn't Cost Trump the Election*, N.Y. Times (Nov. 17, 2020), https://www.nytimes.com/2020/11/16/upshot/election-fraud-trump-cities.html [https://perma.cc/782E-6Q5M].
42. *Id.*
43. Reuters Staff, *Fact Check: Courts Have Dismissed Multiple Lawsuits of Alleged Electoral Fraud Presented by Trump Campaign*, Reuters (Feb. 15, 2021), https://www.reuters.com/article/uk-factcheck-courts-election/fact-check-courts-have-dismissed-multiple-lawsuits-of-alleged-electoral-fraud-presented-by-trump-campaign-idUSKBN2AF1G1 [https://perma.cc/CG5T-2UJ4].
44.
45. *The Law Enforcement Experience on January 6th: Hearing Before H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Cap.*, 117th Cong. 40 (2021) (statement of Daniel Hodges, Officer, Metropolitan Police Department) ("How many guns are there in this crowd? If we start firing, is that the signal to them to set off the explosives, however many there are in the city? Is that the signal for them to break out their firearms and shoot back? So that's the reason why I didn't shoot anyone, and I imagine many others didn't. Because like I said before, there were over 9,000 of the terrorists out there with an unknown number of firearms and a couple hundred of us, maybe. So we could not . . . if that turned into a firefight, we would've lost, and this was a fight we couldn't afford to lose.").
46. Kathleen Gray, *In Michigan, a Dress Rehearsal for the Chaos at the Capitol on Wednesday*, N.Y. Times (Jan. 9, 2021), https://www.nytimes.com/2021/01/09/us/politics/ michigan-state-capitol.html [https://perma.cc/DS67-PNPG].
47. Tyler Valeska, *Rittenhouse and the Right's Strategy of Deputizing Vigilantes*, Slate (Nov. 22, 2021, 2:22 PM), https://slate.com/news-and-politics/2021/11/how-the-rittenhouse-verdict-threatens-first-amendment-right-public-protest.html [https://perma.cc/G7E3-PDQD].
48. Tim Sullivan & Adam Geller, *Increasingly Normal: Guns Seen Outside Vote-Counting Centers*, AP News (Nov. 7, 2020), https://apnews.com/article/protests-vote- count-safety-concerns-653dc8f0787c925852407854 8d518992 [https://perma.cc/V7SX-WR9U].

With this background in mind, it is important to note that Americans seem increasingly ready to accept both the threat of violence and its occurrence. A research team led by Dr. Garen Wintemute, director of the gun violence prevention program at UC Davis, conducted a weighted, population-representative study of Americans and found "a high level of support for violence, including lethal violence, to achieve political objectives."[49] The study further extrapolated that nearly 20 million Americans expect to be armed in a political situation within the next few years, more than half of them expect to be openly carrying, and 3 million expect to actually shoot someone.[50] A political environment where some citizens choose to express their views through armed intimidation and violence rather than open discourse and voting can never promote equality. As philosophy professor Firmin DeBraBander succinctly put it, "[e]quality vanishes as soon as some are armed and others are not."[51]

Moreover, Everytown and the Armed Conflict Location & Event Data Project (ACLED) found "a marked uptick in protests at which people were visibly armed following the police murder of George Floyd . . . Loose state firearms laws are part of the explanation for this phenomenon. The incidence of armed protests was three times higher in states with expansive open-carry laws," the study noted.[52] Meanwhile, many state legislatures doubled down on policies that make voting more difficult;[53] between 2020 and 2022, eleven states passed restrictive voter ID laws, nineteen passed laws making it harder to vote by mail, and seven passed laws facilitating the de-registration of voters.[54] In this tense context, the Supreme Court has chosen to embrace dubious interpretations of certain constitutional principles that narrow avenues for political participation while simultaneously broadening avenues for public carry.

49. Garen Wintemute et al., Views of American Democracy and Society and Support for Political Violence: First Report from a Nationwide Population-Representative Survey 16 (July 15, 2022) (unpublished manuscript) (on file with medRxiv) https://www.medrxiv.org/content/10.1101/2022.07.15.22277693v1.full.pdf+html [https://perma.cc/7TBH-UC2W].
50. *Id.*
51. Firmin DeBrabander, Do Guns Make Us Free 185 (2015).
52. Diana Palmer & Timothy Zick, *The Second Amendment Has Become a Threat to the First*, The Atlantic (Oct. 27, 2021), https://www.theatlantic.com/ideas/archive/2021/10/ second-amendment-first-amendment/620488 [https://perma.cc/F898–4FN8].
53. David Daley, *Seven ways Republicans are already undermining the 2024 election*, The Guardian (Jan. 11, 2022 1:12 AM), https://www.theguardian.com/commentisfree/2022/jan/10/ republicans-election-democracy-seven-ways-trump [https://perma.cc/XM2H-ZYR7].
54. Julia Harte & Claire Trainor, *Where Voting Has Become More Difficult*, Reuters (Nov. 1, 2022), https://www.reuters.com/graphics/USA-ELECTION/VOTING-RESTRICTIONS/znvnbdjbkvl/index.html [https://perma.cc/9NVD-528C].

III. The Court's Dueling Principles: Conservative on Political Participation, Liberal on Firearms

Over a series of three cases, the Supreme Court transformed the right to keep and bear arms from a civic right tied to militia service to a private right tied to private defense. First, in *District of Columbia v. Heller*, the Court held that the Second Amendment protects an individual's right to keep a handgun in the home for self-defense.[55] To reach that conclusion, the *Heller* majority effectively rewrote the Second Amendment. Specifically, *Heller* deemed the Second Amendment's first half, which reads "A well regulated Militia, being necessary to the security of a free state"[56] as "prefatory"[57] and the second half, which reads "the right of the people to keep and bear arms, shall not be infringed"[58] as "operative."[59] Then, the majority, declared that the prefatory clause does not constrain the operative clause.[60] Consequently, the majority read the Second Amendment backwards, concluding that the Second Amendment was first and foremost a right to keep arms for private self-defense. The *Heller* majority then relied on selected history to further its notion that the Founders originally intended to create an individual right to private firearms. Because *Heller* concerned a Washington D.C. law, it left open whether the individual right to keep and bear arms applied to the states. Two years later, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court confirmed that the Fourteenth Amendment indeed incorporated the Second Amendment to citizens in the states. Because *Heller* and *McDonald* only considered the scope of the Second Amendment inside the home, it was unclear whether, and to what extent, the Second Amendment right to keep and bear arms extended to the public domain until *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) ("Bruen"). In *Bruen*, the Supreme Court held that a New York law requiring applicants for an unrestricted concealed carry permit to show "proper-cause" violated the Second Amendment.[61] Critically, the *Bruen* Court made several conclusions in invalidating New York's law.

First, the Court established, for the first time, that the right to keep and bear arms extended to the public sphere.[62] Second, the Court adopted a new framework for Second Amendment cases. Before *Bruen*, courts generally evaluated gun laws using a two-step test that considered not only the individual's Second Amendment interest, but also the government's public safety interest. In *Bruen*, however, the Court replaced the

55. District of Columbia v. Heller, 554 U.S. 570 (2008) (holding that a District of Columbia law banning handguns violated the Second Amendment because citizens have the right to keep and bear arms applies to individual citizens).
56. U.S. Const. amend. II.
57. *Heller*, 554 U.S. at 595–98.
58. U.S. Const. amend. II.
59. *Heller*, 554 U.S. at 579–95.
60. *Id.* at 598–600.
61. New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2122 (2022).
62. *Id.* at 2135.

two-part test with one that considers only whether a given regulation "is consistent with this Nation's historical tradition of firearm regulation."[63] In other words, *Bruen* built on *Heller* and *McDonald*, by formally linking the Second Amendment to its supposed "original" meaning.

While proponents of an individual right to keep and bear arms cast *Heller*, *McDonald*, and *Bruen* as "originalism," the decisions are anything but. Even ideologically conservative judges, if they are being honest, agree. Reagan-appointed Circuit Judge J. Harvie Wilkinson III, for example, observed that even as some considered *Heller* a triumph of originalism, it could also be seen as "an exposé of original intent as a theory no less subject to judicial subjectivity and endless argumentation as any other."[64] Wilkinson then excoriated *Heller*, saying, "the majority read an ambiguous constitutional provision as creating a substantive right that the Court had never acknowledged in the more than two hundred years since the amendment's enactment."[65] Fellow conservative Judge Richard Posner likewise criticized *Heller*, stating, "It is questionable in both method and result, and it is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology."[66] The notion that originalism is no more than a cover for results-oriented activist judging is exemplified in the Supreme Court's altogether opposite treatment of voting rights cases. Indeed, as this Article discusses:

- The Court claims that text, history, and tradition require restraint when it comes to firearms laws but holds that voting rights laws must evolve;
- The Court treats even a slight burden on the Second Amendment as anathema while tolerating all manner of burdens on political participation; and
- The Court shows no deference to States' interest in preventing gun violence but practically invents States' interest with respect to voting laws.
- The Court's contradictory approach to the Second and Fifteenth Amendments are in conversation with each other and the public, and taken together, are accelerating the rise of extremism.

A. *The Court claims that text, history, and tradition require constraint when it comes to firearms laws but holds that voting rights laws must evolve*

The discrepancy between the Court's Second Amendment jurisprudence, which shackles modern laws to history, and its voting jurisprudence,

63. *Id.* at 2126.
64. Wilkinson, J. Harvey, *Of Guns, Abortions, and the Unraveling Rule of* Law, 95 Va. L. Rev. 253, 256 (2009).
65. *Id.* at 265.
66. Richard Posner, *In Defense of Looseness*, The New Republic, (Aug. 26, 2008), https://newrepublic.com/article/62124/defense-looseness [https://perma.cc/NVH5-BQVZ].

which embraces so called evolving circumstances, shows originalism is simply a cover for judicial activism/lawmaking.

In *Bruen*, the majority unambiguously tied the fate of laws regulating modern firearms, such as assault-style rifles, to the days of muskets and revolvers, stating, "[o]nly if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'"[67] To put a finer point on it, the Court reiterated that "[t]he test that we set forth in *Heller* and apply today requires courts to assess whether *modern firearms* regulations are consistent with the Second Amendment's text and historical understanding." Now, contrary to the *Bruen* majority's assertions, the history of firearms laws is not straightforward; indeed, an honest historical assessment would have compelled opposite results in *Heller*, *McDonald*, and *Bruen*.[68] This paper does not address the *inaccuracy* of the Court's historical analysis; legal historians have already published significant critiques of *Bruen*'s "history."[69] Instead, this paper discusses the different way the Court *weighs* history in the firearms and voting contexts. It is therefore necessary to first understand the Second and Fifteenth Amendments' differing backgrounds.

In the wake of the Civil War, Congress passed the Fifteenth Amendment, which forbids federal and state governments from denying a citizen the right to vote based on "race, color, or previous condition of servitude."[70] Section 2 of the 15th Amendment empowers Congress to "enforce this article by appropriate legislation." Thus, the Fifteenth Amendment's purpose was clear. As Justice Frankfurter wrote in *Lane v. Wilson*, 307 U.S. 268, 275 (1930), the Amendment was designed to block "contrivances by a state to thwart equality in the enjoyment of the right to vote." But states quickly sought to undermine the Fifteenth Amendment. Namely, states adopted policies excluding Black men from the polls, such as literacy tests, poll taxes, and "grandfather clauses" (limiting the right to vote to men whose ancestors could vote before 1867).[71] Indeed, discriminatory voting laws, coupled with intimidation and violent suppression, disenfranchised Black people in Southern states until the 1960s. Almost a century after Congress passed the 15th Amendment, civil rights activists finally secured protection through the Voting Rights

67. *Bruen*, 142 S. Ct. at 2126 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

68. Saul Cornell, *Cherry picked history and ideology-driven outcomes: Bruen's originalist distortions*, SCOTUS Blog (Jun. 27, 2022, 5:05 PM), https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions [https://perma.cc/9EEK-4H3P]; Saul Cornell, *New Originalism: A Constitutional Scam*, Dissent Mag. (May 3, 2011), https://www.dissentmagazine.org/online_articles/new-originalism-a-constitutional-scam [https://perma.cc/UAT4-ZNET] [hereinafter *New Originalism*].

69. *New Originalism*, *supra* note 68.

70. U.S. Const. amend. XV, § 1.

71. *Black Americans and the Vote*, Nat'l. Archives https://www.archives.gov/research/african-americans/vote [https://perma.cc/32NA-JDJA].

Act of 1965 ("VRA").[72] Congress intended for the VRA to "enforce the Fifteenth Amendment."[73] The VRA's text accordingly makes its purposes explicit: to prevent discriminatory voting laws and policies. President Lyndon Johnson, whose administration championed the VRA, summarized it thus, "[w]herever, by clear and objective standards, states and counties are using regulations, or laws, or tests to deny the right to vote, then they will be struck down."[74] Likewise, the Johnson administration's key witness to Congress, Attorney General Nicholas Katzenbach, testified that Congress must pass the VRA to redeem the Fifteenth Amendment's promise.[75] Further, Everett Dirksen (R-Il), who co-sponsored the VRA in the Senate, justified the bill on the basis that "discrimination in the matter of voting rights has continued and the data . . . makes it quite clear that additional legislation is needed if the unequivocal mandate in the Fifteenth Amendment to the Constitution of the United States is to be enforced and made effective."[76]

Compared with the Voting Rights Act and Fifteenth Amendment's extensive legislative history supporting the notion that Congress intended for the Amendment to prevent racial and ethnic discrimination in voting,[77] the Second Amendment's background is sparse. And, what little drafting history survives supports a militia-based rather than an individual right.[78] Yet, despite the Voting Rights Act's clear intent to prevent legislatures from passing discriminatory voting laws, and the Second Amendment's seemingly forgotten mention of a "well regulated militia," the Court consistently accepted legislatures' pretextual

72. Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437 (1965).
73. *Id.*
74. Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), *in* The Am. Pres. Project, https://www.presidency.ucsb.edu/documents/remarks-the-capitol-rotunda-the-signing-the-voting-rights-act [https://perma.cc/FVC2-BR54].
75. *A Bill to Enforce the Fifteenth Amendment to the Constitution of the United States: Hearing on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 2 (1965) [hereinafter *Hearings*] (statement of Nicholas Katzenbach, Att'y Gen of the United States).
76. 89 Cong. Rec. S1564, 8293 (daily ed. Apr. 22, 1965) (statement of Rep. Everett Dirksen).
77. Earl Maltz, *The Coming of the Fifteenth Amendment: The Republican Party and the Right to Vote in the Early Reconstruction Era*, 82 La. L. Rev. 395, 396 (2022).
78. Jonathan E. Lowy et al., *Everything's at Stake: Preserving Authority to Prevent Gun Violence in the Second Amendment's Third Chapter*, 83 Minn. L. Rev. 118, 139 (2021) (articulating that "[t]he drafting history confirms the Second Amendment's militia focus. James Madison's first proposal to Congress read: 'The right of the people to keep and bear arms shall not be infringed; a well-armed and well-regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." The conscientious objector exemption was only needed because the 'right' concerned mandatory service that necessitated exemptions. Madison's draft also treated 'bearing arms' as synonymous with 'render[ing] military service.'").

rationales for passing discriminatory voting laws while rejecting legislatures' public safety rationales for passing firearms laws.

Consider how the Court undermined §§ 4 and 5 of the VRA. Section 4 established a rubric that allowed the government to identify which jurisdictions engaged in racial discrimination. Section 5 required the jurisdictions identified under § 4 to seek "preclearance" for any proposed voting laws.[79] Initially, Congress determined that §§ 4 and 5 would expire in 1970. But because of ongoing voter discrimination, Congress affirmatively voted to reauthorize §§ 4 and 5 several times; the Supreme Court then upheld each of these reauthorizations as Constitutional.[80] However, after Congress once again reauthorized §§ 4 and 5 in 2006, a majority of the Supreme Court, led by Chief Justice Roberts, departed from prior holdings in *Shelby County v. Holder*, 570 U.S. 529 (2013). Despite ample evidence that § 4 enabled the government to prevent real and harmful voter discrimination and Congress' findings that it was still necessary, the majority decided to invalidate the reauthorization on the basis that "the country has changed."[81] The *Shelby County* majority overrides Congress' unambiguous intent on the basis that Congress did not sufficiently account for changing societal conditions, saying, "Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day."[82] Stunningly, the Court chastises Congress for using data it deemed too outdated, claiming:

> [t]here is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story.[83]

The Court's tenacious attention to societal context in *Shelby County* is in stark contrast with their "originalist" reasoning in *Bruen*, where the Court said, "the Second Amendment's definition of 'arms' is fixed according to its historical understanding."[84]

While the *Shelby County* Court stressed that "[o]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions,"[85] the *Bruen* court insisted that "history

79. Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437 (1965).
80. *See* Georgia v. United States, 411 U.S. 526, 532–33 (1973); City of Rome v. United States, 446 U.S. 156, 173 (1980); Lopez v. Monterey County, 525 U.S. 266, 282–83 (1999).
81. Shelby County v. Holder, 570 U.S. 529, 557 (2013).
82. *Id.* at 554.
83. *Id.* at 556.
84. New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2132 (2022).
85. *Shelby*, 570 U.S. at 557.

guide[s] our consideration of modern regulations that were unimaginable at the founding."[86] The deference to history, text, and tradition, so prized in the Second Amendment context, is absent from *Shelby County*, even though the Fifteenth Amendment and VRA's historical record is exponentially richer than the Second Amendment's.

These contrasts have consequences. Because the *Shelby County* majority ignored racially discriminatory voting laws, the federal government lost its authority to "preclear" voting laws in certain states. Almost immediately after the Court issued its opinion, previously covered states enacted laws making it harder for minoritized Americans to vote.[87]

While § 5, at issue in *Shelby County*, is arguably the most important provision of the VRA, it was not the only provision the Supreme Court undermined.

Section 2 forbids jurisdictions from implementing "voting qualifications or prerequisites" that deny or abridge the right to vote on account of race or color (such as states redistricting districts areas so as to dilute minority communities' power).[88] In 1982, Congress amended the VRA to clarify that § 2 covers both discriminatory intent *and* discriminatory effect. Following the 1982 amendment, the Court's seminal vote dilution case, *Thornburg v. Gingles*, further clarified § 2's history and intent, finding "[t]he essence of a section 2 claim is that a certain electoral law, practice, or structure *interacts with social and historical conditions* to cause an *inequality in the opportunities* of minority and non-minority voters to elect their preferred representatives." Despite clear congressional intent and the Court's own precedent agreeing that § 2 of the VRA prevented discriminatory effect, the Court weakened§ 2 in *Brnovich v. Democratic National Committee, ("Brnovich")*.[89]

Brnovich involved challenges to two Arizona voting laws that the Democratic National Committee (DNC) and its affiliates alleged made it more difficult for Arizonans of color to participate in the political process. Under one law, Arizona refused to count ballots cast in the wrong precinct; under the other, Arizona made it a crime for anyone other than enumerated parties to knowingly collect someone's early ballot.[90] The DNC sued, claiming that these laws violated § 2 of the VRA by discriminating against the state's Black, Latin, and Native American voters.

86. *Bruen*, 142 S. Ct. at 2132.
87. *The Effects of Shelby County v. Holder*, Brennan Ctr. for Just. (Aug. 6, 2018) https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder [https://perma.cc/27VX-3HVN].
88. 42 U.S.C. § 1973 ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2).").
89. Brnovich v. Democratic Nat'l. Comm., 141 S.Ct. 2321, 2333 (2021) (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)).
90. *Id.* at 2334.

Evidence showed that the state was, indeed, twice as likely to throw out minority Arizonans' votes than those of white voters.[91] The provision criminalizing third-party ballot collection likewise made it harder for minority residents, specifically rural Native Americans, many of whom have neither mail service nor a car, to access their ballots without the assistance of a third party.[92] Finding that Arizona's laws made the state's election less accessible to minority residents, the Ninth Circuit Court of Appeals held that the out-of-precinct and third-party ballot bans violated § 2.[93] But the Supreme Court reversed, upholding both laws in an opinion that is markedly different from its firearms jurisprudence. Specifically, the *Brnovich* majority cast history aside as irrelevant, saying, "[t]he dissent provides historical background that all Americans should remember, but that background does not tell us how to decide these cases."[94] Yet, the *Bruen* majority states the exact opposite, claiming that its "focus on history also comports with how we assess many other constitutional claims."[95] Had the Court tied its Fifteenth Amendment and VRA cases to history the way it claims to tie gun cases to history, *Shelby County* and *Brnovich* would have gone the other way, because there are unambiguous parallels between the pretextual voting laws of the past and the pretextual voting laws of the present. Conversely, *Bruen's* mangled "history," crafted by adversarial parties and judges, is more akin to putty than it is to concrete: easily manipulated, readily distorted, and never fixed. Indeed, lawyers and judges are, by definition, trained in analyzing case law not history.

At the outset, the *Bruen* majority wrongly declares that the Second Amendment's meaning is "historically fixed."[96] The National Council on Public History published a primer on public history, explaining that historical research constantly evolves.[97] The Council clarified that "revisiting and often revising earlier interpretations is actually at the very core of what historians do."[98] As U.S. District Judge Carlton Reeves put it, judges "lack both the methodological and substantive knowledge that historians possess. The sifting of evidence that judges perform is different than the sifting of sources and methodologies that historians perform."[99] As such, the Second Amendment's meaning is decidedly not fixed. But to the extent historians have some consensus, it does not support *Bruen*. Pro-

91. *Id.* at 2368 (Kagan, J., dissenting).
92. *Id.* at 2369–2370 (Kagan, J., dissenting).
93. *Id.* at 2335.
94. *Id.* at 2341.
95. New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2130 (2022).
96. *Id.* at 2132.
97. *Why Do Historians' Accounts of the Past Keep Changing?*, Nat'l. Council on Pub. Hist. (accessed Sept. 8, 2022) https://ncph.org/what-is-public-history/how-historians-work/the-changing-past [https://perma.cc/L5LS-GVV4].
98. *Id.*
99. United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022).

fessors of History and Law, for example, filed an amicus brief, affirming that "[t]he historical record plainly demonstrates that New York's "good cause" law is not a historical aberration; on the contrary, it is reflective of a long Anglo-American tradition of broad restrictions on carrying dangerous weapons in public."[100] Yet *Bruen* dismisses that long tradition altogether. Historian Saul Cornell describes how Justice Thomas brushed off an 1871 Texas law that was analogous to New York's "proper cause" requirement, as an "outlier" even though it was not.[101] In fact, Cornell showed that "all of the nation's largest cities were living under some form of restrictive public carry regime by the end of the 19th century."[102]

To be clear, while historical understanding evolves, at the time of writing, trained historians generally agree that United States history does not undermine gun violence prevention laws. So, in order to make a historical case for invalidating them, the Court must cherry-pick and distort history of the Second Amendment context. Conversely, in the Fifteenth Amendment jurisprudence, the Court seems to ignore history altogether.

B. *The Court treats even a slight burden on the Second Amendment as anathema while tolerating all manner of burdens on political participation*

The Court finds that any burdens associated with exercising the right to keep and bear arms are an affront. The *Bruen* majority cites *Heller's* claim that "'[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.' . . . 'A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.'"[103] Curiously, the *Bruen* majority's insistence that enumerating a right takes it out of the purview of future judges does not extend to voting rights cases.

In *Brnovich*, for example, the Court breezily acknowledged that "every voting rule imposes a burden of some sort. Voting takes time and, for almost everyone, some travel, even if only to a nearby mailbox. Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules."[104] Given that voting necessarily imposes some burden, the *Brnovich* court then determined that the relevant inquiry is not whether a burden exists

100. Brief for Professors of History and Law at 3, as Amici Curiae Support Respondents, New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2022) (No. 20–843).

101. Saul Cornell, *Clarence Thomas' Latest Guns Decision is Ahistorical and Anti-Originalist*, Slate (Jun. 24, 2022, 9:26 AM) https://slate.com/news-and-politics/2022/06/clarence-thomas-gun-decision-bruen-anti-originalist.html [https://perma.cc/8G5M-ZSFE].

102. *Id.*

103. New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2129 (2022) (citing District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (citation omitted)).

104. Brnovich v. Democratic Nat'l. Comm., 141 S.Ct. 2321, 2338 (2021).

but the extent of the burden, claiming that "[m]ere inconvenience cannot be enough to demonstrate a violation of § 2." Ultimately, the *Brnovich* Court found that the Arizona laws at issue did not "overly" burden minority voters, despite a record replete with evidence of the laws' disparate impacts on Black and Brown residents.[105] In contrast to *Brnovich's* robust factual record, *Bruen* came to the Court before the parties even had an opportunity to conduct discovery or gather evidence.[106] Yet the majority still concluded, without evidence, that New York's law was too demanding.[107] As Justice Kagan noted in her *Brnovich* dissent, it is especially egregious for the Court to accept burdensome rules in voting rights cases, as it did there, because the VRA's explicit rationale is to prevent states from imposing undue burdens on minority voters:

> The Voting Rights Act was meant to replace state and local election rules that needlessly make voting harder for members of one race than for others. The text of the Act perfectly reflects that objective. The 'democratic' principle it upholds is not one of States' rights as against federal courts. The democratic principle it upholds is the right of every American, of every race, to have equal access to the ballot box. The majority today undermines that principle as it refuses to apply the terms of the statute. By declaring some racially discriminatory burdens inconsequential, and by refusing to subject asserted state interests to serious means-end scrutiny, the majority enables voting discrimination.[108]

In accepting Arizona's rationale for implementing policies that on their face made it harder for minority residents to vote at face value, the Court undermined the VRA's very reason for being. The *Brnovich* majority thus empowered the state of Arizona to burden minority resident's voting rights.

And *Brnovich* is no outlier. In *Raysor v. DeSantis*, the Supreme Court prevented "thousands of otherwise eligible voters from participating in Florida's primary election simply because they are poor."[109] *Raysor* arose after Floridians voted for a state Constitutional amendment

105. *Id.* at 2370 (Kagan, J., dissenting) (For example the idea of a "nearby" mailbox did not apply for Native Americans living in Arizona. As the dissent noted, "Most Arizonans vote by mail. But many rural Native American voters lack access to mail service, to a degree hard for most of us to fathom. Only 18% of Native voters in rural counties receive home mail delivery, compared to 86% of white voters living in those counties. See 329 F. Supp. 3d, at 836. And for many or most, there is no nearby post office. Native Americans in rural Arizona "often must travel 45 minutes to 2 hours just to get to a mailbox." 948 F. 3d, at 1006; see 329 F. Supp. 3d, at 869 ("Ready access to reliable and secure mail service is nonexistent" in some Native American communities). And between a quarter to a half of households in these Native communities do not have a car. See *ibid.* So getting ballots by mail and sending them back poses a serious challenge for Arizona's rural Native Americans.")
106. *Bruen*, 142 S. Ct. at 2164 (Breyer, J., dissenting).
107. *Id.*
108. *Brnovich*, 141 S. Ct. at 2366 (Kagan, J., dissenting).
109. Raysor v. Desantis, 140 S. Ct. 2600, 2600 (2020) (Sotomayor, J., dissenting).

that restores residents with felony convictions' voting rights, so long as those residents had completed "all terms" of their sentences.[110] Subsequently, the Republican controlled Florida legislature and Florida Supreme Court decided that in order to complete "all terms" of a sentence, would-be voters would need to pay all fines, fees, and restitution related to the sentence.[111] That interpretation now keeps almost a million residents, disproportionately poor Black and Brown people, from voting (it is quite difficult if not impossible in many cases to find out the amount of money owed). Impacted Florida residents sued, claiming the financial requirements violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment as well as the Twenty-Fourth Amendment. Then, the District Court, agreeing with the plaintiffs, issued a preliminary injunction, which the Eleventh Circuit affirmed and declined to rehear en banc. Next, a full trial in District Court found that the payment scheme violated Equal Protection, Due Process and the Twenty-Fourth Amendment, and issued a permanent injunction. But then, without need or explanation, the Eleventh Circuit stayed the permanent injunction pending appeal.

As a last resort, impacted residents appealed to the Supreme Court to vacate the stay, but the majority refused. The majority did not publish an opinion but Justice Sotomayor published a dissent, joined by Justice Ginsburg and Justice Kagan, calling out the majority's miserly interpretation. Sotomayor wrote that "[t]his Court's inaction continues a trend of condoning disenfranchisement."[112] *Raysor* thus impugns the *Bruen* majority's claim that the right to keep and bear arms is "'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need."[113] Although the *Bruen* Court insists that the Second Amendment is the only right that requires people to comply with a governmental standard before exercising it, the Court, itself, creates barriers to would-be voters. The Court's inaction in *Raysor* continues its trend of blessing state laws that unduly burden minority voters, while it blesses people's interests in playing Rambo.

Similarly, the Court accepted voter suppression rules in *Rucho v. Common Cause*,[114] refusing to rectify partisan gerrymandering in North Carolina and Maryland. *Rucho* arose after Democrats in North Carolina and Republicans in Maryland complained that their respective states' districting plan discriminated against them, violating the First Amendment, Equal Protection Clause of the Fourteenth Amendment,

110. *Id.*
111. *Id.*
112. *Id.* at 2603 (Sotomayor, J., dissenting).
113. New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2156 (2022).
114. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

the Elections clause, and Article I, § 2 of the Constitution.[115] After the district courts in both cases overturned the respective districting plans, the states sought direct appeal with the Supreme Court—and won. In dissent, Justice Kagan noted that the majority "disputes none"[116] of the facts and yet "[t]he partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives."[117]

While making it harder for people to vote, the Court has also made it easier for corporations to influence the political process. Of course, protecting corporate interests seems to be one exception to the Court's general trend of endorsing burdens on political participation. For example, in *Citizens United v. Federal Election Commission*[118] the Court eagerly contorted itself to first establish that corporations are people. The Court then went a step further to zealously protect corporate people's political rights. To get there, the majority needlessly converted an as-applied challenge into a facial challenge in order to upend over a century of tradition[119] and empower corporations to spend unlimited funds on election-related content. Contrary to the Court's comfort with laws burdening minority voters in cases like *Shelby County* and *Brnovich*,[120] the *Citizens United* majority was loath to inconvenience corporations. The Court accordingly decided that Political Action Committees were insufficient means for channeling corporate speech because they are "burdensome" and place "onerous restrictions" on corporations.[121] *Citizens United* diminished democracy. As Justice Stevens wrote in his

115. *Id.* at 2491–2494.
116. *Id.* at 2512 (Kagan, J., dissenting).
117. *Id.* at 2509 (Kagan, J., dissenting).
118. Citizens United v. Fed. Election Comm'n., 558 U.S. 310 (2010).
119. *Id.* at 394–95 (Stevens, J., dissenting) ("The majority's approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907, ch. 420, 34 Stat. 864. We have unanimously concluded that this "reflects a permissible assessment of the dangers posed by those entities to the electoral process," *FEC v. National Right to Work Comm.*, 459 U. S. 197, 209 (1982) *(NRWC)*, and have accepted the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," *id.*, at 209–210. The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce*, 494 U. S. 652 (1990). Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law including *FEC* v. *Wisconsin Right to Life*, *Inc.*, 551 U. S. 449 (2007) *(WRTL)*, *McConnell v. FEC*, 540 U. S. 93 (2003), *FEC v. Beaumont*, 539 U. S. 146 (2003), *FEC v. Massachusetts Citizens for Life*, *Inc.,* 479 U. S. 238 (1986) *(MCFL)*, *NRWC*, 459 U. S. 197, and *California Medical Assn. v. FEC*, 453 U. S. 182 (1981).").
120. *Brnovich*, 141 U.S. at 2338; *Raysor* 140 U.S. at 2603. (Sotomayor, J., dissenting).
121. *Citizens United*, 558 U.S. at 337; *id.* at 339.

dissent, *Citizens United* "threatens to undermine the integrity of elected institutions across the nation."[122]

Not only does the Court find any burden on gun ownership antithetical to the Second Amendment while accepting pretextual burdens on voting, but the Court also deems states' interest in preventing gun violence irrelevant while accepting pretextual state interests in voting laws that unduly burden the right to vote.

C. *The Court shows no deference to States' interest in preventing gun violence but practically invents states' interest for voting laws*

Although the facts in election cases differ from cases firearm cases, the same basic structure underlies both. In both contexts, the government, usually state or local but sometimes federal, has passed a law or implemented a policy that an impacted party claims is unconstitutional, but the government claims is a valid means of furthering its interests. Yet, the Court gives the government's interest undue, and even inappropriate, deference in VRA cases, while ignoring the government's interest altogether in Second Amendment cases. To understand why, it is necessary to revisit the VRA's rationale.

Recall that the Fifteenth Amendment's prohibition on racially discriminatory voting laws was effectively dead letter, because states had passed facially neutral, pretextual voting laws designed to suppress minority votes. Indeed, Attorney General Katzenbach, on behalf of the Johnson administration, testified that the VRA "is designed to deal with the two principle means of frustrating the Fifteenth Amendment: the use of onerous, vague, unfair tests and devices enacted for the purpose of disenfranchising Negros, and the discriminatory administration of these and other kinds of registration requirements."[123] Similarly, Emanuel Celler (D-N.Y.), the Representative who ushered the VRA through the House, stated that Congress needed to preclude the "legalisms, stratagems, trickery, and coercion that now stand in the path of the Southern Negro when he seeks to vote must be smashed and banished."[124] The Supreme Court itself acknowledged that states routinely "'contriv[ed] new rules,' mostly neutral on their face but discriminatory in operation, to keep minority voters from the polls."[125] In other words, despite the Fifteenth Amendment's prohibition on racially discriminatory voting rules, states nonetheless implemented policies, such as literacy tests and poll taxes that kept Black people from voting. Even though the states claimed that literacy tests and poll taxes were "necessary" the federal government knew that they were pretextual ways to discriminate. And, as researchers found, discrimination remains today: "[a]lthough voter

122. *Id.* at 396 (Stevens, J., dissenting).
123. *Hearings*, *supra* note 75, at 8.
124. *H.R. 6400 And Other Proposals to Enforce the 15th Amendment to the Constitution of the United States*, 89th Cong. 1 (1965) (statement of Emanuel Celler, Comm. Chairman).
125. South Carolina v. Katzenbach, 383 U. S. 301, 335 (1966).

fraud is exceedingly rare, conservatives have been fabricating reasons to enact laws that disenfranchise as many potential voters as possible among certain groups, such as college students, low-income people, and minorities."[126] Accordingly, the VRA empowered the federal government to overcome states' pretextual interests in order to prevent voter discrimination. In fact, Congress amended § 2 to clarify that "if minority citizens 'are denied a fair opportunity to participate,' then 'the system should be changed."[127] Put differently, the VRA understood that the federal government need not accept a state's given interest for voting-related laws and policies if that law or policy caused minoritized residents to have unequal access to the polls.

Yet, the Supreme Court does the opposite, routinely accepting states' proffered interests in passing election laws, despite clear evidence that those polices are discriminatory. In *Brnovich*, for example, the Court declared that "the strength of the state interests served by a challenged voting rule is also an important factor that *must* be taken into account"[128] but ignored evidence that Arizona's laws unduly burdened minority residents. For example, even though "[i]n 2016, Hispanics, African Americans, and Native Americans were about twice as likely . . . .to have their ballots discarded than whites,"[129] the majority dismissed the statistics as irrelevant. Likewise, the Court ignored the way in which Arizona's ban on third-party ballot-collection disproportionately kept Native Americans from voting. Even though there is no documented incidence of fraud involving ballot collection in Arizona, the majority accepted the state's claim that the ballot collection rule was necessary to prevent fraud.[130] The *Brnovich* Court further reasoned that "every voting rule imposes a burden of some sort, and therefore, in determining 'based on the totality of circumstances' whether a rule goes too far, it is important to consider the reason for the rule. Rules that are supported by strong state interests are less likely to violate § 2."[131] But, as Justice Kagan's dissent retorts, Congress designed the VRA to address subtle discrimination and "[o]ne of those more subtle ways is to impose 'inconveniences,' especially a collection of them, differentially affecting members of one race."[132]

Shelby County is another instance of the Court privileging state and local governments' interests in passing discriminatory voting laws over ample evidence that those laws keep minoritized voters from the polls. As Justice Ginsberg's dissent details, the majority did not engage with the extensive record supporting the 2006 Reauthorization for the

126. Scott Keyes et al., *Voter Suppression Disenfranchises Millions*, 19 Race, Poverty & the Env't. 11 (2012).
127. Brnovich v. Democratic Nat'l. Comm.,141 S.Ct. 2321, 2357 (2021) (Kagan, J., dissenting).
128. *Id.* at 2339 (emphasis added).
129. *Id.* at 2368 (Kagan, J., dissenting).
130. *Id.* at 2340.
131. *Id.* at 2339–2340.
132. *Id.* at 2361 (Kagan, J., dissenting).

preclearance coverage formula.[133] Indeed, the House Judiciary Committee Chairman called the record supporting the Reauthorization "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years"[134] he served in the House. That record included transcripts from 21 hearings and several investigative reports, filling more than 15,000 pages[135] with evidence that "intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed."[136] Congress also found that without the VRA, "racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."[137] Beyond the voluminous Congressional record supporting the VRA's renewal, there was also ample evidence of voter discrimination in Alabama, home to Shelby County. As Justice Ginsberg's dissent noted, "'Between 1982 and 2005, Alabama had one of the highest rates of successful § 2 suits, second only to its VRA-covered neighbor Mississippi.'"[138] Tellingly, in 2008, a city located within Shelby County defied section 5 of the VRA by implementing voting rules that the DOJ objected to because the rules eliminated the city's lone majority-black district.[139] As a result, an incumbent Black city councilman, who represented the eliminated majority Black district, lost his election.[140] Despite the rich Congressional record and well-documented incidences of Alabama and Shelby County engaging in discrimination, the Court privileged Shelby County's prerogative over the VRA. Indeed, the Court invalidated Section 5 entirely, even though Shelby County had only brought a facial challenge.

The Supreme Court prioritizes states' interests in passing laws that make it harder for minorities to vote, despite the VRA's clear mandate against such deference. Conversely, the Court gives states' interest in keeping residents alive no weight at all, even though the Second Amendment, on its face, comprehends regulations and security. Consider, for example, how Justice Thomas described the Second Amendment in *Bruen*, claiming it "'is the very *product* of an interest balancing by the people' and it 'surely *elevates above all other interests* the right of law-abiding, responsible citizens to use arms' for self-defense. It is this balance—struck by the traditions of the American people—that demands our *unqualified*

133. Shelby County v. Holder, 570 U.S. 529, 580 (2013) (Ginsberg, J., dissenting).
134. 152 Cong. Rec. H5143 (July 13, 2006) (statement of Rep. Sensenbrenner).
135. *Shelby County*, 570 U.S. at 565 (Ginsburg, J., dissenting).
136. Shelby County v. Holder, 679 F.3d 848, 864 (D.C. Cir. 2012).
137. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, § 2(b)(9), 120 Stat. 577, 578 (2006).
138. *Shelby County*, 570 U.S. at 582 (Ginsburg, J., dissenting) (quoting (*Shelby County*, 679 F.3d at 897 (Williams, J. dissenting)).
139. *Id.* at 583–584.
140. *Id.* at 584.

deference."[141] The *Bruen* majority, in asserting that the Second Amendment deserves "unqualified deference" effectively elevates the right to keep and bear arms above all others.

Moreover, *Bruen* claims that "*Heller* and *McDonald* expressly rejected the application of any 'judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important government interests.'"[142] Accordingly, the Court invalidated the interest-balancing framework, in which courts generally considered whether a given gun law properly furthered an important state interest, in favor of a pure history test.[143] *Bruen's* novel history test is an attempt to allow courts to analyze gun laws without having to deal with why those gun laws exist: gun violence. Indeed, Justice Thomas's majority opinion does not address gun violence at all. Perhaps worse than ignoring gun violence, as Justice Thomas' majority opinion does, is Justice Alito's concurrence, which dismisses it. Justice Alito deems "the ubiquity of guns and our country's high level of gun violence"[144] irrelevant to gun laws. In contrast, Justice Breyer's *Bruen* dissent observes, "[t]he primary difference between the Court's view and mine is that I believe the [Second] Amendment allows States to take account of the serious problems posed by gun violence . . . I fear that the Court's interpretation ignores these significant dangers and leaves States without the ability to address them." *Bruen* epitomizes the inverse of the Court's VRA jurisprudence. There, the Court gives undue weight to states' spurious interests in passing laws that interfere with minoritized citizen's right to vote, but in the Second Amendment context the Court ignores states' real interest in keeping citizens from being shot.

IV. Implications: Eroding Democracy while Empowering Armed Political Violence

The Supreme Court is not on an island. Across the street from the chambers where a majority of Justices have chipped away at democracy via the written word, a radicalized mob tried to impede democracy by brute force on January 6, 2021. Across the same city where a majority of Justices elevated the Second Amendment above "all other interests," gun violence kills an average of 128 people each year.[145] Across the country the justices purport to serve,[146] tension is rising. After the FBI

141. New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2131 (2022). (emphasis added) (internal citation omitted).
142. *Id.* at 2129 (internal citations omitted).
143. *Id.* at 2129–2131.
144. *Id.* at 2158 (Alito, J., concurring).
145. *How does gun violence impact the communities you care about?*, EveryStat, https://everystat.org/#DistrictofColumbia, [https://perma.cc/W8EW-8H5S] (last visited Apr. 8, 2023).
146. *Oaths of Office*, Sup. Ct. of the U.S., https://www.supremecourt.gov/about/oath/oathsofoffice.aspx [https://perma.cc/T548-V22M] (last visited Apr. 8, 2023).

raided former President Donald Trump's Mar-a-Lago estate seeking classified documents, one of his supporters, armed with a gun, tried to breach the Bureau's Cleveland office. Members of Congress including Republican Lee Zeldin and Democrat Pramila Jayapal, as well as state officials, including Michigan Governor Gretchen Whitmer faced violence or threats from antigovernment actors.[147] A recent report from the UC Davis Violence Prevention Research Program and the California Firearm Violence Research Center found that one in five survey participants believed political violence was "at least sometimes justified."[148] In fact, almost 25 percent of respondents believed that violence is justified to "keep an election from being stolen."[149] This report arrives amid record gun sales that started in 2020[150] and continue to this day.[151] The combination of increasingly violent rhetoric from right-wing, often white supremacist, antigovernment actors and surging gun sales is particularly troubling because evidence shows that firearms are domestic extremists' weapon of choice.[152] Extremists have wasted no time invoking a false, extreme notion that the Second Amendment protects a right to violent insurrection.[153] Representative Matt Gaetz (R-FL), for example, stated that the Second Amendment empowers citizens to "maintain an armed rebellion against the government."[154] As the threat of political violence looms and gun violence ravages our communities, state legislatures are passing laws suppress voting rights.

Voter suppression did not disappear after the Civil Rights movement. As researchers found, "[a]lthough voter fraud is exceedingly rare, conservatives have been fabricating reasons to enact laws that disenfranchise as many as potential voters as possible among certain groups, such

147. Lauren Gambino & Joan E. Greve, *US faces new era of political violence as threats against lawmakeres rise*, The Guardian (Jul. 31, 2022, 9:17 AM), https://www.theguardian.com/us-news/2022/jul/31/us-political-violence-threats-against-lawmakers [https://perma.cc/XRR4-LP9S].

148. Wintemute et. al, *supra* note 49, at 2.

149. *Id.* at 13.

150. *Trends in Gun Sales*, Brady https://www.bradyunited.org/fact-sheets/trends-in-gun-sales [https://perma.cc/264D-XV4E].

151. *Guns, violence and political extremism putting U.S. at risk of disaster, according to expert*, U.C. Davis Health (Nov. 4, 2021), https://health.ucdavis.edu/news/headlines/guns-violence-and-political-extremism-putting-us-at-risk-of-disaster-according-to-expert/2021/11 [https://perma.cc/LB75–56VF].

152. Center on Extremism, *Firearms Remain the Weapons of Choice for Domestic Extremists*, Anti-Defamation League (June 21, 2022), https://www.adl.org/resources/blog/firearms-remain-weapons-choice-domestic-extremists [https://perma.cc/RY8M-FM4G].

153. Jamie Raskin, *The Second Amendment Gives No Comfort to Insurrectionists*, N.Y. Times (Sept. 27, 2022), https://www.nytimes.com/2022/09/27/opinion/us-second-amendment.html [https://perma.cc/Q866-H94D]; *Origins of an Insurrection: How Second Amendment Extremism Led to January 6*, Brady 4–5, https://brady-static.s3.amazonaws.com/january-6-second-amendment-extremism-guns.pdf [https://perma.cc/X8DW-U3GD] (last visited Apr. 8, 2023).

154. Brady, *supra* note 150, at 4–5.

as college students, low-income people, and minorities."[155] Indeed, evidence of racist voter suppression policies abounds.[156] As political leader and voting advocate Stacy Abrams said:

> The insidious nature of voter suppression in the 21st century is that it no longer uses the blunt instruments of law enforcement or the literacy test as obstacles to voting. Instead, you see different versions of, say, the poll tax. The poll tax is now making ex-offenders pay fees and fines. There's also a poll tax in making people stand in line for hours on end.[157]

Abrams went on to characterize other measures such as closing down polling centers in marginalized communities and voter ID laws as modern "poll taxes."[158] Myriad research proves Abrams' point; many laws supposedly intended to reduce "voter fraud" have a disproportionate impact on Black and Brown communities, just as poll taxes once did.[159] In light of these forces—legislatures passing laws to suppress voter suppression, brewing political violence, and an appetite for armed extremism—the Supreme Court's jurisprudence is troubling to say the least.

First, the country remains divided as the 2024 presidential election looms. Second, As *Bruen* moves from chambers to communities, some lower courts have already started to use its tortured "historical" standard to improperly undermine gun laws throughout the country.[160] While these cases are still making their way through the courts, they make it clear that proponents of Second Amendment extremism intend to wield *Bruen* against common sense gun regulation

V. Conclusion

The Supreme Court's differing treatment of Second Amendment and Voting Rights cases puts the country on a path toward maximal public carry and minimal democracy. But all is not lost because both the living Constitutional framework and "originalism," would require

155. Keyes et. al, *supra* note 126, at 11.

156. "Consistent with our findings for proposed legislation, states where minority turnout has increased since the previous presidential election were more likely to pass restrictive legislation." Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 Persp. on Pols. 1088, 1100 (2013).

157. Ezra Klein, *Stacey Abrams on minority rule, voting rights, and the future of democracy*, Vox (Nov. 6 2020, 3:24 PM), cast/21540804/stacey-abrams-2020-bidpodcast/21540804/stacey-abrams-2020-biden-trump-election-voter-suppression-law [https://perma.cc/BU9G-UZUS].

158. *Id.*

159. *See* Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. Pols. 363 (2017); Matt A. Barreto et al., *Are All Precincts Created Equal? The Prevalence of Low-Quality Precincts in Low-Income and Minority Communities*, 62 Pol. Rsch. Q. 445 (2009); Bentele, *supra* note 156.

160. Miller et al., *State Firearm Laws After Bruen*, RAND Corporation (2022), https://www.rand.org/pubs/perspectives/PEA243–1.html.

an honest Court to contextualize the Second Amendment within the greater fabric of well-ordered liberty. The Constitution, whether in 1791, 1868, or 2022, was not designed to usher in the country's undoing. If the Court wants to prioritize "history" so be it; it is consistent with history and tradition for the state's firearms laws to relate to the state's interest in public safety. It is consistent with history and tradition for the Fifteenth Amendment to put minoritized voters' interest above the state's interest in discriminating against them.