



– Essays on Race and Guns in America –

The Racial Justice Gambit

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Racial justice has become a pawn in Second Amendment litigation. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, both [petitioners](#) and [respondents](#) raised the racialized history of gun regulation to support their positions on the constitutionality of New York’s concealed carry licensing scheme. Moreover, groups from across the ideological spectrum filed amicus briefs tout-ing racial justice arguments in support of [both parties](#). The briefs offered competing views on what the history of race and guns in America portends for present day Second Amendment controver-sies. And both sides had differing takes on what loosening gun regulation would mean for Black people and other people of color today. As the briefing in *Bruen* shows, no matter what side of the ‘v.’ one finds themselves, there is a racial justice angle available to exploit.

Netflix’s *The Queen’s Gambit* taught us pawns are one of the most (if not *the* most) powerful pieces in chess. The question is: What role is racial justice playing in the game of chess that is Second Amendment litigation? Who wins by deploying the racial justice gambit? Both questions are complicated. Yet one thing seems clear—no matter who ultimately wins in *Bruen*, Black peo-ple are bound to lose.

Start with the weaponizing of history. Some briefs filed in support of petitioners in *Bruen* argue New York’s concealed carry licensing regime is unconstitutional because it’s apiece with colonial American laws and Black Codes that prohibited Black people from possessing firearms, purpose-fully leaving them defenseless. For example, the National African American Gun Association [ar-gued](#), “New York’s discretionary licensing scheme is within a similar legacy as the Black Codes and Jim Crow Regimes that prohibited the carrying of firearms by African Americans.” The or-ganization Black Guns Matter, after tracing the racialized history of gun regulation, [asserted](#) New York’s licensing scheme “is one more thread in this deeply discriminatory history.” And the Ruth-erford Institute [claimed](#) that there are “strong parallels between poll taxes, literacy tests, and certain gun control schemes that can have the effect of preventing blacks and other minorities from owning guns much as they were once prevented from voting.” These briefs paint the picture that all gun regulation [is racist](#).

Then you read the briefs in support of respondents, and the history becomes murkier. Many mar-shaled evidence showing that, historically, gun regulation was important to protect Black Ameri-cans from white violence. For instance, Everytown for Gun Safety [argued](#), “Radical Republican governors in the Reconstruction-era South passed laws prohibiting public carry precisely because they were seen as a way of protecting Black freedman from racist violence.” A group of history and law professors [maintained](#) that while Black Codes were passed to “disarm Black citizens,” “subsequent racially neutral laws passed by Republican-dominated state legislatures sought to re-strict arms carrying to protect Black citizens from terrorist violence by organizations like the Ku Klux Klan.” And a brief by the NAACP Legal Defense Fund and the National Urban League

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[contended](#) that during Reconstruction, Republican-led governments in the South “took direct steps toward protecting Black freedmen from racial handgun violence perpetrated by recalcitrant whites . . . by limiting public carrying of firearms.” Under this view of history, perhaps gun regulation is in fact necessary for racial equity.

As these snippets show, the history is complicated. True, gun regulation was used aspirationally to protect Black Americans from white violence. Yet it is also true that gun regulation was used to disarm Black people and leave them intentionally *unprotected* from white violence. Further complicating the historical tableau, as several briefs in *Bruen* point out, there is a long history of gun regulation in America that seemingly had nothing to do with race.

Turn to the present day implications. Racial justice advocates are split on whether gun regulation is good for Black people. For example, Black public defenders in New York filed a [brief](#) in support of petitioners. They detailed how “virtually all of [their] clients whom New York prosecutes for exercising their Second Amendment rights are Black or Hispanic.” The data they presented in support of this claim are arresting. According to New York City Police Department data, in 2020, 96 percent of those arrested for possessing a gun without a license were Black or Latino, and “this percentage has been above 90% for 13 consecutive years.” Then, the Black public defenders included poignant vignettes of clients who have been prosecuted for having a gun, describing the parade of horrors that flowed from their being ensnared in the criminal legal system.

LDF and Urban League’s brief presented data painting a different racial justice picture. As their brief relays, Black Americans are ten times more likely than white Americans to die from gun violence, with gun homicide being the leading cause of death for young Black men. And as their brief persuasively asserts, “carrying a concealed handgun increases the chances of a confrontation becoming lethal.” They then provided their own tragic examples of Black people falling victim to senseless gun violence, including the high profile killings of Trayvon Martin and Jordan Davis.

Thus, the present day implications of loosening or tightening gun regulation is also complicated. If gun possession is criminalized, Black people and other people of color will disproportionately bear the brunt of that criminalization. At the same time, Black people are more likely to die from gun violence; allowing the public carry of guns raises the risk of gun violence and can turn what should otherwise be innocuous encounters into deadly confrontations.

Where does that leave us?

The conflicting briefs show that those interested in racial justice and the rights and safety of Black people can honestly hold different views on the role of gun regulation as it relates to racial justice, and that there is no clear answer on the best racial justice outcome in Second Amendment litigation.

Start with the premise that Black people being vastly over-prosecuted for possessing guns without a license is a reason to jettison licensing schemes. As sure as water is wet, jurisdictions will find other ways to criminalize Black gun ownership even if it is legal to carry a gun in public. For



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instance, even where people are legally allowed to carry guns outside the home, it is usually illegal to “brandish” a gun, meaning using it in a “threatening” manner. In a society where Blackness is often [equated](#) with violence, dangerousness, and criminality, it takes little imagination to guess what happens next. Further, a [study](#) estimated that as of 2010, 1 out of every 3 Black men had a felony conviction; loosening gun licensing requirements says nothing about felon in possession laws, which Black people are disproportionately charged with violating. As proof, in 2020 [55.8 percent](#) of those prosecuted for violating the federal felon in possession of a firearm statute were Black. Then there are the statutes that allow for super-added penalties for crimes involving guns, which are disproportionately enforced against Black people. An example: 18 U.S.C. § 924(c) allows the federal government to charge a separate crime when a person uses a gun during a “crime of violence” or a “drug trafficking crime.” What this means, is that the government can charge a person for a crime of violence or a drug crime, and then tack on another charge if that crime involved a gun. In 2020, [51 percent](#) of those prosecuted for violating § 924(c) were Black. Abandoning licensing schemes to address the disparate prosecution of Black gun possession seems very much like slapping a Band-Aid over a bullet hole.

Moreover, loosening gun regulation says nothing about the social dynamics that complicate Black gun ownership. Even in states where public carry is legal, [courts](#) have [held](#) that seeing a person with a gun, legal or not, gives an officer reason to frisk that person so long as the officer had reasonable suspicion to make the stop. As a reminder, reasonable suspicion is an exceedingly easy standard to satisfy, and a frisk, even if no contraband is found, is no petty indignity. Thus, there is a very real chance that Black people could routinely (and lawfully) be subject to degrading police interactions just by exercising their Second Amendment rights.

Or take police use of force. Police disproportionately use force, [including deadly force](#), against Black people. One [factor](#) that goes into deciding whether police force was justified is whether the person posed an immediate threat to the officer. In a world that connotes Blackness with dangerousness, and where Black people are disproportionately [stopped](#) by police, there is no good reason to think that Black gun possession will not lead to and be cited by police to justify use of force incidents, even if that gun were possessed legally. One need only recall the killing of Philando Castile as an example. Castile informed the officer who pulled over him that he [was legally carrying a gun](#). And yet, when Castile went to reach for his wallet, the officer still shot him dead, purportedly out of fear for his safety (that officer was [acquitted](#) of all wrongdoing). That’s just [one](#) high-profile example. Whatever happens with gun regulation will not change the entrenched misperceptions surrounding Black criminality, which makes the exercise of Second Amendment rights particularly precarious for Black people.

Still, leaving regulations in place that stymie Black people’s ability to fully enjoy their Second Amendment rights seems like an unsatisfying alternative. Nor should we placidly accept the fact Black people are disproportionately punished for bearing arms. Because, while in theory there should be legal redress for the racialized enforcement of gun laws, in reality, the [evolution](#) of equal protection doctrine has made racial selective prosecution claims all but impossible to prove.



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Not to mention that [increased Black gun ownership](#) makes increasing sense in the current socio-political climate. In a world where we see Black people (Ahmaud Arbery) gunned down *on camera* by white vigilantes who would have gotten away with it but for [public pressure](#). A world where a white teen (Kyle Rittenhouse) [got away](#) with showing up at a racial justice protest with an AR-15 and shooting three people, killing two. A world where a mob of mostly white people [stormed the Capitol](#) after the former President [accused](#) locales with diverse populations of stealing the election. When faced with this world, it's no surprise that Black people want to arm themselves to ensure they aren't left unprotected given the ever-looming threat of racialized violence.

But what the racialized debate surrounding gun control also reveals is how easily racial justice narratives can be coopted. Professor Darrell Miller [explained](#) it best: “The hypocrisy on display in [some of the] briefs is galling.” As Miller noted, some who signed briefs advancing a racial justice narrative in *Bruen* were “the same figures who spent the summer of 2021 supporting ‘big lie’-backed voting rights restrictions on minorities, who screeched that immigrants are replacing ‘real Americans’ and who endorsed anti-critical-race-theory legislation so ham-handed that teachers are now instructed to offer ‘opposing’ views of the Holocaust. These right-wing leaders have suddenly discovered the merits of concepts like White privilege, anti-Blackness and structural racism — but only when it applies to gun rights, it seems.”

It's important to take a step back and assess what's happening here. There are white people pointing to the history of white people discriminating against Black people to further their own white interests. It's perverse. But looking to [Heller](#) and [McDonald](#), if past is prologue, this strategy might work. Thus, while there may be honest debates about what scope of Second Amendment rights are best for Black people, there are also insidious invocations of racial justice narratives by those who seemingly have no real interest in broader racial equity.

Again, where does that leave us?

The quest for equal citizenship for Black Americans has perpetually proved elusive. Since the passage of the Reconstruction Amendments, Black people have fought for, yet have still not achieved, the full realization of their constitutional rights. Whether it's the right to serve on a jury, the right to be free from unreasonable searches and seizures, or the fundamental right to vote, Black people have been denied the full panoply of constitutional rights as they are afforded to white Americans.

The *Bruen* litigation captures the conundrum Black people face when it comes to the realization of constitutional equality in the Second Amendment context. No matter what the Supreme Court holds in *Bruen*, Black people's Second Amendment rights will look very different than white people's rights.

In the end, racial justice has been reduced to a gambit in Second Amendment litigation. How effective a gambit? We'll have to wait and see.

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