
RACE AND GUNS, COURTS AND DEMOCRACY

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Is racism in gun regulation reason to look to the Supreme Court to expand Second Amendment rights? While discussion of race and guns recurs across the briefs in *New York State Rifle & Pistol Ass'n v. Bruen*,¹ it is especially prominent in the brief of legal aid attorneys and public defenders² who employed their Second Amendment arguments to show-case stories of racial bias in the enforcement of New York's licensing and gun possession laws. Because this Second Amendment claim came from a coalition on the left, it was widely celebrated by gun rights advocates.³

This Essay argues that the racial justice concerns the public defenders highlight should be addressed in democratic politics rather than in the federal courts. We show that problems to which public defenders point are partly attributable to the Court's decades-long abdication of equal protection oversight of the criminal justice system — its transformation of equal protection into an instrument for protecting majority

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¹ No. 20-843 (argued Nov. 3, 2021). About a quarter of the briefs in *Bruen* discussed the relationship between gun regulation and marginalized groups. Alexys Ogorek, *Breaking Down the Initial Amicus Briefs in Bruen*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Aug. 11, 2021), <https://firearmslaw.duke.edu/2021/08/breaking-down-the-initial-amicus-briefs-in-bruen> [<https://perma.cc/LU2G-8RD5>].

² Amici, including The Black Attorneys of Legal Aid (BALA), The Bronx Defenders (BxD), and the Brooklyn Defender Services (BDS), come from ten different legal organizations, and have “first-hand experience representing hundreds of indigent people each year who are arrested, jailed, and prosecuted for exercising their constitutional rights to keep and bear arms.” Brief of the Black Attorneys of Legal Aid et al. as Amici Curiae in Support of Petitioners at 1–4, *Bruen*, No. 20-843 (July 20, 2021) [hereinafter Brief of the Black Attorneys of Legal Aid et al.]. Following common practice, we refer to the coalition's filing as the “public defenders' brief.”

³ See, e.g., Nicholas Johnson, *Is the Left's Gun-Control Faction Breaking Up?*, NAT'L RIFLE ASS'N: AM.'S 1ST FREEDOM (Oct. 31, 2021), <https://www.americas1stfreedom.org/articles/2021/10/31/is-the-left-s-gun-control-faction-breaking-up> [<https://perma.cc/B5WQ-2B7Q>]; Cody J. Wisniewki, *The Supreme Court Briefs that Dismantle New York's Public Carry Ban*, TRUTH ABOUT GUNS (July 30, 2021), <https://www.thetruthaboutguns.com/the-supreme-court-briefs-that-dismantle-new-yorks-public-carry-ban> [<https://perma.cc/7BRE-U6LX>]; see also Editorial, *Progressive Gun-Control Crackup*, WALL ST. J. (July 23, 2021, 6:43 PM), <https://www.wsj.com/articles/progressives-gun-control-black-attorneys-of-legal-aid-supreme-court-amicus-brief-11627078928> [<https://perma.cc/J85W-3639>].

rather than minority rights.⁴ Actors in democratic politics can enforce equal protection in ways that courts have not and they can enforce equal protection in ways that courts cannot, by coordinating multiple racial justice goals, seeking freedom from gun violence in nondiscriminatory law enforcement and transformed, less carceral approaches to public safety.⁵ Only democratic actors have the institutional competence to integrate these race-egalitarian aims and to experiment with strategies for achieving them. We highlight jurisdictions where there is debate about the best toolkit to achieve inclusive forms of public safety in an era of rising crime.⁶ None of this is possible if the Court expands Second Amendment rights in ways that deprive communities of the democratic authority they need to coordinate these various compelling public ends.

Like any instruments of power, guns and their regulation can be employed for domination or freedom, along lines of race, gender, and class.⁷ In prior work we locate government's interest in promoting public safety in this social field. Regulation that promotes public safety not only enables physical security but also the very preconditions of collective life.⁸ We show that *District of Columbia v. Heller*⁹ recognizes the government's prerogative to protect members of the public from weapons threats, and we argue that government must promote public safety in such a way as to protect the public sphere on which a constitutional democracy depends. "Given the commitments that define our constitutional democracy, government can regulate weapons to ensure that all persons have equal claims to security and to the exercise of liberties whether or not they are armed and however they may differ by race, sex, or viewpoint."¹⁰ Our account of public safety "does not necessarily require enacting more gun laws," but highlights why "concerns about racial and political evenhandedness should be a central part of all conversations about the passage and enforcement of gun laws and about killings in 'self-defense.'"¹¹

⁴ See *infra* notes 25–30 and accompanying text.

⁵ See *infra* Part II, pp. 455–60 (describing gun violence, bias in criminal law enforcement, and carceral public safety strategies as racial justice issues).

⁶ See *infra* notes 47–55 and accompanying text.

⁷ See, e.g., CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* (2021); Susan P. Liebell, *Sensitive Places?: How Gender Unmasks the Myth of Originalism in District of Columbia v. Heller*, 53 *POLITY* 207, 210 (2021).

⁸ See Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 *NW. U. L. REV.* 139, 139–40 (2021) [hereinafter Blocher & Siegel, *When Guns Threaten*]; Reva B. Siegel & Joseph Blocher, *Why Regulate Guns?*, 48 *J.L. MED. & ETHICS* 11, 11 (2020); Joseph Blocher & Reva Siegel, *Guns Are a Threat to the Body Politic*, *THE ATLANTIC* (Mar. 8, 2021, 1:03 PM), <https://www.theatlantic.com/ideas/archive/2021/03/guns-are-threat-body-politic/618158> [<https://perma.cc/4MRB-SWTJ>].

⁹ 554 U.S. 570 (2008).

¹⁰ Blocher & Siegel, *When Guns Threaten*, *supra* note 8, at 198.

¹¹ *Id.* at 162.

In this short Essay we address issues raised by the public defenders and others contesting racial bias in gun regulation.¹² Like the public defenders, we have emphasized the issue of racial bias in the enforcement of gun laws,¹³ and we have also objected to courts' evisceration of equal protection guarantees in the criminal law context.¹⁴ But we part ways with the public defenders when they turn to the courts to expand gun rights in response. The decision in *Bruen* might provide interim relief from New York's licensing regime, but it will not address racial bias in the criminal justice system, and most importantly, it will secure whatever relief it does at high cost by restricting the democratic authority of communities to seek freedom from gun violence through law. We favor responses that protect a community's democratic competence to experiment with the most inclusive approaches to public safety. We argue that, despite their many limitations, democratic actors can do more than federal courts can or will, and that the best current path to advance and coordinate racial justice goals is through democratic politics.¹⁵ We analyze the relevant constitutional values and institutions best suited to vindicate them as follows.

In Part I, we demonstrate that the public defenders' Second Amendment arguments present claims of structural racism that sound most naturally in equal protection. But because of the ways that federal

¹² See, e.g., Brief for Amicus Curiae National African American Gun Ass'n, Inc. in Support of Petitioners at 34, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (July 16, 2021) [hereinafter Brief for National African American Gun Ass'n, Inc.]; Brief of Black Guns Matter, A Girl & A Gun Women's Shooting League and Armed Equality as Amici Curiae in Support of Petitioners at 10, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (July 20, 2021) [hereinafter Brief of Black Guns Matter et al.].

¹³ See *supra* p. 450; Blocher & Siegel, *When Guns Threaten*, *supra* note 8, at 144 ("The enforcement of gun laws helps define and shape a constitutional democracy, whether it reinforces hierarchies or attests to the equal liberties of community members.").

¹⁴ See, e.g., Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in McCleskey v. Kemp — And Some Pathways for Change*, 112 NW. U. L. REV. 1269, 1269 (2018) [hereinafter Siegel, *Blind Justice*] (discussing the constraints the Court has imposed on proof of purpose in equal protection violations); Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 61–67 (2013) [hereinafter Siegel, *Foreword*] (discussing how the Supreme Court has focused its equal protection doctrine and docket on majority claimants in affirmative action cases rather than minority claimants in stop-and-frisk cases); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1139–40 (1997) [hereinafter Siegel, *Why Equal Protection No Longer Protects*] (showing how status regimes evolve in history and illustrating how doctrine of discriminatory purpose can legitimate state action enforcing racial inequality through the criminal law).

¹⁵ See Elie Mystal, *Why Are Public Defenders Backing a Major Assault on Gun Control?*, THE NATION (July 26, 2021), <https://www.thenation.com/article/society/black-gun-owners-court> [<https://perma.cc/CV37-BAYW>] ("[T]he public defenders are not wrong. But to fix that, we must demand that the state do better, not throw up our hands and consign ourselves to a Hobbesian state of nature, powered by Beretta. . . . I want racial justice, but I also don't want to be shot to death in a crossfire of 'liberty.'").

courts have interpreted the Equal Protection Clause, federal courts are not likely to provide relief from the forms of bias that the public defenders describe. For this reason, the public defenders have apparently concluded that the conservative Justices are more likely to grant their clients gun rights than equality rights.

This is a dangerous bargain.¹⁶ The public defenders argue that the Second Amendment prohibits all gun licensing, advancing an even more expansive claim than the petitioners make and the Court is likely to grant.¹⁷ As importantly, the public defenders call for the elimination of gun licensing for public carry, nationwide, *through judicial decree, not through politics*. Whatever Second Amendment victory they help achieve will restrict the democratic authority of communities to protect themselves through law, including minority communities most ravaged by gun violence.¹⁸ As we see it, democratic competence is exactly what is needed to pursue and coordinate racial justice goals. The question isn't whether democratic actors are always choosing or properly coordinating these ends. Rather, the question is whether to continue the conversations now ignited or to invite federal courts to expand gun rights in ways that take control of decisionmaking out of democratically responsive institutions.

Few would dispute the public defenders' core claim: communities seeking relief from gun violence should not have to accept public safety

¹⁶ Associate Director-Counsel of NAACP Legal Defense & Educational Fund, Inc., Janai Nelson, has made a similar observation: "The idea that gun regulations are harmful because they can be used to discriminate against Black people creates a false choice for Black communities about their safety." Janai Nelson (@JNelsonLDF), TWITTER (Sept. 23, 2021, 10:07 PM), <https://twitter.com/JNelsonLDF/status/1441222614538592256> [<https://perma.cc/B42P-2AQD>].

¹⁷ See Brief of the Black Attorneys of Legal Aid et al., *supra* note 2, at 31 (arguing that "New York cannot condition Second Amendment rights on a person first obtaining a license"). Even the petitioners do not object to all licensing regimes, and it seems unlikely that the Court would mandate nationwide public carry. Transcript of Oral Argument at 50, *Bruen*, No. 20-843 (Nov. 3, 2021) (comments of Paul Clement).

The more likely result is for the Court to invalidate New York's current "may issue" rule, in part because of the discretion it affords licensing authorities, *see infra* note 29, and to expand access to guns without eliminating licensing entirely. The Court's decision will not require government to take steps to address racial bias in the administration of public safety law. Without political actors committed to design and enforce the laws in a way that would reduce racial bias in the system, such bias will persist.

¹⁸ Brief of the NAACP Legal Defense & Educational Fund, Inc., and the National Urban League as Amici Curiae in Support of Respondents at 6, *Bruen*, No. 20-843 (Sept. 21, 2021) [hereinafter Brief of the NAACP LDF] (arguing that public carry laws are "an indispensable tool in ensuring physical protection for Black people and other disfavored or minority groups"); Brief of Amici Curiae American Medical Ass'n et al. in Support of Respondents at 4-5, 12, *Bruen*, No. 20-843 (Sept. 21, 2021) (noting disproportionate harm); Brief of Amici Curiae Social Scientists and Public Health Researchers in Support of Respondents at 33-34, *Bruen*, No. 20-843 (Sept. 21, 2021) ("The data clearly shows that 'may issue' laws are of critical importance to addressing the disproportionate impact of gun violence on communities of color.").

regimes rife with racial bias. Constitutional values should guide protection of the public sphere. In Part I, we identify equal protection principles that should constrain public safety law but for the exceedingly narrow ways that federal courts have enforced them in the last several decades.

But all government actors, not only judges, should enforce the Constitution — and actors in representative government can do so with institutional resources that judges lack.¹⁹ In Part II, we show that democratic actors can do what federal courts won't and much more than federal courts can to advance equality in the course of protecting public safety. Actors in representative government vindicate equality as courts might when they seek evenhandedness in the enforcement of the law. But legislators, executives, administrators, and prosecutors are able to vindicate equality values in different ways than judges can. They can prevent gun violence by a range of noncarceral strategies, and, responding to their constituencies, they can debate the balance of noncarceral and criminal law means. In closing our Essay, we offer a glimpse of this practice of democratic constitutionalism, which, however limited, nonetheless offers a more robust dialogue about the meaning of equal protection in the criminal justice system than do decades of conversation in the federal courts.

I. THE PUBLIC DEFENDERS' SECOND AMENDMENT AND EQUAL PROTECTION CLAIMS

While the public defenders' brief presents itself as making claims rooted in the Second Amendment, almost every line of argument involves claims about race and law enforcement that seem most naturally rooted in the Equal Protection Clause of the Fourteenth Amendment.

The brief points to racialized patterns in the exercise of government discretion. It describes a regime in which the state grants few gun licenses to people of color and then disproportionately prosecutes people of color for possessing a gun without a license.²⁰ As one of the authors of the brief put it in an article explaining their argument, "New York

¹⁹ See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947, 2026–32 (2003).

²⁰ For a discussion of the licensing framework and prosecution for possession, see Brief of the Black Attorneys of Legal Aid et al., *supra* note 2, at 6–15; for a discussion of racial dynamics, see, for example, *id.* at 5 ("New York enacted its firearm licensing requirements to criminalize gun ownership by racial and ethnic minorities. That remains the effect of its enforcement by police and prosecutors today."); and *id.* at 14–15 ("In 2020, while Black people made up 18% of New York's population, they accounted for 78% of the state's felony gun possession cases. Non-Latino white people, who made up 70% of New York's population, accounted for only 7% of such prosecutions.").

has total discretion over whether you can possess a firearm at all, anywhere,” and “[w]hat’s actually happening is that the NYPD is marching around the city taking firearms from Black and brown people every single day.”²¹ The public defenders object that government delivers public safety in a carceral form that is not healthy, dignified, or even *safe* for their clients in communities of color.²²

The natural doctrinal home for this kind of argument would seem to be the Equal Protection Clause, the “central purpose” of which is to address “official conduct discriminating on the basis of race.”²³ The constitutional evaluation of a licensing law — like New York’s — that is facially neutral but alleged to be enforced in a race-based manner is not a new problem for Fourteenth Amendment doctrine.²⁴ And yet there is no equal protection claim in *Bruen*. Why not?

One obvious explanation is that, thanks to doctrinal changes advocated and implemented by conservative Justices, it is nearly impossible to prevail on an equal protection challenge to the enforcement of a facially neutral criminal law like New York’s. The Court first required a plaintiff to prove that enactment or enforcement of the law is motivated by discriminatory purpose²⁵ and then defined the discriminatory purpose standard in terms that are virtually impossible to satisfy.²⁶ Federal courts have been especially resistant to statistical evidence of discrimi-

²¹ Avinash Samarth, Michael Thomas & Christopher Smith, *Second Class*, INQUEST (Nov. 5, 2021), <https://inquest.org/nyc-public-defenders-amicus-second-class> [<https://perma.cc/E4BL-UCFG>] (quoting Avinash Samarth).

²² Brief of the Black Attorneys of Legal Aid et al., *supra* note 2, at 32–33.

²³ *Washington v. Davis*, 426 U.S. 229, 239 (1976).

²⁴ See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977).

²⁵ *Davis*, 426 U.S. at 239.

²⁶ In equal protection cases, the Court has defined discriminatory purpose as requiring a showing “that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979); see Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1783 (2012) (noting that the *Feeney* standard is “so exacting that, since this test was announced in 1979, it has never been met — not even once”). For a history tracing the Court’s deliberate choice of standards that would foreclose discrimination claims, see Siegel, *Foreword*, *supra* note 14, at 9–23. The Court relies on *Feeney* whenever it wants to insulate government action from close judicial oversight. For example, the Court relied on *Feeney* to protect the exercise of prosecutorial discretion in a First Amendment selective prosecution case. See *Wayte v. United States*, 470 U.S. 598, 607–08 (1985) (observing that “[t]his broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review,” *id.* at 607, and reasoning that “[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards . . . [which] require petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose,” *id.* at 608 (citing *Feeney*, 442 U.S. at 256)).

natory purpose in the criminal law context, where Justices have emphasized that this method of proving equal protection violations could limit prosecutorial discretion.²⁷

Briefs in *Bruen* suggested that modern statutory regimes that invest government officials with discretion perpetuate race discrimination of the past.²⁸ During oral argument, some Justices were receptive to the claim that government discretion in gun licensing is inconsistent with the protection constitutional rights deserve.²⁹ We would be amazed if these same Justices attacked doctrines that protect prosecutorial discretion in cases alleging selective prosecution on the basis of race or political viewpoint.³⁰

II. PUBLIC SAFETY AND RACIAL JUSTICE

The public defenders are right to shine a spotlight on the inequitable and inefficient carceral system that ensnares so many of their clients. The pattern of law enforcement they depict derails lives and families and undermines public safety rather than promotes it:

It is not safe to be approached by police on suspicion that you possess a gun without a license. It is not safe to have a search warrant executed on your home. It is not safe to be caged pretrial at Rikers Island. It is not safe to lose your job. It is not safe to lose your children. It is not safe to be sentenced to prison. And it is not safe to forever be branded as a “criminal,” or worse, as a “violent felon.”³¹

²⁷ See *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (“McCleskey’s statistical proffer . . . challenges decisions at the heart of the State’s criminal justice system. . . . Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.”); Siegel, *Blind Justice*, *supra* note 14, at 1274–76.

²⁸ Brief of Black Guns Matter et al., *supra* note 12, at 8 (“[W]ithout such discriminatory language, the statutes nonetheless accomplish and perpetuate a form of veiled discrimination under the guise of discretion.”); Brief for National African American Gun Owners Ass’n, Inc., *supra* note 12, at 4 (“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 without a license subject to the discretion of the licensing authority.”).

²⁹ Transcript of Oral Argument at 72, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, No. 20-843 (Nov. 3, 2021) (question of Kavanaugh, J.) (“If it’s the discretion of an individual officer, that seems inconsistent with an objective constitutional right.”); *id.* at 96 (question of Roberts, C.J.) (“You can say that the right is limited in a particular way, just as First Amendment rights are limited, but the idea that you need a license to exercise the right, I think, is unusual in the context of the Bill of Rights.”). Again, the Court *has* blessed such discretion in other contexts, including prosecutorial discretion in First Amendment selective prosecution cases. See *supra* note 26 (discussing *Wayte*, 470 U.S. 598). The fundamental question is why the Justices seem more willing to preserve discretion in equal protection contexts than when gun rights are at stake. In fact, in *Voisine v. United States*, 136 S. Ct. 2272 (2016), Justice Thomas criticized the majority for interpreting a criminal statute in a way that “[l]eaves the right to keep and bear arms up to the discretion of federal, state, and local prosecutors.” *Id.* at 2291 (Thomas, J., dissenting).

³⁰ See *supra* notes 26–27 and accompanying text.

³¹ Brief of the Black Attorneys of Legal Aid et al., *supra* note 2, at 32–33 (citations omitted).

Our concern is with the remedy they propose: judicial expansion of Second Amendment rights. Depending on how the Court rules,³² this remedy could provide short-term relief to some, but in a way that imposes substantial costs on others.³³ Experience suggests that expanded gun rights have tended to privilege white gun carriers — whether acting in public spaces³⁴ or in self-defense.³⁵ Whether or not this bias persists, expanding Second Amendment rights to favor those who wish to defend themselves with guns necessarily restricts the ability of communities to defend themselves through law.

Communities of color highly value self-defense through law. A recent poll found that “[a]bout eight-in-ten Black adults (82%) say gun violence is a very big problem — by far the largest share of any racial or ethnic group.”³⁶ A different poll found that “[m]ajorities of Black adults (75%), Asian adults (72%) and Hispanic adults (65%) say that gun laws should be stricter, compared with 45% of White adults.”³⁷

Such support is not hard to understand, given that communities of color suffer vastly disproportionate harm from gun violence. Black Americans are ten times more likely than white Americans to die from gun violence.³⁸ In 2017, Black people comprised thirteen percent of the population but fifty-nine percent of firearm-related homicide victims.³⁹ Young Black men are twenty times more likely to die in a firearm homicide than young white men, and Black teenagers and young men (ages fifteen to thirty-four) make up thirty-seven percent of the nation’s gun

³² See *supra* note 17 and accompanying text.

³³ See *supra* notes 1–8 and accompanying text.

³⁴ Michele L. Norris, Opinion, *We Cannot Allow the Normalization of Firearms at Protests to Continue*, WASH. POST (May 6, 2020), https://www.washingtonpost.com/opinions/firearms-at-protests-have-become-normalized-that-isnt-okay/2020/05/06/19b9354e-8fc9-11ea-a0bc-4e9ad4866d21_story.html [https://perma.cc/PQ8X-LLM4].

³⁵ See JOHN K. ROMAN, URB. INST., RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS 9 (2013); Justin Murphy, *Are “Stand Your Ground” Laws Racist and Sexist? A Statistical Analysis of Cases in Florida, 2005–2013*, 99 SOC. SCI. Q. 439, 439 (2018).

³⁶ Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns> [https://perma.cc/KF9U-QBV3].

³⁷ PEW RSCH. CTR., AMID A SERIES OF MASS SHOOTINGS IN THE U.S., GUN POLICY REMAINS DEEPLY DIVISIVE (2021), <https://www.pewresearch.org/politics/2021/04/20/amid-a-series-of-mass-shootings-in-the-u-s--gun-policy-remains-deeply-divisive> [https://perma.cc/7VGM-6L3H]. One recent study found seventy-seven percent support among Black respondents for license-to-purchase restrictions. Cassandra K. Crifasi et al., *Public Opinion on Gun Policy by Race and Gun Ownership Status*, PREVENTIVE MED., Aug. 2021, at 1, 2.

³⁸ Brief of the NAACP LDF, *supra* note 18, at 17 (citing Centers for Disease Control and Prevention data).

³⁹ MICHAEL SIEGEL, THE IMPACT OF STATE-LEVEL FIREARMS LAWS ON HOMICIDE RATES BY RACE/ETHNICITY 1 (2020), <https://www.ojp.gov/pdffiles1/nij/grants/254669.pdf> [https://perma.cc/CT54-UYJH].

homicides despite comprising just two percent of the population.⁴⁰ Losses of this kind make “[f]irearm violence . . . a racial justice crisis”⁴¹ for communities of color and make it especially urgent to find approaches to public safety that do not reflexively depend on criminal law enforcement — even if it somehow could be stripped of its many forms of bias.

As we emphasized at the outset of this Essay, public safety is a civil rights issue. In a constitutional democracy, public safety protects the public sphere in which all have a right to participate.⁴² That means designing and enforcing public safety regimes in such a way as to defend *all* persons’ claims to security and to the exercise of liberty, whether or not they are armed and however they may differ by race, sex, or viewpoint. And when we confront evidence that existing public safety regimes deliver security along lines of race, sex, and class, this same commitment to equal participation makes clear why we need to reimagine and transform those regimes so that they deliver more inclusive forms of public safety that alleviate and do not aggravate status inequality.

The most elemental goal is to end the discriminatory enforcement of the criminal law that federal courts have for too long refused to review and redress. But nondiscrimination in law enforcement is not enough. Nondiscrimination can reduce but by no means eliminate the disparate burdens of the criminal law on communities of color.⁴³ Because enforcement of the criminal law can damage communities in myriad ways — as the public defenders’ brief so vividly emphasizes⁴⁴ — it is critical for those designing public safety strategies to reduce reliance on the criminal law and to involve other parts of government in implementing policies that prevent violence, with the goal of making criminal law the strategy of last rather than first resort.

This drive to minimize reliance on the criminal law in achieving public safety has already begun to shape efforts to redress and reduce intimate-partner violence with new initiatives “that are *not* focused on criminal intervention or are focused on a *reimagined* criminal justice

⁴⁰ EDUC. FUND TO STOP GUN VIOLENCE, A PUBLIC HEALTH CRISIS DECADES IN THE MAKING 14 (2021).

⁴¹ COUNCIL OF THE CITY OF PHILA., 100 SHOOTING REVIEW COMMITTEE REPORT 6 (2021), <http://phlcouncil.com/wp-content/uploads/2022/01/100-Shooting-Review-complete.pdf> [<https://perma.cc/RJ2C-C6SL>].

⁴² See *supra* note 8 and accompanying text (citing sources).

⁴³ See David M. Hureau, *Seeing Guns to See Urban Violence: Racial Inequality & Neighborhood Context*, DAEDALUS, Winter 2022, at 49, 61 (observing that American gun policy punishes “illegal gun possession in the inner city while ensuring practical immunity for upstream gun sellers and manufacturers”).

⁴⁴ See generally Brief of the Black Attorneys of Legal Aid et al., *supra* note 2.

response.”⁴⁵ There is parallel development in the gun violence prevention context. At the national and local levels, advocates seek fewer prosecutions for gun possession crimes and more resources for background checks or community violence intervention programs, which “have been shown to break cycles of violence by connecting high-risk individuals to wraparound social services,” including violence interruption, counseling, education, and employment opportunities.⁴⁶ Such programs were pioneered by activists and community groups, and have now — thanks to developing partnerships with the White House’s Domestic Policy Council — become a centerpiece of the Biden Administration’s gun violence prevention plan.

In some cities, progressive prosecutors have campaigned on proposals for combatting gun violence that lead with noncarceral interventions and follow with measured gun-control legislation and enforcement policies.⁴⁷ San Francisco District Attorney Chesa Boudin demonstrates that many of these prosecutors understand their role *constitutionally*, as promoting public safety in a way that also promotes equality and procedural fairness.⁴⁸ Brooklyn District Attorney Eric Gonzalez empha-

⁴⁵ Donna Coker, Leigh Goodmark & Marcia Olivo, *CONVERGE! Reimagining the Movement to End Gender Violence*, 5 U. MIA. RACE & SOC. JUST. L. REV. 249, 254 (2015); see also Leigh Goodmark, *Reimagining VAWA: Why Criminalization Is a Failed Policy and What a Non-carceral VAWA Could Look Like*, 27 VIOLENCE AGAINST WOMEN 84, 84 (2021); I. India Thusi, *Feminist Scripts for Punishment*, 134 HARV. L. REV. 2449, 2480 (2021) (reviewing AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION* (2020)).

⁴⁶ Myah Ward, *Gun Control Legislation Isn’t Going to Happen. Here’s What Biden’s Doing Instead.*, POLITICO (Nov. 5, 2021, 10:51 AM), <https://www.politico.com/news/2021/11/05/biden-gun-violence-legislation-519625> [<https://perma.cc/UJQ3-9CQ2>]. Organizations such as Advance Peace employ former members of gangs as community violence interrupters to counsel at-risk youth rather than sending in police as first responders. Professor Jason Coburn has evaluated such programs in California and found them effective at deterring violence and saving substantial public-safety dollars. See generally JASON COBURN & AMANDA FUKUTOME, *ADVANCE PEACE STOCKTON 2018–20 EVALUATION* (2021), http://healthycities.berkeley.edu/uploads/1/2/6/1/12619988/advance_peace_stockton_eval_report_2021_final.pdf [<https://perma.cc/KXQ2-JBPT>]. President Biden has authorized the use of coronavirus relief funds to support these community-based antiviolence groups and provide summer jobs for at-risk youth. Zolan Kanno-Youngs, *Biden Pushes New Efforts to Tackle Gun Violence*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/live/2021/06/23/us/joe-biden-news> [<https://perma.cc/M3RD-JBVT>].

⁴⁷ See Chris Palmer, *Philly DA Larry Krasner Says His Second Term Will Focus on Gun Violence Prevention, Not Just Punishment*, PHILA. INQUIRER (Jan. 3, 2022), <https://www.inquirer.com/news/larry-krasner-district-attorney-second-term-gun-violence-20220103.html> [<https://perma.cc/NGZ6-VMGZ>] (describing Krasner’s pledge to “lead community-focused efforts that might help prevent shootings in the first place”); Jonah E. Bromwich, *Manhattan D.A. Acts on Vow to Seek Incarceration Only for Worst Crimes*, N.Y. TIMES (Jan. 6, 2022), <https://www.nytimes.com/2022/01/06/nyregion/alvin-bragg-manhattan-da.html> [<https://perma.cc/52NG-3AU8>].

⁴⁸ See, e.g., Memorandum from Chesa Boudin, S.F. Dist. Att’y 1 (Feb. 22, 2020), <https://sfdistrictattorney.org/wp-content/uploads/2020/11/Declination-of-Contraband-Charges-Based-on-Pretextual-Stops.pdf> [<https://perma.cc/659G-CVGM>] (“It is the duty and obligation of the District

sizes “that the choice between safety and constitutional protections, especially in communities of color, is a false choice.”⁴⁹ And with this understanding of their role, the prosecutors are exploring new approaches to securing public safety.⁵⁰ In New York, for example, Manhattan District Attorney Alvin Bragg was elected on a platform that treats gun violence as a “civil rights and equality issue.”⁵¹ Philadelphia District Attorney Larry Krasner has issued a remarkable report that over nearly two hundred pages examines the root causes of the city’s gun violence crisis; the report scrutinizes the record of two thousand shootings and sets out evidence-based public safety strategies “with elements of enforcement, intervention, and prevention to achieve both short-term and long-term reductions in gun crimes” that are recommended by different branches of city government.⁵² The commitment to enforcing constitutional guardrails can spark policy innovation and identify more efficient public safety strategies. It also sparks intragovernmental debate.

There is an accumulating body of evidence that reducing prosecution and incarceration for certain offenses is efficient as well as equitable,⁵³

Attorney’s Office to protect the constitutional rights of every San Franciscan and to increase the fairness of our system of justice.”)

⁴⁹ EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 94 (2020).

⁵⁰ See, e.g., Conor Friedersdorf, *The Anti-gun Laws that Make Progressives Uneasy*, THE ATLANTIC (Feb. 10, 2022), <https://www.theatlantic.com/ideas/archive/2022/02/blue-americas-new-gun-control-debate/622035> [<https://perma.cc/R8ES-546H>] (“Los Angeles County District Attorney George Gascón has chosen a different approach. Upon taking office in December 2020, he declared his intention to stop using a legal provision that allows prosecutors to seek longer sentences for convicted criminals who used guns in their crime. A subsequent analysis by the local-news site LAist found a 63 percent drop in gun charges filed by his office.”)

⁵¹ Alvin Bragg, *A Real Plan to Stop Gun Violence in Manhattan*, <https://www.alvinbragg.com/gun-safety> [<https://perma.cc/K9XJ-ETD>]. For Bragg’s prosecution policies, see Memorandum from Alvin J. Bragg, Jr., N.Y. Dist. Att’y, *Achieving Fairness and Safety* (Jan. 3, 2022), <https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf> [<https://perma.cc/ZVV8-63KW>]; Bromwich, *supra* note 47 (noting that Bragg has “instructed prosecutors to avoid seeking jail time for . . . gun possession in cases where no other crimes are involved” and to “find alternatives to incarceration, especially for first-time offenders” to the extent consistent with public safety).

⁵² COUNCIL OF THE CITY OF PHILA., *supra* note 41, at i, 6. The full 100 Shooting Review Committee Report is available at <http://phlcouncil.com/wp-content/uploads/2022/01/100-Shooting-Review-complete.pdf> [<https://perma.cc/RJ2C-C6SL>].

⁵³ Recent empirical research suggests that the reforms enacted by progressive prosecutors — such as prison-diversion programs, restrictions on seeking cash bail, and nonprosecution of misdemeanors — have no impact on local crime rates. See, e.g., Amanda Agan, Jennifer L. Doleac & Anna Harvey, *Prosecutorial Reform and Local Crime Rates* 1 (L. & Econ. Ctr. Geo. Mason Univ. Scalia L. Sch. Rsch. Paper Series No. 21-011, 2021) (examining this relationship in the thirty-five jurisdictions that elected progressive prosecutors and finding “no significant effects [of their reforms] on local crime rates”). Indeed, more lenient policies appear to reduce repeat offending. See, e.g., Ally Jarmanning, *Not Prosecuting Low-Level Crimes Leads to Less Crime in Suffolk County, Research Finds*, WBUR (Mar. 29, 2021), <https://www.wbur.org/news/2021/03/29/non-prosecution-low-level-crime-rollins-suffolk-county> [<https://perma.cc/U982-SNHF>]; Michael Mueller-Smith &

and cities are weighing these new constitutionally informed approaches to public safety. Because the reforms defy decades of police and prosecution practices, and because the prosecutors are trying to implement the reforms at a time of rising gun violence, the initiatives have provoked backlash from city officials and from electoral campaigns whose financing and basis of support remain murky. Resistance may reflect the reflex of law enforcement and the views of the wealthy few who finance the campaigns; but it may also reflect the anxiety of officials or voters who instinctively want to attack rising gun violence with maximum law enforcement, even if the old ways are inefficient and inequitable.⁵⁴

In short, government officials are now seeking to coordinate nondiscriminatory law enforcement and transformed, less carceral approaches to public safety and are debating the proper balance between them.⁵⁵ Whatever the deficiencies of New York City's reform efforts, a Supreme Court decree enforcing Second Amendment rights is not likely to improve upon these initiatives. Communities need a wide range of resources to combat gun violence, and, critically, they need the democratic authority to experiment with and deliberate about how best to preserve the public safety of all their members, when both human life and the shape of constitutional community are at stake. The question of how to deliver public safety equitably and effectively is likely to vary across communities and over time, and, especially at present, is more likely achieved through democratic politics than in the federal courts.

CONCLUSION

It has been decades since the Supreme Court has demonstrated leadership in the pursuit of racial justice. The Court is ready to denounce racism of the past,⁵⁶ but when it comes to the forms of inequality afflicting

Kevin T. Schnepel, *Diversion in the Criminal Justice System*, 88 REV. ECON. STUDS. 883, 883 (2021).

⁵⁴ See Emma G. Fitzsimmons & Ashley Southall, *Adams Unveils Ambitious Plan to Confront Rising Gun Violence*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/nyregion/adams-crime-nypd-shooting.html> [<https://perma.cc/633K-FRCW>]; Astead W. Herndon, *They Wanted to Roll Back Tough-on-Crime Policies. Then Violent Crime Surged.*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/us/politics/prosecutors-midterms-crime.html> [<https://perma.cc/T7ZJ-EUF2>]; Emily Bazelon & Jennifer Medina, *He's Remaking Criminal Justice in L.A. But How Far Is Too Far?*, N.Y. TIMES (Dec. 3, 2021), <https://www.nytimes.com/2021/11/17/magazine/george-gascon-los-angeles.html> [<https://perma.cc/U5XB-JRTT>]; Daniel Duane, *Everyone in San Francisco Has Something to Say About Chesa Boudin*, N.Y. MAG.: INTELLIGENCER (Aug. 3, 2021), <https://nymag.com/intelligencer/2021/08/chesa-boudin-recall-san-francisco.html> [<https://perma.cc/MzQ6-5VM3>].

⁵⁵ See sources cited *supra* note 54.

⁵⁶ Notably, the Court's major decisions expanding Second Amendment rights discuss nineteenth-century efforts to deprive African Americans of gun rights. See *McDonald v. City of Chicago*, 561 U.S. 742, 772 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008).

minority communities in the present, the Court too often interprets the Constitution to license inequality and to obstruct efforts to dismantle it.⁵⁷

It is possible that the Justices who find government discretion in gun licensing an intolerable threat to Second Amendment rights will act consistently and find the cases requiring deference to prosecutorial discretion in the criminal justice system an intolerable threat to equal protection rights.⁵⁸ We doubt it. Instead, the Court will take another equal protection case focusing the nation's attention on affirmative action.⁵⁹ Though many are slow to recognize it, in recent years it is the democratic process that has produced initiatives seeking racial justice in our criminal justice system,⁶⁰ not Article III courts, whatever story *Carolene Products*⁶¹ may tell about the courts' role in protecting minorities from prejudice in the political process.⁶²

⁵⁷ See, e.g., *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2351 (2021) (Kagan, J., dissenting) (noting that recent Court decisions have "assailed" and "undermine[d]" sections 2 and 5 of the Voting Rights Act); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129–31 (2017) (discussing the ways that the Court's Fourth Amendment decisions legalize racial profiling); sources cited *supra* note 14 (tracing this dynamic in the Court's equal protection cases that (1) limit challenges to facially neutral laws asserted to discriminate on the basis of race and (2) enable challenges to affirmative action and other race-conscious efforts to integrate).

⁵⁸ See *supra* notes 26–27 and accompanying text (discussing prosecutorial discretion in equal protection and First Amendment cases).

⁵⁹ *Students for Fair Admissions v. Univ. of N.C.*, No. 21-707, 2022 WL 199376 (Jan. 24, 2022); cf. Siegel, *Foreword*, *supra* note 14, at 63 & n.310 (observing that the Court's equal protection doctrine and docket demonstrate empathy for the claims of majority-group members, illustrated by the Court's repeated decisions to hear affirmative action cases and not to take cases involving claims of bias in the criminal justice system).

⁶⁰ See, e.g., BAZELON, *supra* note 49; Chika O. Okafor, *Prosecutor Politics: The Impact of Election Cycles on Criminal Sentencing in the Era of Rising Incarceration* (Harv. Univ. Dep't of Econ., Working Paper), <https://scholar.harvard.edu/files/okafor/files/prosecutorpolitics.pdf> [<https://perma.cc/GBB9-9QP8>] (finding, inter alia, that district attorneys' sentencing decisions are shaped by electoral pressures, and that punitive results "decline[d] over the period 1986–2006, in tandem with U.S. public opinion softening regarding criminal punishment," *id.* at 3); Steve Eder, Michael H. Keller & Blacki Migliozi, *As New Police Reform Laws Sweep Across the U.S., Some Ask: Are They Enough?*, N.Y. TIMES (Oct. 10, 2021), <https://www.nytimes.com/2021/04/18/us/police-reform-bills.html> [<https://perma.cc/2U79-MJQP>] (tracking over 140 state police-reform bills passed since the killing of George Floyd); see also Bromwich, *supra* note 47 (discussing the election of progressive prosecutors like New York City's Alvin Bragg).

⁶¹ *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); see Reva B. Siegel, *The Constitutionalization of Disparate Impact — Court-Centered and Popular Pathways*, 106 CALIF. L. REV. 2001, 2022 (2018) (observing that the history of disparate impact standards illustrates "that there are eras when it is the institutions of representative government — and not the Court — that vindicate minority rights").

⁶² In *Carolene Products*, as the Supreme Court retreated from review of laws regulating "ordinary commercial transactions," it affirmed a democracy-protecting role and "more searching judicial inquiry" in cases where "prejudice . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." 304 U.S. at 152 & n.4; see Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1911 (2021) (observing that "courts can make majoritarian processes more democratic when courts grant rights that protect speech or enable the

The public defenders' brief in *Bruen* has undoubtedly helped focus attention on concerns of Americans who for too many years have been marginalized in courts and politics. But, the public defenders' appeal to the deregulatory Second Amendment⁶³ is a vote for expanding the authority of the Supreme Court and for restricting the authority of democracy. We are concerned that the Supreme Court may use claims of racism to justify expanding gun rights in ways that do not redress underlying claims of racial injustice and instead restrict the community's authority to respond to gun violence. There is a role for courts in promoting democracy; but the Roberts Court's decisions on guns and race are not democracy promoting. They embody the very forms of judicial overreach against which *Carolene Products* warned.

participation of marginalized or excluded groups" and observing that marginalized groups may also use courts to make claims audible in democratic politics in "conditions of genuine political domination" when "all branches fail in offering redress or access").

⁶³ See Reva B. Siegel, Comment, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 215-24 (2008) (tracing *Heller*'s originalism to the Reagan Administration, where advocates first began developing arguments for courts striking down gun control laws under the Second Amendment, an argument opposed by many conservatives of the era, including Robert Bork).