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GUN RIGHTS AND THE CONSTITUTIONAL SIGNIFICANCE OF VIOLENT CRIME

Jonathan Simon*

INTRODUCTION: THE SECOND AMENDMENT AND CONSTITUTIONAL CHANGE

In their thoughtful and well-researched book on the right to arms as granted by the U.S. Constitution, Richard Uviller and William Merkel make a persuasive argument that the Second Amendment as originally ratified did not include an individual's right to bear arms outside of participation in the state militias.¹ For the Framers of the Amendment and the generation of Americans who ratified the Constitution, the popular possession of firearms had constitutional significance, but only insofar as it served to sustain the unique institution of state militias as a vital part of the defense of the new nation. The question remains, however, as to how much that late eighteenth-century understanding should bind Americans, or their courts and legislatures, in the early twenty-first century.

The groundbreaking work of Bruce Ackerman has pointed to a way of thinking about our constitutional obligations that is both more complicated and more historically adequate than the standard model of interpreting the original document and its formal textual amendments.² In Ackerman's account, Article V of the Constitution is not an exclusive procedure for amending the Constitution but rather a schema for recognizing moments of "higher lawmaking" that amend or even transform the Constitution. To be sure, the procedure described in Article V remains one option, and has been used many times since 1789, but on other occasions the constitutional system has been transformed by periods of "higher lawmaking" that cannot easily be fitted to the letter of Article V.³

Ackerman points to two such moments in particular. After the Civil War, the Republican majority in Congress constitutionalized the emancipation of the slaves by proposing the Thirteenth Amendment. President Andrew Johnson negotiated with Southern leaders to secure the ratification of that Amendment in exchange for

* Professor of law, jurisprudence, and social policy, University of California, Berkeley.

¹ See RICHARD UVILLER & WILLIAM MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002).

² See BRUCE ACKERMAN, *WE THE PEOPLE 1: FOUNDATIONS* (1991) [hereinafter *FOUNDATIONS*]; BRUCE ACKERMAN, *WE THE PEOPLE 2: TRANSFORMATIONS* (1998) [hereinafter *TRANSFORMATIONS*].

³ *TRANSFORMATIONS*, *supra* note 2, at 268–69 (stating that "the higher lawmaking efforts of the 1930's broke with the premises of Article Five . . .").

returning the rebellious states to full status in Congress.⁴ This deal soon fell apart as an increasingly radicalized Republican majority in Congress sought to fundamentally recast the role of federal power. The resulting Fourteenth Amendment cannot be easily assimilated to the textual amendment procedure of Article V.⁵ Instead, Ackerman argues, Congress began a process of higher lawmaking outside the textual channels of Article V against the resistance of President Johnson and the partially reconstructed Southern state governments. After winning decisive elections in 1866 and 1868, the Republican Congress succeeded in consolidating support behind the Fourteenth Amendment, demonstrating the broad consensus of an aroused public on notice as to the constitutional significance of what was being done, and thus acting self-consciously as "We the People."⁶ Because of this protracted battle, the resulting change in our understanding of our constitutional republic remains worthy of preservation by subsequent generations long after that aroused self-understanding has gone.

Ackerman argues that the battle between President Franklin Roosevelt and the conservative majority on the Supreme Court in the early 1930s over the constitutionality of New Deal legislation designed to rescue the nation from the Great Depression constituted a second such period of higher lawmaking.⁷ Frustrated by the rejection of his economic recovery legislation by the Court, Roosevelt announced his (in)famous "Court-packing" plan.⁸ While Congress never adopted the plan, the conservative majority on the Court bent to the pressure in what came to be known as the "switch in time that saved nine."⁹ Discouraged conservatives soon stepped down from the Supreme Court to be replaced by new Justices anxious to implement the New Deal program. Roosevelt's stunning electoral victories in 1936 and 1940 confirmed and consolidated this judicial transformation, effectively ratifying a new constitutional scheme of federal powers in the area of economic regulation.¹⁰

In Ackerman's account, each of these changes (and the original Federal Constitution itself) not only produced more than specific amendments, but initiated fundamental recasting of the existing federal system.¹¹ Thus judges obliged to

⁴ *Id.* at 140 (describing the North Carolina Proclamation as an example of how this was achieved).

⁵ FOUNDATIONS, *supra* note 2, at 44–45 (stating that "[t]he Reconstruction Amendments — especially the Fourteenth — would never have been ratified if the Republicans had followed the rules laid down by Article Five . . .").

⁶ *Id.* at 81 (stating that "the will of the nation was independent of, and superior to, the will of the states" (footnote omitted)).

⁷ FOUNDATIONS, *supra* note 2, at 47.

⁸ *Id.* at 49.

⁹ *Id.*

¹⁰ *Id.* at 48.

¹¹ *Id.* at 44.

preserve the constitutional choices of “We the People” need to examine not just the original understanding of particular clauses of the Constitution, but how these may have been recast by succeeding constitutional moments. Nor is the door closed to further such changes. Ackerman argues that the study of both constitutional moments points to a consistent structure underlying such moments that can be used to assess the claims of social movements that would like to recast our constitutional order. He identifies five steps as integral to any successful constitutional moment:¹²

1. A “signaling” phase when a major constitutional impasse highlights to the American people that core values of our system are at stake.
2. A “propositional” phase when the proponents of change articulate their vision and win a sufficient political victory to demonstrate real capacity to mobilize the public.
3. A “triggering” phase, when strong opposition by “conservatives” initiates a full fledged political battle among different institutions of government over the direction of the country.
4. A “ratifying” phase, when the battle, having been joined, the American people mark their support for or rejection of constitutional change.
5. A “consolidating” phase, when having had a chance to fully take notice that the nature of the constitutional system is really changing, the American people mark their acceptance of that change.

In his most recent volume, Ackerman explores a more recent period of constitutional contention, when the Reagan Administration articulated a powerful critique of the “welfare state” forged by the New Deal.¹³ Reagan never succeeded in ratifying any of the numerous formal constitutional amendments proposed by his administration and supporters,¹⁴ but he did succeed in delegitimizing many of the collectivist rationalities of governance underlying the New Deal, and enacting a major tax cut that strained the revenue sources of the welfare state.¹⁵ Reagan also followed Roosevelt’s lead in seeking to appoint visionary Supreme Court Justices ready to reassess the victories of the New Deal and the subsequent jurisprudence of the Warren Court.¹⁶ Indeed, in Ackerman’s account, it was the failure of Reagan

¹² TRANSFORMATIONS, *supra* note 2, at 39–40.

¹³ *Id.* at 390 (describing “presidential” signaling).

¹⁴ *Id.* at 390–92.

¹⁵ *Id.* at 391.

¹⁶ *Id.* at 391–92.

and his successors to pursue this battle in the court of public opinion that undercuts any claim that Reagan's popularity constitutes a true change in the U.S. Constitution.¹⁷ The most articulate constitutional theorist of the Reagan moment, conservative legal scholar and judge Robert Bork failed to win Senate approval after one of the most contentious debates in modern history.¹⁸ The failure of Reagan and his successor, George H. W. Bush, to nominate scholars or judges with comparably public postures as change agents, suggests that they were unwilling to proceed to the kind of politically risky battle whose victory can warrant the recognition of constitutional change.¹⁹ Reagan and Bush nominated other conservatives who were approved, but like Justice Anthony Kennedy, they were more moderate in their judicial philosophy, or like Justice Clarence Thomas, they publicly denied their radical philosophy.²⁰

In considering Uviller and Merkel's analysis of the Second Amendment, we need to look beyond the founding period to subsequent constitutional moments that have recast the meaning of that Amendment. A case can be made that the Fourteenth Amendment and the contemporary constitutional moment that led to its ratification worked a fundamental change in the meaning of the Second Amendment.²¹ The meaning of the militias, which, as Uviller and Merkel show, had long been in decline, was permanently altered by battles between Union and Confederate armies.²² Perhaps most importantly, Reconstruction intensified the national commitment to individual, as opposed to states', rights.²³ It is not implausible to think that the Reconstruction Republicans, confronted by organized violence against recently freed slaves in the South, saw the right to arms belonging to individuals as a crucial support to their liberty.²⁴

The New Deal constitutional moment is a far less likely source of support for an individual right to arms. That moment, after all, embraced collectivist solutions to social problems that seriously compromised the individual rights vision of our

¹⁷ TRANSFORMATIONS, *supra* note 2, at 394–95.

¹⁸ *Id.* at 27.

¹⁹ *Id.* at 398–99.

²⁰ *Id.* at 396–97.

²¹ See Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 900 (“Thus the Reconstruction Amendment, when read in the light of its history, does support an individual right to have a gun in one's home for self- protection.”); see also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 46–63, 257–68 (1998); Brent J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673, 674–79 (2000).

²² UVILLER & MERKEL, *supra* note 1, at 119, 131.

²³ See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 258 (1988).

²⁴ Uviller and Merkel address these arguments in their book, UVILLER & MERKEL, *supra* note 1, at 202–09, but since our interests lie in the more recent period, I will not consider this debate here.

Constitution. The great lesson of the Depression was that social problems could not be solved simply by calling for greater individual resoluteness or discipline, but required a strong federal government to create systems of collective risk sharing. There is little basis to believe that the lessons of the Great Depression or the capacity of strong central government to protect Americans from economic disaster should be read as enhancing the right of individuals to bear arms outside of participation in collective institutions.

The remainder of this essay suggests that we may have, in fact, experienced a new constitutional moment since the 1960s, with profound implications for gun rights. This constitutional moment has taken shape around the problem of criminal violence and the widespread and enduring fear among Americans that our systems of public security, primarily our criminal justice system, could not protect them from becoming victims. In what follows, I will use Ackerman's framework to make a case that we have had a constitutional moment around criminal violence and victimization and that this moment of higher lawmaking could well be interpreted by judges as sustaining an individual right to arms. Like the previous constitutional moments, around Reconstruction and the New Deal, constitutional change around criminal violence has involved a prolonged struggle between branches of the federal government and involved the states. Like these previous moments, the consolidation of a new constitutional consensus around criminal violence at first seems rather narrow in its substantive focus. However, the passage of decades has shown those earlier moments to be far broader in their governmental impact and the same may be true of crime.

I. THE SIGNALING PHASE: FROM *MAPP* AND *MIRANDA* TO THE 1968 PRESIDENTIAL ELECTION

As with the earlier constitutional moments, the constitutional transformation around crime has its roots in powerful social problems. The closest analogy is to the New Deal, when the economic catastrophe of the Great Depression brought pressure on political institutions that soon broke through the channels of normal politics. Starting in the early 1960s, violent crime in the United States (and actually across much of the globe) began a rapid rise that peaked in the 1970s and remained high, with additional peaks appearing through the early 1990s, until a sustained decline began. Nothing epitomized the new threat of violence more than murder, the reported incidents of which more than doubled during the 1960s.²⁵

American political institutions began to respond to this emerging threat in a variety of ways. The Kennedy Administration (1961–1963) initiated a number of high-profile programs narrowly aimed at youth crime and improving the

²⁵ See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 451 (1993).

rehabilitative capacity of the correctional systems in the states.²⁶ However, the assassination of President Kennedy during his motorcade through Dallas, Texas on November 22, 1963, blamed on an individual bearing a mail-order rifle, seemed only to confirm that criminal violence, especially in America's large cities, threatened all Americans.

In the 1964 election, Republican candidate Barry Goldwater spoke of "crime in the streets" during his nomination acceptance speech.²⁷ The Democratic nominee, Lyndon Johnson, succeeded instead in focusing the election on Goldwater's alleged extremism in foreign affairs.²⁸ Johnson won by a landslide, and his administration took on the crime issue by declaring "war on crime" and initiating a presidential commission to recommend a comprehensive strategy to improve the nation's law enforcement capacity.²⁹

Despite this attention, violent crime rates continued to grow during the second half of the 1960s.³⁰ The perception of a breakdown in crime control was further heightened by the political violence that grew during the second half of the 1960s, including riots in the impoverished minority neighborhoods of large cities like Los Angeles, Detroit, and Newark, protests against the increasingly unpopular war in Vietnam, and an ominous pattern of assassinations of political leaders.³¹ This culminated in the 1968 slayings of civil-rights leader Martin Luther King and liberal Democratic presidential candidate, Senator Robert Kennedy.

Social problems, even extreme ones, do not, by themselves, lead to constitutional moments. Instead, it is the way political institutions respond to social crises that can create moments of higher lawmaking. It is possible that America's response to the dramatic rise of violent crime during the 1960s might have stayed within the channels of normal politics. A crucial, if unintended, push toward constitutional change came from the Supreme Court. In a series of landmark constitutional decisions beginning in 1961, the Court enhanced procedural protections for defendants in criminal cases. In *Mapp v. Ohio*,³² the Court reversed a precedent less than fifteen years old and held that state courts were obliged to follow the so-called "exclusionary rule" by excluding evidence collected in violation of the Fourth Amendment from the prosecution's case-in-chief.³³ In

²⁶ NANCY E. MARION, *CRIMINAL JUSTICE IN AMERICA: THE POLITICS BEHIND THE SYSTEM* 33 (2002).

²⁷ E. J. DIONNE, *WHY AMERICANS HATE POLITICS* 179 (1990).

²⁸ *See id.*

²⁹ FRIEDMAN, *supra* note 25, at 274.

³⁰ *See id.* at 451.

³¹ *See id.*

³² 367 U.S. 643, 654–55 (1961).

³³ *Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (holding that the Fourth Amendment was binding on the states through incorporation in the Fourteenth Amendment's Due Process Clause, but further holding that the exclusionary rule was not incorporated as a mandatory remedy to violations of the Fourth Amendment).

Gideon v. Wainwright,³⁴ the Court extended an existing line of precedents by holding that states must provide counsel to indigent defendants facing felony trials. Finally, in *Miranda v. Arizona*,³⁵ the Court held that state courts must exclude statements taken by police officers in custodial interrogations unless suspects received a comprehensive package of warnings about the risks of speaking to the police, including the right to remain silent, and to have an attorney present during the interrogation.

As revolutionary as these decisions may have seemed to many Americans (including American lawyers),³⁶ they can each be understood as part of the normal, if often controversial, work of the Court in interpreting existing constitutional texts and moments. Indeed all three should be seen as interpretations of the original Federalist Constitution as modified by the Reconstruction constitutional moment.³⁷ The Federalists intended the Fourth and Sixth Amendments as protections against abuse of criminal justice power by an overreaching federal government. The Republican Reconstruction established a new concern with protecting individual rights against abuse of power by the state governments. The line of cases holding certain elements of the Bill of Rights applicable to the state governments began in the late nineteenth century, and accelerated rapidly in the years leading up to the New Deal constitutional moment.

This doctrine, known as incorporation, became far more potent and sweeping after the New Deal was well established. As we review the criminal procedure decisions of the 1960s, we can see them as normal interpretations of the Federalist and Reconstruction amendments into the new logic of the New Deal. The idea, so palpable in all three opinions, but especially in *Miranda v. Arizona*,³⁸ that protecting individual rights required structural reform of state institutions rather than case-by-case judicial remedies, was a central legacy of the New Deal moment. Moreover, it is widely recognized today that the Court in the 1960s saw criminal justice cases as integral to protecting the civil-rights movement that was working to realize promises of the Reconstruction period left unfulfilled due to political compromises

³⁴ 372 U.S. 335, 344–45 (1963).

³⁵ 384 U.S. 436, 444 (1966).

³⁶ Indeed, after the 1960s it became common to refer to these landmark decisions and the numerous lesser decisions decided in the same period as a revolution in criminal procedure.

³⁷ Ackerman suggests that the work of constitutional interpretation consists in large part of examining how the meaning of constitutional texts enacted at one stage have been altered in their meaning by subsequent constitutional moments. For example, he argues that *Brown v. Bd. of Educ.*, 347 U.S. 383 (1954), correctly reinterpreted the meaning of the Fourteenth Amendment's Equal Protection Clause in light of the new role of an activist federal state after the New Deal. It is central to Ackerman's theory that, when judges engage in this kind of interpretation of one constitutional moment or another, they are "preserving" the meaning of past constitutional transformations, even if, as in the case of *Brown*, the result is controversial. See also FOUNDATIONS, *supra* note 2, at 144–45.

³⁸ 384 U.S. 436 (1966).

by the Republicans in the 1870s and by the New Deal Democrats in the 1930s (when Roosevelt refused even to sign anti-lynching legislation for fear of offending southern white Democrats).³⁹

This process of normal constitutional interpretation by the Warren Court seemed threatening to the growing rates and perceptions of violent crime. While the Supreme Court was not signaling the need for a new constitutional struggle, the response of political leaders, especially candidates for the presidency, began to take on this character.⁴⁰ While Democrat Lyndon Johnson was striving to place the crime problem within his "Great Society" vision for expanding the New Deal, a number of opposition candidates arose who specifically focused on crime.⁴¹ While social movements of the Left were gaining considerable attention for their stands on civil rights (now transformed into Black Power) and in opposition to the war in Vietnam, the two major candidates facing Hubert Humphrey⁴² (the Democratic nominee in 1968) focused their major attacks on the crime problem.⁴³ Nixon's victory, close as it was, and his considerable success in traditionally Democratic strongholds, could be seen (even at the time) as a result of the crime problem.⁴⁴

II. THE PROPOSING AND TRIGGERING PHASE: FROM THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 TO *FURMAN V. GEORGIA*

Proposing constitutional change is often associated with a major electoral battle. The congressional election of 1866 provided a stage on which the ambitions of the Republicans in Congress became the central controversy.⁴⁵ By campaigning vigorously against the direction Reconstruction was taking, and then losing, President Andrew Johnson helped trigger a constitutional crisis that would soon include his own impeachment. In the presidential election of 1936, Franklin Roosevelt's frustrations with the conservative Supreme Court and his "Court-packing" plan became central concerns, placing the agenda of constitutional change squarely before the American electorate.⁴⁶

³⁹ Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 678 (1992) ("Both supporters and opponents of *Miranda* understood that, in large measure, the crime problem was the race problem.").

⁴⁰ FRIEDMAN, *supra* note 25, at 274.

⁴¹ KATHERINE BECKETT, *MAKING CRIME PAY: LAW & ORDER IN CONTEMPORARY AMERICAN POLITICS* 38 (1997).

⁴² Humphrey was President Lyndon Johnson's vice president.

⁴³ KATHERINE BECKETT, *supra* note 41, at 38.

⁴⁴ RICHARD SCAMMONS & BENJAMIN WATTENBERG, *THE REAL MAJORITY* 206–10 (1969) (This highly influential book argued that Republican domination of "social issues," especially crime, was leading to the breakup of the New Deal coalition that had dominated the country since the 1930s).

⁴⁵ TRANSFORMATIONS, *supra* note 2, at 179–81.

⁴⁶ *Id.* at 308–10.

If we have experienced a constitutional moment concerning criminal violence and what government should do about it, the presidential election campaign of 1968 clearly marked the moment when the growing constitutional tension around crime moved into an open challenge to existing institutions, triggering a period of higher lawmaking. The election was one of the closest in American history.⁴⁷ Lyndon Johnson, beset by national concerns about the Vietnam War, chose not to seek a second term.⁴⁸ After a primary campaign focused on the war, the Democrats chose Vice President Hubert Humphrey (an outcome partially determined by the assassination of Senator Robert Kennedy).⁴⁹ The Republicans nominated former Vice President Richard Nixon who lost a close election to John Kennedy in 1960.⁵⁰ For the first time since the 1948 election, these major party candidates were confronted by a serious third party challenge from Governor George Wallace of Alabama who had emerged as the strongest defender of white southern racial policies.⁵¹ Nixon and Wallace both made crime the major focus of their attacks on the incumbent administration.⁵² In repeated attacks on the Supreme Court and Johnson's Attorney General, Ramsey Clark, both Nixon and Wallace claimed the country was facing a breakdown of law and order that required a major assertion of federal power in an area of governance traditionally left to state and local governments.⁵³ Only Democrat Hubert Humphrey took the position in the campaign that crime could be addressed with New Deal-like strategies of fighting poverty and inequality.⁵⁴

Even before the election itself, Congress responded to the growing national clamor about crime (intensified by the campaign) by enacting the Omnibus Crime Control and Safe Streets Act of 1968.⁵⁵ The development of the law highlights the shift from ordinary to higher lawmaking. In 1967 the Johnson Administration introduced a crime bill tailored to address the findings of the recently published report of the President's Commission on Law Enforcement and the Administration of Justice.⁵⁶ The thrust of the administration's bill was an effort to fund research

⁴⁷ See JOHN KENTLETON, *PRESIDENT AND NATION: THE MAKING OF MODERN AMERICA* 229 (2002).

⁴⁸ See *id.* at 228.

⁴⁹ See VAUGHN DAVIS BORNET, *THE PRESIDENCY OF LYNDON B. JOHNSON* 310–11 (1983).

⁵⁰ See KENTLETON, *supra* note 47, at 222.

⁵¹ See *id.* at 227.

⁵² See BECKETT, *supra* note 41, at 38.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ Pub. L. No. 90-351 § 701(a), 82 Stat. 210 (1968), and Pub. L. No. 90-578 § 301(a)(3), 82 Stat. 1115 (1968) (codified as amended at 18 U.S.C. § 3501 (2003)).

⁵⁶ PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967).

and reform efforts aimed at improving the fairness and capacity of local and state criminal justice agencies. In this sense it was a continuation of the governmental strategies that were already being promoted in the "war on poverty" to create new networks of knowledge and power aimed at improving governance rather than changing individual behavior.

Candidate Nixon took precise aim at this kind of application of the New Deal/ Great Society vision of governance to the crime problem. Nixon argued that the "solution to the crime problem is not the quadrupling of funds for any governmental war on poverty but more convictions."⁵⁷ Although Democrats held a strong majority in Congress, a coalition of Republicans and conservative Southern Democrats modified the Johnson program to give operational control over the new federal funds to governors and other state officials (in this sense it anticipated the revenue-sharing approach to federal largesse that the Nixon Administration would pursue more generally). More importantly, new articles were added to the legislation, toughening sentences for some federal crimes and denying federal benefits to rioters.⁵⁸ Most significantly, in terms of the proposing and triggering stage of constitutional change, a new article was added purporting to reverse the *Miranda* decision by instructing federal courts to admit statements taken in custodial interrogations so long as they were "voluntary."⁵⁹ This section appeared to challenge the constitutional nature of the *Miranda* decision.⁶⁰

Nixon's victory in 1968 was too close to be taken as the kind of election that ratifies constitutional change, but together with the challenge to judicial supremacy in the Crime Control Act of 1968,⁶¹ the new tough on crime politics can be fairly seen as proposing a new constitutional vision. This vision was that a central purpose of the federal government was to protect ordinary Americans not from abuse by state governments, or from general economic collapse, but from acts of criminal violence by other Americans.

Nixon had few immediate options to expand the federal role in the war on crime, other than giving money to the states. Federal jurisdiction over crimes was generally limited to certain kinds of interstate criminal activity like bootlegging.⁶² Over the years federal jurisdiction had been created in a few specific areas but no general federal police power existed. Nixon strategically decided to launch an

⁵⁷ BECKETT, *supra* note 41, at 38.

⁵⁸ *See id.* at 39.

⁵⁹ Pub. L. No. 90-351 § 701(a), 82 Stat. 210 (1968), and Pub. L. No. 90-578 § 301(a)(3), 82 Stat. 1115 (1968) (codified as amended at 18 U.S.C. § 3501 (2003)).

⁶⁰ The question raised by this as to whether *Miranda* was in fact a constitutional decision, or merely a rule of evidence for the federal courts (in which case it had no binding effect on state courts, but could be superseded by an act of Congress) was only resolved recently in the case of *Dickerson v. United States*, 530 U.S. 428, 438 (2000).

⁶¹ 46 U.S.C. § 3701.

⁶² FRIEDMAN, *supra* note 25, at 275.

initiative in one of these specialized areas by declaring in 1971, just prior to his reelection campaign, a “war on drugs.”⁶³ Although the traffic in illegal drugs was not the kind of crime that Americans most feared, Nixon launched a successful rhetorical drive to convince the country that many local street crimes, including the acts of personal violence most feared by Americans, were a result of drug addiction and the interstate traffic in drugs.⁶⁴

Nixon won a landslide reelection in 1972.⁶⁵ However, because the campaign largely turned on the administration’s conduct of the Vietnam War,⁶⁶ it offered little opportunity to clarify the stakes in constitutional change dealing with crime. Shortly after the election, the administration became bogged down in the Watergate scandal that ultimately resulted in Nixon’s resignation from the presidency.⁶⁷ Ironically, the first president to make the new politics of crime central to his governance was caught up in the appearance of criminality, compelled to deny in a public statement that he himself was a “crook.”⁶⁸ Temporarily focused on the problem of political corruption, the presidencies of Gerald Ford (Nixon’s second vice president, who became president upon Nixon’s resignation) and Democrat Jimmy Carter focused little attention on crime.⁶⁹ The crucial post-New Deal role of the presidency in generating constitutional moments was temporarily disabled in the crime field.

Ironically, it was the Supreme Court once again whose actions bucked the national trend toward punitive approaches to crime, and triggered a renewed phase of higher lawmaking politics around the problem of violent crime. In *Furman v. Georgia*⁷⁰ the Court struck down all existing death penalty statutes in the United States, nullifying the death sentences of hundreds of prisoners on death rows around the country.⁷¹ While no opinion garnered a majority of Justices, it seemed to many observers that the Court was effectively eliminating the death penalty from American criminal justice.⁷²

An examination of the opinions shows that the majority viewed the decision as one of normal constitutional law, and essentially a continuation of the Warren Court’s elaboration of Reconstruction and New Deal themes, while the dissents contained important hints that a profoundly new conception of the role of government was taking shape around the threat of violent crime. Justice Douglas,

⁶³ See BECKETT, *supra* note 41, at 39.

⁶⁴ See *id.* at 38.

⁶⁵ See KENTLETON, *supra* note 47, at 239.

⁶⁶ See LEWIS L. GOULD, *THE MODERN AMERICAN PRESIDENCY* 149 (2003).

⁶⁷ See *id.* at 172.

⁶⁸ See *THE PRESIDENCY A TO Z* 277, 348 (2d ed. 1998).

⁶⁹ See BECKETT, *supra* note 41, at 44.

⁷⁰ 408 U.S. 238, 239–40 (1972).

⁷¹ See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 266 (2003).

⁷² See *id.*

concurring, expressed the view that the Eighth Amendment's prohibition of "cruel and unusual punishment" included an equal protection value.⁷³ A penalty as rarely imposed as the modern death penalty opened the door to discriminatory application, an inference supported by statistical evidence showing disproportionate use against "the poor, the Negro, and the members of unpopular groups."⁷⁴ Justice Brennan, concurring, focused mainly on the declining usage of the death penalty, which he took as evidence that the American public had effectively rejected the death penalty even though polls continued to show a closely divided public.⁷⁵ In the end, he cited four different Eighth Amendment values that were offended by the death penalty:

Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.⁷⁶

Justice Marshall devoted his concurring opinion to assessing social science evidence on the utility of the death penalty.⁷⁷ Because death showed no measurable superiority to life imprisonment in accomplishing any of the legitimate goals of criminal punishment (which, in his view, did not include retribution⁷⁸), Marshall concluded that "the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment."⁷⁹ Marshall also thought that the majority of contemporary Americans if they "were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable."⁸⁰

Brennan and Marshall had categorically found that the death penalty violated the Eighth Amendment, no matter what was done to improve its administration.⁸¹ Douglas appeared to lean in that direction, although he left the logical possibility that a return to more regular use of the death penalty could eliminate its discriminatory effects.⁸² Two other Justices, Stewart and White, found the

⁷³ *Furman*, 408 U.S. at 257 (Douglas, J., concurring).

⁷⁴ *Id.* at 250 (Douglas, J., concurring).

⁷⁵ See BANNER, *supra* note 71, at 261.

⁷⁶ *Furman*, 408 U.S. at 305 (Brennan, J., concurring).

⁷⁷ See BANNER, *supra* note 71, at 262.

⁷⁸ See *Furman*, 408 U.S. at 343 (Marshall, J., concurring).

⁷⁹ *Id.* at 358-59.

⁸⁰ See *id.* at 361.

⁸¹ See BANNER, *supra* note 71, at 263.

⁸² *Id.* at 261.

arbitrariness of the current death penalty practice a violation of the Eighth Amendment, but quite explicitly left the door open to improved statutes and practice.⁸³

As noted above, President Richard Nixon helped signal the need for a constitutional change around crime via his harsh criticism of the Warren Court.⁸⁴ By the time of *Furman* he had been able to appoint three new Justices to the Court.⁸⁵ Nixon had promised to appoint justices who were willing to change constitutional direction on crime, and he obtained the results he wanted; all three of his appointees dissented in *Furman*. The focus of the dissents was the argument that the majority was reaching beyond the proper limits of the Eighth Amendment into decisions that had been properly left to Congress and the state legislatures. Interestingly, two of the three, Chief Justice Burger and fellow Minnesotan, Justice Blackmun, expressly indicated their own personal opposition to the death penalty and suggested that as legislators, they would vote to abolish it.⁸⁶ The legal postures of the dissents stressed traditional, prudential, and textual limits to judicial power rather than new constitutional visions. Dicta in two of the three dissents, however, pointed in a different direction: toward a new approach to crime, one grounded in a new appreciation of the victim as the central concern of criminal justice.⁸⁷

Justice Blackmun, although expressing personal opposition to the death penalty, noted ominously that the majority position might create a populist backlash because of its apparent empathy with victims of capital punishment, rather than victims of capital crimes:

It is not without interest, also, to note that, although the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of those opinions makes reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. The arguments for the respective petitioners, particularly the oral arguments, were similarly and curiously devoid of reference to the victims. There is risk, of course, in a comment such as this, for it opens one to the charge of emphasizing the retributive. . . .

Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the

⁸³ See *id.*; see also *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring), 310–13 (White, J., concurring).

⁸⁴ See KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* 59 (2000).

⁸⁵ See BANNER, *supra* note 71, at 263.

⁸⁶ See *Furman*, 408 U.S. at 375 (Burger, C.J., dissenting), 405–06 (White, J., dissenting).

⁸⁷ See *id.* at 413–14 (Blackmun, J., dissenting), 444–45 (Powell, J., dissenting).

fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked. Let us hope that, with the Court's decision, the terror imposed will be forgotten by those upon whom it was visited, and that our society will reap the hoped-for benefits of magnanimity.⁸⁸

Justice Lewis Powell, a Virginian who made no comment on his personal beliefs but probably supported the death penalty, interjected a similar note, pointedly calling into question the assumptions about public repugnance against the death penalty and highlighting the role that murder and violent crime played in mobilizing the public:

If, as petitioners urge, we are to engage in speculation, it is not at all certain that the public would experience deep-felt revulsion if the States were to execute as many sentenced capital offenders this year as they executed in the mid-1930s. It seems more likely that public reaction, rather than being characterized by undifferentiated rejection, would depend upon the facts and circumstances surrounding each particular case. Members of this Court know, from the petitions and appeals that come before us regularly, that brutish and revolting murders continue to occur with disquieting frequency. Indeed, murders are so commonplace in our society that only the most sensational receive significant and sustained publicity. It could hardly be suggested that in any of these highly publicized murder cases — the several senseless assassinations or the too numerous shocking multiple murders that have stained this country's recent history — the public has exhibited any signs of "revulsion" at the thought of executing the convicted murderers. The public outcry, as we all know, has been quite to the contrary. Furthermore, there is little reason to suspect that the public's reaction would differ significantly in response to other less publicized murders.⁸⁹

These dissenting comments, although mere dicta, reveal a wholly new vision of the role of government that was coming into focus around the problem of violent crime in general, and capital punishment in particular. First and foremost is the prominence given to the victims of violence. Modern penology with its emphasis on deterrence, incapacitation and rehabilitation had little to say about the victim. Even retribution, as against vengeance, spoke of the importance of social norms rather than individual feelings. In the years since *Furman*, crime victims have emerged not simply as central to criminal justice, but as idealized political subjects

⁸⁸ *Id.* at 413–14 (Blackmun, J., dissenting).

⁸⁹ *Id.* at 444–45 (Powell, J., dissenting).

whose needs largely define the proper concerns of government.⁹⁰ As against the New Deal consensus shared by many of the Justices themselves, that punishment should serve collective ends of social control, Blackmun and Powell emphasized the centrality of the victim, the importance of personal experiences of terror and pain, and popular satisfaction as an independent and sufficient purpose for capital punishment.⁹¹ Murder as a social problem, more than taxes and welfare, highlighted the ontological limits of the New Deal with its collectivist notions of risk spreading. Murder is a risk that cannot be spread in any important sense. By embracing the death penalty despite its lack of utilitarian effectiveness, Americans were rejecting the idea of modern penology: that rational ends, rather than emotions, should define the purposes of government.⁹² The death penalty would come to symbolize a new kind of populism in governance, whose reach now extended well beyond criminal justice.⁹³ It is not clear that either Blackmun or Powell embraced this vision,⁹⁴ but they presciently signaled that the majority opinion in *Furman* risked mobilizing the public against it.

III. RATIFICATION AND CONSOLIDATION: FROM *GREGG V. GEORGIA* TO WILLIE HORTON

It is clear in retrospect that *Furman* led to a reaction that would go a long way toward mobilizing the public and political elites behind just such a consensus. The response to *Furman* was fast and furious. Five state legislatures announced their intention to draft new statutes the day after the opinion was published.⁹⁵ In November 1972, California voters approved an amendment to their state constitution that restored the death penalty by a margin of two to one.⁹⁶ Historian Stuart Banner notes:

⁹⁰ See DAVID GARLAND, *THE CULTURE OF CONTROL* 102 (2001); JONATHAN SIMON, *GOVERNING THROUGH CRIME: THE WAR ON CRIME AND THE TRANSFORMATION OF AMERICA, 1960–2000* (forthcoming 2005) (on file with author).

⁹¹ See *Furman*, 408 U.S. at 413–14 (Blackmun, J., dissenting), 444–45 (Powell, J., dissenting).

⁹² See Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, in *AMERICA'S BEYOND REPAIR? AMERICA'S DEATH PENALTY* 33–34 (Stephen P. Garvey, ed., 2003) (explaining that few Americans cite deterrence as the reason for supporting the death penalty).

⁹³ See *id.* at 46.

⁹⁴ In one of his last opinions, Justice Blackmun announced that he would vote to find the death penalty unconstitutional. See *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting).

⁹⁵ See BANNER, *supra* note 71, at 268.

⁹⁶ The California statute had been struck down by the state high court a few months before *Furman*. See *id.*

[I]f *Furman* did not influence the *direction* of change, it almost certainly influenced the *speed* of change. *Furman* suddenly made capital punishment a more salient issue than it had been in decades, perhaps ever. People who previously had had little occasion to think about the death penalty now saw it on the front page of the newspaper. *Furman*, like other landmark cases, had the effect of calling its opponents to action.⁹⁷

When these new death penalty statutes reached the Supreme Court in 1976, something very much like the “switch in time” of 1937 came about. Justices Stewart and White, joined by Republican appointee John Paul Stevens, found that the new statutes addressed the concerns about arbitrariness and overly-broad discretion raised by the Stewart and White concurrences to *Furman*.⁹⁸ The new statutes had not totally repudiated *Furman*. The statutes approved in *Gregg v. Georgia* were drawn from the Model Penal Code and included bifurcated sentencing procedures, lists of “aggravating factors” or special circumstances that limited the discretion of prosecutors and juries, and guarantees of appellate review by the state supreme court.⁹⁹ But in the speed with which the statutes were drafted,¹⁰⁰ and the rising tide of angry rhetoric that accompanied them,¹⁰¹ few could miss this as a mobilization of the nation around the problem of violent crime. Indeed, after being closely divided for a generation, American public opinion in favor of the death penalty jumped dramatically to supermajority levels, where it has remained.¹⁰² Over the course of the next few years, the Supreme Court retreated from even the minimal restraints recognized by *Gregg*.¹⁰³

Moreover, the new death penalty would not be the sluggish institution that seemed to be slowly dying in the 1960s. The new statutes produced in response to *Furman* were put into use with an intensity unseen even during the 1930s.¹⁰⁴ More importantly, the reaction to *Furman* soon made the death penalty an issue in virtually every American election, especially for executive offices.¹⁰⁵ If Brennan and Marshall had been right that the American public, once focused on capital

⁹⁷ *Id.* at 268–69.

⁹⁸ See generally *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁹⁹ *Id.* at 197–98.

¹⁰⁰ See BANNER, *supra* note 71, at 268.

¹⁰¹ See Gross & Ellsworth, *supra* note 92, at 18 (explaining that reaction to *Furman* was swift and unequivocal).

¹⁰² See BANNER, *supra* note 71, at 275; FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 10–11 (2003).

¹⁰³ See Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

¹⁰⁴ See BANNER, *supra* note 71, at 270.

¹⁰⁵ See *id.* at 276.

punishment, would reject it,¹⁰⁶ elections would have seen the triumph of abolitionist candidates¹⁰⁷ — but the opposite happened.¹⁰⁸

In the immediate aftermath of *Gregg*, Jimmy Carter, a Democrat with moderate views on the death penalty won a narrow victory over the Republican incumbent Gerald Ford (who had succeeded Nixon following the latter's resignation).¹⁰⁹ That election remained focused on the Watergate scandal.¹¹⁰ In 1980, however, Carter was decisively defeated by Ronald Reagan, a conservative Republican who made support for the death penalty, one of his signature issues when he entered politics in the early 1960s (when opposition to the death penalty was still on the rise).¹¹¹ While many issues, especially the weak economy and Reagan's call for a hard-line anti-Communist foreign policy were in play during the election, crime and the death penalty played a significant role.¹¹² More importantly, Reagan's full-throated support for the death penalty went beyond the traditional concerns about deterrence to embrace the new governmental logic of the death penalty signaled by Justices Blackmun and Powell in their *Furman* dissents.

For Reagan, the war on crime was a battle with evil that could only be won by a government willing to act with total moral certainty and swift retribution.¹¹³ The death penalty, while only a minor aspect of crime control, was the clearest symbol of that commitment to certainty and retribution.¹¹⁴ Reagan's administration, particularly his second Attorney General, Edwin Meese, led a highly visible campaign to reverse Warren Court precedents like *Mapp v. Ohio*¹¹⁵ and *Miranda v. Arizona*.¹¹⁶ While the Supreme Court refused to completely overrule either, it did produce numerous opinions reducing the reach and significance of both.¹¹⁷

Perhaps because of the variety of issues in the 1980 campaign, and because Democrat Jimmy Carter took pains to keep his own views on the death penalty and crime out of the campaign as much as possible,¹¹⁸ it is difficult to take this election as an example of a clear ratification election of a constitutional moment around

¹⁰⁶ See *id.* at 268.

¹⁰⁷ See *id.* at 276.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* at 277.

¹¹⁰ See WILLIAM E. LEUCHTENBERG, *IN THE SHADOW OF FDR: FROM HARRY TRUMAN TO GEORGE W. BUSH* 208 (3d ed. 2001).

¹¹¹ See BANNER, *supra* note 71, at 277.

¹¹² BECKETT & SASSON, *supra* note 84, at 60.

¹¹³ See BECKETT, *supra* note 41, at 47.

¹¹⁴ See Gross & Ellsworth, *supra* note 92, at 18.

¹¹⁵ 367 U.S. 643 (1961).

¹¹⁶ 384 U.S. 436 (1966).

¹¹⁷ See, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (limiting exclusionary rule in cases where police officers act in good faith reliance on a warrant); *New York v. Quarles*, 467 U.S. 649 (1984) (creating public safety exception to *Miranda*).

¹¹⁸ See GOULD, *supra* note 66, at 201.

violent crime. Likewise, Reagan's landslide victory in 1984 followed a campaign mainly addressing tax policy and other economic issues.¹¹⁹ The real ratification election for the constitutional moment around violent crime took place in 1988 when Reagan's vice president, George H. W. Bush, ran against Democrat Michael Dukakis in an election thereafter identified with a debate about the death penalty, and about a convicted criminal named Willie Horton.¹²⁰

Dukakis and the Democrats were expected to do well in 1988.¹²¹ The Reagan administration had been significantly weakened by the post-Watergate politics of the Iran-Contra scandal.¹²² Moreover, the economic boom of the Reagan years seemed to be reaching its limits, and the high costs generated by their policies on the deficit, on the decline of American manufacturing, and on the decline of American cities seemed palpable.¹²³ Although seventeen points behind Dukakis in national polls at the time of his nomination, Bush's campaign led to a landslide victory, largely on the issue of the death penalty.¹²⁴ Like Walter Mondale, the Democratic nominee in 1984, Michael Dukakis was personally opposed to the death penalty.¹²⁵ This time, however, Bush and his advisers found a way to push this to the center of the campaign. As governor of Massachusetts, Dukakis presided over a prison furlough program that permitted convicted felons to leave prison temporarily to prepare for their eventual release.¹²⁶

A few years earlier, a felon named Willie Horton used his furlough to launch a crime spree in which he murdered, raped, and kidnapped a number of victims.¹²⁷ Organizations allied with the Bush campaign released television commercials centering on Willie Horton and accusing Dukakis of failing to identify with the concerns of ordinary Americans.¹²⁸ While few saw the commercials, they helped focus the campaign on crime, and the death penalty in particular.¹²⁹ In a widely remembered debate with Bush, Dukakis was asked how he would respond if his wife was raped and murdered.¹³⁰ Dukakis's response, suggesting that personal

¹¹⁹ See *id.* at 205.

¹²⁰ See THE PRESIDENCY A TO Z, *supra* note 68, at 87.

¹²¹ See GOULD, *supra* note 66, at 203.

¹²² *Id.* at 204.

¹²³ THE PRESIDENCY A TO Z, *supra* note 68, at 87.

¹²⁴ Gross & Ellsworth, *supra* note 92, at 42.

¹²⁵ GOULD, *supra* note 66, at 205.

¹²⁶ *Id.* Such programs were a common part of penal policy in many states at that time.

¹²⁷ Michael R. Beschloss, *George Bush, 1989–1993*, in CHARACTER ABOVE ALL: TEN PRESIDENTS FROM FDR TO GEORGE BUSH 236–37 (Robert A. Wilson, ed., 1995).

¹²⁸ See SUSAN ESTRICH, GETTING AWAY WITH MURDER: HOW POLITICS IS DESTROYING THE CRIMINAL JUSTICE SYSTEM 65–66 (1998).

¹²⁹ See *id.*

¹³⁰ See Beschloss, *supra* note 127, at 237.

feelings should not define state penal policy, became a central point of comparison with Bush, who emphasized his enthusiasm for the death penalty.

Bush won the election handily in a campaign with few other issues.¹³¹ In retrospect it is clear that such programs with their roots in the rehabilitative ideal represented precisely the kind of collectivist risk-sharing that Americans were coming to reject through the crime problem. In embracing the death penalty, Bush was embracing "zero tolerance," in which the government's job was to protect ordinary Americans against their worst feared losses, no matter the cost to other purposes or ideals of government.¹³² The death penalty earned its place alongside the Freedmen's Bureau and the Works Progress Administration as a new emblem of what the federal government did for people.

While Bush was defeated in 1992 by Democrat William Clinton in a campaign dominated by economic anxiety, his death penalty politics had become a new consensus among the political elite.¹³³ Indeed, Clinton, governor of Arkansas at the time, went out of his way to preside over an execution during the primary campaign and took every opportunity to signal his shared enthusiasm for the death penalty and other tough-on-crime measures.¹³⁴ As president, Clinton presided over the restoration of a general federal death penalty and the greatest increase in the American prison population in history.¹³⁵ After being defeated legislatively in his efforts to expand New Deal-type social programs in 1993 and 1994, Clinton ran for reelection emphasizing his policies on crime, welfare, and immigration. In 2000, when Clinton's vice president, Al Gore, faced Bush's son, George W. Bush, the death penalty was not an issue, as both candidates enthusiastically supported it.¹³⁶

The Supreme Court has also signaled its acceptance of the constitutional transformation around violent crime. The Court has time and again signaled its willingness to accept popular will on most aspects of capital punishment, including the death penalty. The Court has affirmed a steady retreat from the implication of an ongoing constitutional regulation of the death penalty. In the 1986 case of *McCleskey v. Kemp*,¹³⁷ the Court upheld the Georgia death penalty against a statistical analysis far more sophisticated than the evidence presented in *Furman*. This evidence showed that even the supposedly controlled discretion of post-*Furman* statutes resulted in greater odds of a death sentence for killers of white victims, especially black killers of white victims, even when some 200 variables

¹³¹ See Gross & Ellsworth, *supra* note 92, at 42.

¹³² *Id.*

¹³³ See *id.*

¹³⁴ See KENTLETON, *supra* note 47, at 266.

¹³⁵ See Gross & Ellsworth, *supra* note 92, at 44.

¹³⁶ As governor of Texas, Bush had presided over more than 100 executions. Although the public was actually uneasy over the scale of the Texas death penalty and charges that innocent people might be executed, Gore declined to criticize Bush in any way on the issue.

¹³⁷ 481 U.S. 279 (1987).

were controlled.¹³⁸ In the view of the Court, even if the measurable racial disparity could not be explained away, it did not condemn capital punishment in the absence of proof of discriminatory intent by someone in a specific case.¹³⁹ *McCleskey* was not inconsistent with past equal-protection decisions that required intent,¹⁴⁰ but it clearly signaled that the death penalty was for the most part, a normal penal practice without a particular taint of racism, as several members of the *Furman* Court had clearly held.

McCleskey raised bitter dissent from the remaining members of the *Furman* majority who were still on the Court in the mid-1980s.¹⁴¹ By the mid-1990s, after tough-on-crime Democrat Bill Clinton¹⁴² had appointed two individuals to the Supreme Court, basic challenges to the death penalty and other features of a whole generation of state and federal penal statutes constructed in the spirit of populist punitiveness received little serious dissent.¹⁴³ In the 2003 term, a solid majority of the Supreme Court upheld the constitutionality of California's three-strikes law under an Eighth Amendment proportionality review in a variety of cases involving nonviolent offenses where defendants received sentences of life imprisonment with no real hope for parole.¹⁴⁴ The opinion all but abandoned the idea that the Eighth Amendment set some limits to the quantity of punishment applicable to even undeniably modern penal techniques like imprisonment, which had been cultivated since the 1920s.

V. CONCLUSION: THE CONSTITUTIONAL MOMENT AROUND VIOLENT CRIME AND THE RIGHT TO ARMS

If the U.S. Constitution truly has been reshaped by a constitutional moment around violent crime (and by effect, nonviolent crime as well), it is appropriate to consider the right to arms as it may have been (or is being) recast by this moment. It is, however, far from clear that the constitutional change around crime has produced a determinate result for the question of whether the right to arms should be seen today primarily as individual or linked to the institutional life of the militias or some successor institutions. The question may still be taking shape in the still-fluid constitutional landscape remade by violent crime since the 1960s. Indeed,

¹³⁸ See *id.* at 312–13.

¹³⁹ *Id.*

¹⁴⁰ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (holding that an equal-protection violation requires racially discriminatory purpose).

¹⁴¹ See *McCleskey*, 481 U.S. at 320.

¹⁴² ESTRICH, *supra* note 128, at 69.

¹⁴³ Representative was the unanimous opinion upholding a one-strike-and-you're-out policy against residents of federal housing projects. See *Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

¹⁴⁴ See *Ewing v. California*, 538 U.S. 11 (2003).

both the contemporary gun-rights movement, and the contemporary gun-control movement can rightly argue that they represent the legitimate extension of the way “We the People” demanded that the government protect individuals against interpersonal violence in the period since the 1960s.¹⁴⁵

The gun-control movement can rightly point out that since gun violence is the primary source of lethality in violent crime, “We the People” must be assumed to have assented to the federal government’s (and certainly the states’) actions to control access to guns, when such actions have a rational relationship to diminishing crime. In support of this genealogy, they can point out that the Omnibus Crime Control and Safe Streets Act of 1968¹⁴⁶ included the first modern federal gun-control law.¹⁴⁷ Gun-control proponents can also point to the opposition of contemporary police departments to a broad individual right to arms. More than any other organ of government, the police have merged their identity with crime victims themselves so that they are simultaneously seen as the victim advocates with the least conflict of interest, and as victims themselves of criminal violence and the failures of other government institutions.¹⁴⁸ Starting with the 1968 crime bill,¹⁴⁹ the federal and state governments have invested substantially in linking themselves with the police. Few candidates for executive office at any level can succeed against the opposition of the police.

Proponents of the individual gun-rights view seem to have an even stronger hand. They can argue that gun ownership offers the most direct way for citizens to assure their own defense against lethal violence by others,¹⁵⁰ and that “We the People,” aroused by government’s failure to respond adequately to violent crime, would reasonably have chosen to protect this valuable right against further errors by an unresponsive state that limits access to guns.¹⁵¹ This argument is supported

¹⁴⁵ See Jonathan Simon, *Gun, Gates and Governance*, 39 HOUS. L. REV. 133 (2002).

¹⁴⁶ Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered sections of 42 U.S.C.).

¹⁴⁷ Pub. L. No. 90-351, §§ 201–406, 82 Stat. 197, 902. Ironically it was added after the passage of the primary legislative package in response to the assassination of Senator Robert Kennedy, one of the leading critics of the overall legislation’s approach to crime. The primary bill was actually voted on the day following the assassination.

¹⁴⁸ Jonathan Simon, *Governing Through Crime Metaphors*, 67 BROOK. L. REV. 1035, 1061 (2002).

¹⁴⁹ Pub. L. No. 90-351 § 701(a), 82 Stat. 210 (1968), and Pub. L. No. 90-578 § 301(a)(3), 82 Stat. 1115 (1968) (codified as amended at 18 U.S.C. § 3501 (2003)).

¹⁵⁰ Some, including myself, might be inclined to question this empirically, but that does not mean that the research record is clear enough to resolve the question as a matter of constitutional law.

¹⁵¹ Thus, the requirement of background checks to confirm the eligibility of a person to purchase a gun (felonies being the primary restriction on eligibility today) although substantively rational, might come to seem deeply misguided to a citizen who decides on the eve of a riot or a natural disaster likely to result in crime (like a massive hurricane) to purchase a firearm for the defense of her family and finds it impossible to qualify in time.

by the whole tenor of crime lawmaking at both the state and federal levels since the 1968 crime bill, and especially the wave of lawmaking that has followed the states' repudiation of *Furman v. Georgia*. This body of law shares a number of themes that speak to an individual right to arms:

- It is profoundly mistrustful of government action, especially by New-Deal-type collectivist social agencies.
- It believes in a zero-sum game of security between victims and criminals.
- It celebrates crime victims as possessors of the truth more important than scientific studies or political hierarchies.
- It recognizes lethal violence as a legitimate response to lethal violence.

All of these seem to favor the view that the crime-control revolution that has unfolded since 1972 transformed what Uviller and Merkel argue was a dead letter into a living personal right to arms. The Supreme Court has yet to offer a contemporary reading of the Second Amendment. It is likely to speak soon. One result of Uviller and Merkel's persuasive arguments about the Federalist and Reconstruction amendments is to make it more likely that any Supreme Court ruling in favor of individual gun rights will further mark a constitutional break with the past over the issue of violent crime.