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## RACIST GUN LAWS AND THE SECOND AMENDMENT

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For a significant portion of American history, gun laws bore the ugly taint of racism.<sup>1</sup> The founding generation that wrote the Second Amendment had racist gun laws, including prohibitions on the possession or carrying of firearms by Black people, whether free or enslaved.<sup>2</sup> A Florida law in 1825 authorized white people to “enter into all Negro houses” and “lawfully seize and take away all such arms, weapons, and ammunition.”<sup>3</sup> In *Dred Scott v. Sandford*,<sup>4</sup> Chief Justice Roger Taney argued that one reason Black people could not be citizens under the Constitution was that it “would give to persons of the negro race” the right “to keep and carry arms wherever they went.”<sup>5</sup> After the Civil War, the Black Codes enacted in the South made it a crime for a Black person to have a gun.<sup>6</sup> Even facially neutral laws were used in a racially discriminatory fashion; Martin Luther King Jr. was denied a concealed carry permit even after his house was firebombed.<sup>7</sup> For much of American history, gun rights did not extend to Black people and gun control was often enacted to limit access to guns by people of color.

What are the implications of this racist history of gun laws on how we understand and apply the Second Amendment? This Essay considers three. First, the history of racist gun laws will complicate the emergent Second Amendment test that looks to “text, history, and tradition” to determine the scope of the Second Amendment.<sup>8</sup> That test seeks out historical precedents to identify whether current laws are permissible, but some of the antecedents courts will be required to consider were at least partially motivated by racism or reflected racist attitudes. Second, the history of racist gun laws might suggest that courts today should be

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<sup>1</sup> On the racist history of gun laws, see generally Clayton E. Cramer, *The Racist Roots of Gun Control*, KAN. J.L. & PUB. POL’Y, Winter 1995, at 17 (arguing that American gun laws were designed to disempower racial minorities); and Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 333–42 (1991) (outlining the ways in which American gun control specifically restricted Black Americans’ access to guns).

<sup>2</sup> See Cramer, *supra* note 1, at 18.

<sup>3</sup> Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, in GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT 403, 403 (Robert J. Cottrol ed., 1994).

<sup>4</sup> 60 U.S. 393 (1857).

<sup>5</sup> *Id.* at 417.

<sup>6</sup> Cottrol & Diamond, *supra* note 1, at 344.

<sup>7</sup> ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 235 (2011).

<sup>8</sup> *Silvester v. Becerra*, 138 S. Ct. 945, 947 (2018) (Thomas, J., dissenting from denial of certiorari).

inherently suspect of any gun laws. This argument, however, proves too much, and there are good reasons for courts to reject such skepticism. Third and finally, the history of racist guns calls for us to be attentive to the racially disproportionate impact of gun laws today. While constitutional doctrine does not empower judges to strike down laws solely for a racially disparate impact, legislators and activists should be aware of it in shaping legislation or reform to minimize the racial skew.

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“History and tradition” is rising to prominence in Second Amendment jurisprudence as a way to determine the constitutionality of gun laws, but that approach is significantly complicated by the fact that many gun laws adopted over the course of American history were racially motivated.

Even as the federal circuit courts coalesced around a form of intermediate scrutiny in the immediate aftermath of *District of Columbia v. Heller*,<sup>9</sup> Justices Kavanaugh and Barrett, when they were still circuit court judges, argued that courts should instead use a historically informed approach.<sup>10</sup> In *Heller v. District of Columbia*<sup>11</sup> (*Heller II*), for example, then-Judge Kavanaugh dissented from the D.C. Circuit’s decision upholding mandatory gun registration and bans on assault weapons and high-capacity magazines.<sup>12</sup> Then-Judge Kavanaugh disagreed not only with the outcome but also with the circuit court’s application of intermediate scrutiny, writing: “In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”<sup>13</sup> He continued on to note that the problem with balancing tests is that they allow judges to “re-calibrate the scope of the Second Amendment right based on judicial assessment of whether the law advances a sufficiently compelling or important government interest to override the individual right.”<sup>14</sup> Balancing tests give judges too much discretion, according to this view, allowing judges to impose their own personal views on the Constitution.

Then-Judge Kavanaugh argued that a more determinate approach is to look to the history of gun laws to determine the constitutionality of

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<sup>9</sup> 554 U.S. 570 (2008). See generally Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433 (2018).

<sup>10</sup> See, e.g., *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *Kanter v. Barr*, 919 F.3d 437, 452 (Barrett, J., dissenting) (7th Cir. 2019). For a critical assessment of history and tradition analysis from a noted gun rights scholar, see Nelson Lund, *The Proper Role of History and Tradition in Second Amendment Jurisprudence*, 30 U. FLA. J.L. & PUB. POL’Y 171 (2020).

<sup>11</sup> 670 F.3d 1244 (D.C. Cir. 2011).

<sup>12</sup> *Id.* at 1269 (Kavanaugh, J., dissenting).

<sup>13</sup> *Id.* at 1271.

<sup>14</sup> *Id.*

gun restrictions today.<sup>15</sup> Laws that have longstanding historical precedents are presumptively constitutional, whereas novel laws without a tradition behind them are more likely to be unconstitutional. This historically grounded approach asks judges to put aside their personal views and allow the patterns and practices of the American people to shape constitutional meaning. “[E]xamination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification,” Kavanaugh argued, “is a ‘critical tool of constitutional interpretation.’”<sup>16</sup>

There are several pitfalls with a history and tradition approach. The historical materials may be so vague or conflicting as to render a conclusive judgement about what history permits near impossible. For example, in *New York State Rifle and Pistol Ass’n v. Bruen*<sup>17</sup> (*NYSRPA*), the currently pending Supreme Court case on the right to carry a gun in public, advocates marshalled extensive historical evidence on both sides of the dispute.<sup>18</sup> A Justice inclined to believe there is no right to carry firearms in public has plenty to base their decision on, and the same can be said for a Justice inclined to view public carry as a constitutionally protected right. There is also the problem that many gun laws over the years were enacted without any consideration of the Second Amendment because the Supreme Court had not definitively established that the Second Amendment protected an individual right to bear arms until 2008.<sup>19</sup> As a result, legislators did not always need to deliberate carefully over the scope and meaning of the right to keep and bear arms when enacting gun laws, and therefore those laws might tell us very little about the location of Second Amendment boundaries.

The history of racist gun laws presents a special dilemma for Second Amendment history and tradition analysis. Of course, the long history of racist gun laws does not suggest that governments today can limit guns in racially discriminatory ways. The Constitution’s guarantee of equal protection prohibits racially discriminatory gun laws just as it bars other types of racially discriminatory laws. Yet there will arise situations in which even a racially discriminatory gun law of the past might provide *some* basis for recognizing that lawmakers have a degree of regulatory authority over guns.

For example, some scholars have argued that modern laws that deny the right to keep and bear arms to people with felony convictions are

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<sup>15</sup> *Id.* at 1273.

<sup>16</sup> *Id.* at 1272 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008)).

<sup>17</sup> *NYSRPA*, No. 20-843 (argued Nov. 3, 2021).

<sup>18</sup> Compare Brief for Petitioners at 29–39, *NYSRPA*, No. 20-843 (July 13, 2021), with Brief in Opposition at 21–31, *NYSRPA*, No. 20-843 (Feb. 22, 2021).

<sup>19</sup> *Heller*, 554 U.S. at 576 (2008).

constitutional in part because the Founding generation had laws disarming people thought to be unusually dangerous or unvirtuous, such as Black people, Native Americans, and enslaved persons.<sup>20</sup> Although clear that legislatures no longer have the power to adopt racially discriminatory gun laws, these scholars argue that the racist gun laws nonetheless reflect a legitimate and constitutional power by legislatures to disarm people who are deemed either dangerous or lacking in virtue. That regulatory authority remains viable today, even if it can't be used for racist purposes, and these scholars suggest that it can justify at least some bans on firearms possession by felons and domestic abusers. In this analysis, the scope of the Second Amendment is in fact influenced by undeniably racist gun laws.

This example highlights another difficulty with history and tradition analysis: What level of generality should courts use in assessing historical gun laws? Courts could demand that any gun law today find very clear historical precedents that operated in precisely the same way. A felon-possession ban, for example, would be constitutional if there was a long practice of laws specifically barring felons from having guns. Using only exact historical matches may be a plausible way to conduct a history and tradition analysis, but it would effectively disable lawmakers today from regulating guns in the way current society demands. Many laws that judges across the political spectrum approve of — including bans on the possession of firearms by domestic abusers<sup>21</sup> and those with mental disabilities<sup>22</sup> — have no precise historical precedents prior to the mid-twentieth century. These are modern-day laws and a history and tradition analysis that requires a more or less exact historical match would require striking them all down.

The alternative is to frame the gun laws of the past at a higher level of generality, but this option undermines one of the primary rationales judges like Justice Kavanaugh use to justify history and tradition analysis. Framing historical gun laws at a higher level of generality is exactly what those who see the Founding-era laws as reflecting a legislative power to disarm dangerous or unvirtuous people do. Although the laws themselves did not explicitly ban gun possession by “dangerous” or “unvirtuous” people, we can arguably view the particular laws

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<sup>20</sup> See, e.g., Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 281–83 (2020); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983).

<sup>21</sup> The federal ban on firearms possession by a person subject to a domestic-violence restraining order was first enacted in 1994, and the first federal ban on possession by people convicted of a domestic-violence misdemeanor was enacted in 1997. See Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL'Y REV. 559, 566, 568 (2020).

<sup>22</sup> Federal law only began to prohibit people with diagnosed mental illness from possessing firearms in 1968. See Joseph R. Simpson, *Bad Risk? An Overview of Laws Prohibiting Possession of Firearms by Individuals with a History of Treatment for Mental Illness*, 35 J. AM. ACAD. PSYCHIATRY & L. 330, 331 (2007).

banning Black people, Native Americans, and other minorities as manifestations of a broader category of regulatory power. Yet resorting to such a broader category invites much of the same judicial discretion that a history and tradition test is supposed to avoid. It is judges today, not lawmakers of the past, who define the broader category, such as dangerousness or lack of virtue. And judges can easily manipulate the categories to reach their preferred outcomes. One could imagine that a liberal judge who believes informal armed militias are a threat to democracy might vote to uphold a ban on members possessing firearms. Or that a conservative judge who believes that undocumented immigrants lack virtue due to their violation of immigration laws might vote to uphold a ban on their possession of weapons. In either case, judges with the authority to cast past laws at a higher level of generality will be empowered with discretion to impose their own values on the Constitution. Once the level-of-generality problem is introduced, one of the primary justifications for a history and tradition analysis is severely diminished.

This level-of-generality problem is not unique to the Second Amendment but bedevils originalism more broadly. As Judge Easterbrook recognized three decades ago, “[m]ovements in the level of constitutional generality may be used to justify almost any outcome.”<sup>23</sup> Originalists in the 1970s and 1980s promoted historical inquiry at a very specific level, arguing that constitutional terms should be applied to reach the same outcomes as would have been expected by the people who wrote and ratified the relevant provisions. This “original intent” version of originalism has been replaced by a newer originalism, “public meaning originalism,” that recognizes how many of the Constitution’s rights guarantees are phrased at a high level of generality — “freedom of speech,” “due process,” “equal protection” — and argues that judges should protect those rights at that more abstract level, even if it means arriving at different results from the original originalists. Yet this move up the ladder of generality “creat[es] the very problem that the old originalism was designed to address” — that is, “to prevent the unconstrained judicial creativity that can follow from seeking the original meaning . . . at a high level of generality.”<sup>24</sup> In the Second Amendment context, however, the problem is even worse, because instead of looking to a text to define the level of generality, judges are required to simply make up the categories, such as dangerous or unvirtuous, themselves.

A judge could eschew the level-of-generality problem by simply rejecting the historical relevance of any gun law with a racist motive or reflecting racist attitudes. This approach appears justifiable on a surface level but confronts serious dilemmas on closer inspection. First, it

<sup>23</sup> Frank H. Easterbrook, Exchange, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 358 (1992).

<sup>24</sup> Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 493 (2017).

would likely lead judges to afford legislatures less regulatory authority than the original understanding and historical traditions of the Second Amendment would otherwise permit. Legislatures have always had a considerable sphere of authority to regulate guns. Although they employed that power to further racist motives, the basic sphere of authority to regulate — outside of racist laws in violation of equal protection — remains intact. Yet if judges ignore any law with a racist influence, the courts may not accurately identify the full scope of regulatory authority.

Second, judges determined to discount any law with a racist motive will have to decide how much racism is too much. Many, perhaps most, gun laws enacted between 1789 and 1940 were influenced at least in part by racism. The concealed carry law at issue in *NYSRPA* traces back to the Sullivan Law, which was at least partially influenced by anti-immigrant sentiment.<sup>25</sup> However, that motivation is not the entire story; there were public-safety concerns that were part of the inspiration for the law too.<sup>26</sup> How is a judge to weigh the competing motives? Is a little bit of racism totally disqualifying? If so, then discretionary granting of permits for concealed carry is unconstitutional. At the same time, however, similar laws were enacted in other states, like Montana and South Dakota, without any obvious racist motive — suggesting that the laws were within the historical power of states to adopt.<sup>27</sup> So is discretionary licensing justified by history and tradition or not? The answers are not easy, and judges trying to make sense of history and tradition in a country with a legacy of racist gun laws have little guidance in this wilderness.

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One potential implication of the history of racist gun laws is that they could provide a reason for judges to be skeptical of *all* gun laws. Yet there are reasons, both practical and constitutional, to be skeptical of such skepticism.

Courts do sometimes treat laws skeptically because such laws have been used in the past for purposes of racial exclusion. Courts today approach laws that employ racial categories this way. Because race has so often been used by lawmakers to buttress white supremacy and oppress racial minorities, any explicit use of race today — even in laws designed to open up equal opportunities for people of color — triggers strict scrutiny. Only after applying strict scrutiny, the Supreme Court has told us, can we know whether a racial classification in a law is benign or invidious.<sup>28</sup>

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<sup>25</sup> See generally Amici Curiae Brief of Italo-American Jurists and Attorneys in Support of Petitioners, *NYSRPA*, No. 20-843 (July 15, 2021).

<sup>26</sup> See WINKLER, *supra* note 7, at 206.

<sup>27</sup> *Id.* at 209.

<sup>28</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

While the racism of past gun laws does and should give one pause, we might nonetheless recognize that many areas of law have historically been used to perpetuate racial discrimination but that courts don't approach every law in those areas as inherently suspect. Property laws were used to enforce racially restrictive covenants, but that doesn't mean that all laws regulating property should be presumptively unconstitutional.<sup>29</sup> Zoning laws were used to create and maintain racial segregation, but courts do not automatically review zoning laws with strict scrutiny.<sup>30</sup> Marriage laws were explicitly racially discriminatory,<sup>31</sup> as were criminal laws<sup>32</sup> and laws regulating voting.<sup>33</sup> Yet in all of these areas we still recognize that some forms of regulation are necessary and lawmakers are given wide leeway, more or less, to devise regulatory reforms absent the explicit use of race.

Skeptical judicial scrutiny of all gun laws would also appear to be in tension with the text of the Second Amendment, which recognizes the legitimacy — even necessity — of some regulation. The prefatory clause refers to a “well regulated Militia, being necessary to the security of a free State.”<sup>34</sup> If we assume, as *Heller* suggested, that the “Militia” is shorthand for the common citizenry capable of bearing arms in defense of the state,<sup>35</sup> then the Second Amendment envisions that guns and gun owners are subject to at least some measure of government regulation. *Heller* also suggested that this language permits only “discipline and training,” rather than recognizing a government authority of any breadth.<sup>36</sup> This constrained definition, however, runs counter to other textual provisions of the Constitution adopted around the same time that use “regulate” or “regulation” to suggest broader government authority that includes controlling, directing, or prohibiting activity.<sup>37</sup>

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<sup>29</sup> See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 21–23 (1948) (holding racially restrictive covenants unenforceable).

<sup>30</sup> See Andrew H. Whittemore, *The Role of Racial Bias in Exclusionary Zoning: The Case of Durham, North Carolina, 1945–2014*, 50 ENV'T & PLAN. A: ECON. & SPACE 826, 829 (2018).

<sup>31</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (invalidating a ban on interracial marriage).

<sup>32</sup> See generally Heather Ann Thompson, *The Racial History of Criminal Justice in America*, 16 DU BOIS REV. 221 (2019).

<sup>33</sup> See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 54–59 (2000).

<sup>34</sup> U.S. CONST. amend. II.

<sup>35</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 595–97 (2008).

<sup>36</sup> *Id.* at 597.

<sup>37</sup> See, e.g., U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,” *id.* art. I, § 8, cl. 3, and “To make Rules for the Government and Regulation of the land and naval Forces,” *id.* art. I, § 8, cl. 14.); *id.* art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”).

The Second Amendment not only imagines government regulation but also calls for states to do it qualitatively “well” — not haphazardly, poorly, or partially. This explicit embrace of governmental authority would be undermined by a standard or test that presumed the unconstitutionality of every gun law. Contrast the Second Amendment to the First Amendment, which says that “Congress shall make no law” and makes no mention of the government’s regulatory authority.<sup>38</sup> The Second Amendment is more like the Fourth Amendment, which prohibits “unreasonable searches and seizures” and requires probable cause for warrants.<sup>39</sup> The Fourth Amendment assumes that government has authority to conduct investigations and imposes certain boundaries on that power. Similarly, the Second Amendment both acknowledges and imposes a limit on the regulatory authority of the state; the militia must be well regulated but the government cannot go so far as to infringe the right of the people to have arms. It bears noting that, while strict scrutiny applies in some First Amendment cases, the courts do not use strict scrutiny in Fourth Amendment cases.<sup>40</sup>

There is also reason to doubt the claim that gun laws enacted today are motivated by racial animus. Polling data show that minorities and communities of color are among the nation’s strongest supporters of gun control;<sup>41</sup> elected officials who represent them are among the most vocal about the need for more gun laws.<sup>42</sup> Gun violence is disproportionately felt by these communities and their support for gun control reflects not racism, but rather their desire to live in safer neighborhoods and reduce gun violence. It defies common sense and Americans’ lived experience to suggest that all or even most gun laws are enacted or maintained today because they harm racial minorities.

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Even if gun laws today are not typically racially motivated, some of them likely have a racially disproportionate impact, and the history of racist gun laws serves as a reminder to try to avoid, eliminate, or at least minimize such discriminatory effects. People of color are far

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<sup>38</sup> *Id.* amend. I.

<sup>39</sup> *Id.* amend. IV.

<sup>40</sup> *See, e.g.,* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995); Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 229–30 (2006).

<sup>41</sup> *See* PEW RSCH. CTR., *AMID A SERIES OF MASS SHOOTINGS IN THE U.S., GUN POLICY REMAINS DEEPLY DIVISIVE* 10 (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/YRQ2-QEB6] (showing majorities of Black, Hispanic, and Asian respondents say gun laws “should be stricter,” compared to only a minority of White respondents).

<sup>42</sup> *See, e.g.,* David M. Herszenhorn, *Black Caucus Demands Congress Hold Gun Vote After Shootings*, N.Y. TIMES (July 8, 2016), <https://www.nytimes.com/2016/07/09/us/politics/black-caucus-demands-congress-tighten-gun-laws-after-shootings.html> [https://perma.cc/D83W-T2Z6].



overrepresented among those convicted of federal firearms offenses. According to recent data, approximately seventy percent of all defendants convicted of federal firearms offenses were minorities,<sup>43</sup> even though those same communities make up only about forty percent of the population.<sup>44</sup> The widely popular ban on possession of firearms by felons has a distinctly racially disparate impact. Black and Latino people are disproportionately represented among those who are arrested and convicted of felonies generally, so they make up a relatively large share of the people prohibited from possessing firearms. The lifetime duration of the federal ban means the numbers quickly add up, and it has been estimated that approximately one in four Black men in the United States has a felony conviction on their record.<sup>45</sup> That means that one in four Black men do not enjoy the right to keep and bear arms.

Banning high-capacity magazines — a proposal popular with gun-safety advocates — might also be expected to have a racially disproportionate impact on communities of color. In cities and states that have adopted bans on the possession of high-capacity magazines, there appears to be widespread noncompliance, with little evidence of gun owners discarding their now-illegal magazines or turning them in to authorities. The law is on the books, but people still have their high-capacity magazines and there is no practical or constitutional way for the government to search people's homes to find them. Instead, the ban will often be enforced when someone who happens to have a high-capacity magazine is stopped, searched, or arrested by the police. Due to condemnable but nonetheless highly predictable practices of over-policing in minority communities, a disproportionate percentage of those convicted of violating the ban on high-capacity magazines are likely to be people of color.

These sorts of disparate impacts are likely unavoidable because gun laws tend to be criminal laws and minorities are overrepresented in the criminal process. Absent significant reform of the criminal justice system, people of color are almost certain to make up an excessive percentage of gun law violations. That should not dissuade lawmakers from adopting needed gun reforms, but it should prompt them to consider ways to limit such racially disproportionate outcomes. To lower the burden on minorities, for example, advocates might seek to reform the lifetime ban on possession of firearms by felons similar to how voting

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<sup>43</sup> EMILY TIRY ET AL., URB. INST., PROSECUTION OF FEDERAL FIREARMS OFFENSES, 2000–16, at 19 (2021), <https://www.ojp.gov/pdffiles1/bjs/grants/254520.pdf> [<https://perma.cc/W4Y9-M8M3>].

<sup>44</sup> See *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/RHI225219> [<https://perma.cc/U7GB-ZS48>] (showing about forty percent of people are not White).

<sup>45</sup> Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1807 (2017).

rights advocates have sought to lift the lifetime bans on voting by felons imposed by some states. Or advocates might focus less on criminalizing disfavored gun accessories and emphasize other reforms, such as community intervention programs like Operation Ceasefire, that have a proven track record of reducing gun violence without locking up large numbers of people of color.<sup>46</sup>

For courts, the racially disparate impact of some gun laws would not be enough — at least under current constitutional doctrine — to invalidate them. Under *Washington v. Davis*,<sup>47</sup> a law is deemed to be racially discriminatory only when there is discriminatory intent — in other words, the law was at least partially motivated by race.<sup>48</sup> And, as noted earlier, modern gun laws are not typically enacted or preserved because of racist motivations. One potential difference is that *Washington v. Davis* was an equal protection case under the Fifth Amendment (with equal application to the states through the Fourteenth Amendment), not a Second Amendment case. While it seems unlikely, there is always the possibility the Supreme Court could decide that a racially disparate impact suffices to invalidate a law under Second Amendment doctrine. The Court often devises different doctrinal rules for different constitutional rights, and perhaps the Justices might be inclined to view a disparate impact standard as appropriate for gun rights given the history of racist gun laws, even if disparate impact isn't applicable under equal protection.

Justice Alito has been one jurist who has shown more sensitivity to racism in gun laws than to racist motivations elsewhere in the law. When the Supreme Court struck down Louisiana and Oregon laws permitting criminal convictions by nonunanimous jury verdicts in *Ramos v. Louisiana*,<sup>49</sup> in part because laws permitting the practice were rooted in white supremacy,<sup>50</sup> Justice Alito dissented: “To add insult to injury, the Court tars Louisiana and Oregon with the charge of racism for permitting nonunanimous verdicts.”<sup>51</sup> In the voting rights context, Justice Alito authored the Court's opinion in *Brnovich v. Democratic National Committee*,<sup>52</sup> making it harder for plaintiffs to show that voting laws

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<sup>46</sup> See Adam Winkler, Opinion, *If the New Supreme Court Stymies Gun Safety Laws, What Comes Next?*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/11/01/opinion/supreme-court-gun-control.html> [<https://perma.cc/M6DY-6DTQ>] (proposing refocusing gun-safety-reform agenda to, among other things, community intervention programs).

<sup>47</sup> 426 U.S. 229 (1976).

<sup>48</sup> *Id.* at 242 (“Disproportionate impact is not irrelevant, but . . . [s]tanding alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny . . .”).

<sup>49</sup> 140 S. Ct. 1390 (2020).

<sup>50</sup> *Id.* at 1394 (“Why do Louisiana and Oregon allow nonunanimous convictions? . . . [T]heir origins are clear. . . . According to one committee chairman, the avowed purpose of that convention was to ‘establish the supremacy of the white race’ . . .”).

<sup>51</sup> *Id.* at 1425 (Alito, J., dissenting).

<sup>52</sup> 141 S. Ct. 2321 (2021).

are racially discriminatory.<sup>53</sup> And in *Department of Commerce v. New York*,<sup>54</sup> which prohibited the Trump Administration from including a question about citizenship in the census,<sup>55</sup> Justice Alito's dissent expressed bewilderment that "the decision to place such a question on the 2020 census questionnaire is attacked as racist."<sup>56</sup>

In Second Amendment cases, by contrast, Justice Alito often sees racism at work. As the author of the majority opinion in *McDonald v. City of Chicago*,<sup>57</sup> which held that the Second Amendment was incorporated to apply to state and local governments, Justice Alito discussed at length how racist efforts to disarm Southern Black people in the years after the Civil War helped to inspire the adoption of the Fourteenth Amendment.<sup>58</sup> In the oral argument in *NYSRPA*, Justice Alito pointed to the racist motives behind New York's restrictive concealed carry permitting law: "[T]here are those who argue . . . that a major reason for the enactment of the Sullivan Law was the belief that certain disfavored groups, members of labor unions, Blacks and Italians, were carrying guns and they were dangerous people and they wanted them disarmed."<sup>59</sup>

Perhaps by seeing how gun laws have been tainted by racism, Justices like Justice Alito might become more willing to see how other types of facially neutral laws are similarly suspect. That might be just wishful thinking, but in this time of growing public awareness of institutional racism and implicit bias, legal developments that push judges and justices to recognize the hidden ways that racism works are likely to be a good thing. If nothing else, the history of racist gun laws may make it easier to see, and to eliminate, the racism deeply embedded in other areas of law.

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As the courts increasingly look to history and tradition to determine the scope of the right to keep and bear arms, they will have to decide how to deal with the history of racist gun laws. It is tempting for jurists worried about unelected judges imposing their own values on the Constitution to seek answers in past practices, which might seem determinate and objectively verifiable. Yet the legislation of the past is hardly neutral; the racism embedded in so many gun laws reminds us

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<sup>53</sup> See *id.* at 2343–48.

<sup>54</sup> 139 S. Ct. 2551 (2019).

<sup>55</sup> *Id.* at 2573–76 ("[T]he District Court was warranted in remanding to the agency, and we affirm that disposition. . . Reasoned decisionmaking . . . calls for an explanation for agency action. What was provided here was more of a distraction." *Id.* at 2576.).

<sup>56</sup> *Id.* at 2596 (Alito, J., dissenting).

<sup>57</sup> 561 U.S. 742 (2010).

<sup>58</sup> See *id.* at 745.

<sup>59</sup> Transcript of Oral Argument at 103–04, *NYSRPA*, No. 20-843 (Nov. 3, 2021), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2021/20-843\\_f2q3.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-843_f2q3.pdf) [<https://perma.cc/3FFL-CYNE>].

that such legislation was enacted not out of a solemn attempt to police the boundaries of the Second Amendment but in an effort to abuse the law to protect racial privilege and hierarchy. That does not mean that all gun laws ought to be immediately suspect, however, due to the text of the Second Amendment and the tradition of other gun laws that promoted public safety without racist taint. Yet the history of racist gun laws also must not be forgotten, and if nothing else, it should inspire gun reform advocates and lawmakers to craft efforts to reduce gun violence without a racially disproportionate impact.