



ESSAY

On Sordid Sources in Second Amendment Litigation

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Introduction

The landscape of American history is littered with facially racist, misogynistic, homophobic, xenophobic, and other demeaning, marginalizing, and subordinating laws. Many more facially neutral laws have been applied in ways that subjugate disfavored groups. The history books teem with tales of these heinous American legacies.¹ But legacies they are. And constitutional rules that privilege history and tradition should have some principled standard for dealing with such sordid sources in a consistent fashion.² Yet the Supreme Court's current jurisprudence falls short.

Second Amendment litigation provides a fruitful context for clarifying possible pathways to greater consistency in the doctrinal treatment of our checkered past. That is particularly true given the Supreme Court's recent

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1. See, e.g., MARGARET A. BURNHAM, *BY HANDS NOW KNOWN: JIM CROW'S LEGAL EXECUTIONERS* (2022); CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* (2021); CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2009).
2. Cf. Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality: Dobbs on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 906 (2023) (arguing that "conservative Justices have repudiated past practices when those practices expressed racism or nativism to which the Justices objected" but ignored that past when it became inconvenient to the conclusions the Justices wanted to reach); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2255-56 (2022) (collecting cases) (relying on 19th century abortion restrictions and rejecting arguments that these laws were tainted by discriminatory motive, stating that "[t]his Court has long disfavored arguments based on alleged legislative motives"); W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1197 (2022) (discussing how judgments about discriminatory taint in past legislation should influence current judgments about those laws).

mandate to use a novel history-and-tradition-only legal test, and because race, guns, and the law have been inescapably bound together in American society since its inception.

Within the Anglo-American legal tradition there have been laws expressly disarming specific marginalized groups, like African-Americans, Native Americans, and religious minorities.³ Legal rules have long been used to keep disfavored groups from accessing instruments of power and self-defense. These laws have been legally dead for more than a century, but recent Second Amendment litigation has resurrected them to relevance.⁴ In this context, the question of what courts, counsel, and commentators should do with these moribund laws takes on heightened importance.

This Essay describes why this question matters, explains the options available to legal actors in dealing with these laws, and argues in favor of an approach that abstracts past principles while condemning past judgments. The Court's recent revolution in Second Amendment method forces reliance on historical tradition alone to judge public safety today. Without a full picture of past laws—the prosaic and prejudiced alike—courts risk impermissibly narrowing the range of legislative options the ratifiers understood to be consistent with the right to keep and bear arms. Constricting that authority too tightly would be to usurp the people's power to rule themselves.

I. The Dilemma in *Bruen's* History & Tradition Test

In *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court announced a new legal test for reviewing Second Amendment claims.⁵

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3. See, e.g., 1798 Ky. Acts 106, § 5 (“No negro, mulatto, or Indian whatsoever, shall keep or carry any gun, powder, shot, club, or other weapon whatsoever, offensive or defensive . . .”); DUKE CTR. FOR FIREARMS L., *Repository of Historical Gun Laws*, “Race and Slavery Based” Category, <https://perma.cc/K864-6XRT>; Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting “Dangerous” Groups and Outsiders*, in *NEW HISTORIES OF GUN RIGHTS AND REGULATION: ESSAYS ON THE PLACE OF GUNS IN AMERICAN LAW AND SOCIETY* (forthcoming) (manuscript at 5) (Joseph Blocher, Jacob D. Charles & Darrell A. H. Miller, eds.), <https://perma.cc/85FH-RKJK>; Charles R. McKirdy, *Misreading the Past: The Faulty Historical Basis Behind the Supreme Court’s Decision in District of Columbia v. Heller*, 45 CAP. U. L. REV. 107, 124-25 (2017) (describing how “provincial governments were not averse to disarming entire groups of people,” including “Native Americans, slaves, free blacks, white servants, antinomians, ‘Papists,’ ‘reputed Papists,’ Acadians, nonjurors, the disaffected, those who might be disaffected, and, in many cases, fellow countrymen who had a gun that the government decided that it needed”).
 4. Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537, 538 (2022) (arguing, pre-*Bruen*, that a history and tradition test would be “significantly complicated by the fact that many gun laws adopted over the course of American history were racially motivated”).
 5. 142 S. Ct. 2111 (2022).

Grounded in history, that test requires the government defending contemporary gun laws to point to similar precedent in “this nation’s historical tradition of firearm regulation.”⁶ If the government cannot find an analogous past regulation, the modern law falls. A significant complication from this test—one the Court does not adequately justify or explain—is how it magnifies historical silence.⁷ Because the test requires past precedent for modern regulations, it renders novel laws invalid and thus puts enormous pressure on the search for any comparable analogue in the country’s historical tradition.

One controversial way that public officials have responded to this test is by reanimating the sordid skeletons in our less equal past.⁸ Citing such laws today places questions about their present legal relevance front and center. In some cases, officials face a dilemma of *Bruen*’s own making: rely on relevant but undeniably heinous laws or allow gun regulations supported by empirical evidence to be felled.⁹ By dint of its own historical method, *Bruen* sanctifies appeal to the statutes of an unequal society. That method can practically force officials defending contemporary gun laws aimed at addressing the disproportionate harm in communities of color to cite historical laws discriminating against those very same communities.¹⁰

6. *Id.* at 2125-26.

7. See Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. (forthcoming 2023) (manuscript at 36-44), <https://perma.cc/TR9Y-SBWB> (stating that, by making the absence of historical regulations dispositive, *Bruen* relieves gun rights advocates of the obligation to show historical protection for their conduct).

8. See Jacob Gershman, *Old Racist Gun Laws Enter Modern-Day Legal Battles*, WALL ST. J. (Feb. 27, 2023, 8:00 AM ET) (explaining that, post-*Bruen*, “[g]overnment lawyers reluctantly cite[d] historical laws that kept guns from Blacks, Native Americans and Catholics.”), <https://perma.cc/7VC7-6V2B>. Calling our past less equal than the present does not suggest we have achieved equality in the present; in fact, there is much more work to do. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2200 (2023) (Jackson, J., dissenting) (“Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations.”).

9. See Danny Y. Li, Note, *Antisubordinating the Second Amendment*, 132 YALE L.J. 1821, 1901 (2023) (describing the use of racist laws in support of modern regulations and recognizing that the fault lies at the Court’s feet: “The underlying point is that *Bruen*’s method limits the sources of legal authority that judges can draw on in Second Amendment disputes to historical practices adopted amidst background conditions of social and political inequality”).

10. State Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 21 n.4, *Antonyuk v. Hochul*, No. 22-cv-986, 2022 WL 16744700 (N.D.N.Y. Nov. 7, 2022), 2022 WL 17579123, at n.4 (citations omitted) (acknowledging that the disarmament laws the state cited were grounded in a type of “racial or religious animus that is repugnant to a modern understanding of the Constitution,” but arguing that “[a] clear-eyed look at American history and doctrine

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True, not every case will present so stark a choice. But the question will often arise when the government must defend current laws that restrict gun possession for dangerous individuals—like domestic abusers, violent felons, or intoxicated gun owners—where history supplies no precise replicas and the constitutional question thus turns on analogies.

For many contemporary gun laws, there are a number of analogous historical precedents that span a wide spectrum of similarity.¹¹ And historical gun regulations have a similarly wide spectrum of intersections with race and inequality. There are, of course, bigoted laws that bear facially invidious discrimination.¹² Another set of laws were written in neutral terms but were passed for discriminatory reasons.¹³ And many non-malign gun regulations—like nearly all laws, really—have been enforced in discriminatory ways at some point or another.¹⁴ At the same time, there are scores of gun restrictions passed to protect and defend racial minorities.¹⁵ And, just as there are discriminatory regulations, there were surely discriminatory *failures* to regulate, because the harms to marginalized groups were minimized or ignored by those who wrote the laws.¹⁶ This complexity should not be surprising. After all, “[l]ike any

will necessarily reveal episodes that are shameful but nonetheless relevant, as the *Bruen* opinion teaches us”).

11. Daniel Harawa, *The Racial Justice Gambit*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 5, 2022), <https://perma.cc/3CD8-D2UN> (“[T]here is a long history of gun regulation in America that seemingly had nothing to do with race.”).
12. *See supra* note 3.
13. *See, e.g.*, Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 354-55 (1991) (adducing examples of statutes that had the purpose of disarming Black people).
14. *See, e.g.*, Brief of the Black Attorneys of Legal Aid, et al. as Amici Curiae Supporting Petitioners, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (describing the disparate impact of New York’s concealed carry licensing law); Brennan Gardner Rivas, *The Problem with Assumptions: Reassessing the Historical Gun Policies of Arkansas and Tennessee*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 20, 2022), <https://perma.cc/A68N-482F> (complicating the single-minded narrative that all gun control is racist).
15. *See Li, supra* note 9, at 1870 (describing how “supporters of gun-control measures in the late twentieth century frequently marshaled racial-justice arguments to support gun control”); Mark Anthony Frassetto, *The Nonracist and Antiracist History of Firearms Public Carry Regulation*, 74 SMU L. REV. F. 169, 175-76 (2021) (showing gun laws designed to protect freedmen in the aftermath of the Civil War); Saul Cornell, *Race, Regulation, and Reconstruction: Setting the Historical Record Straight*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Sept. 24, 2021), <https://perma.cc/258X-MKPR> (describing the complexity of gun regulations and race in the Reconstruction era).
16. Charles, *supra* note 7, at 38 (describing the Founders’ failure to disarm domestic abusers); Jacob Charles, Opinion, *The Founders Didn’t Disarm Domestic Abusers: Does That Mean We Can’t?*, THE HILL (Feb. 15, 2023, 2:00 PM ET), <https://perma.cc/J5TD-CCH2> (same). And there was surely discriminatory under-protection of gun rights for people of color, even from the Supreme Court itself. *See* Franita Tolson, *Parchment Rights*, 135
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instruments of power, guns and their regulation can be employed for domination or freedom, along lines of race, gender, and class.”¹⁷

Recognizing this mixed history does not answer the question of its relevance. Instead, it only raises the stakes of the key dilemma: How should conscientious public officials respond?

II. Renounce, Abstract, Embrace

Lawyers and judges have several options when faced with this *Bruen* dilemma, which will arise most often when the government seeks to defend a contemporary law prohibiting someone from possessing guns.¹⁸ The options may include taking different approaches to different types of historical gun regulations. An approach to facially neutral laws motivated by bigotry might be different from an approach to neutral laws with no ill-intent that were later applied partially. Here, I focus mainly on how to deal with the hardest case of facially biased laws, but the options outlined below are likely similar for any type of historical law that gives modern lawyers or judges pause.

One option is to renounce reliance on discriminatory laws altogether.¹⁹ Legal actors might do so on the grounds that these laws are egregiously immoral and would now violate the Equal Protection Clause.²⁰ They could add that for a government or court today to rely on such laws would cause further

HARV. L. REV. F. 525, 527-32 (2022) (detailing the use of guns to perpetuate the Colfax Massacre and the Supreme Court’s subsequent disregard for Black Americans’ right to bear arms).

17. Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449, 450 (2022).
18. The Supreme Court will consider such a law in its upcoming term: the firearms bar for people under domestic violence restraining orders. 18 U.S.C. § 922(g)(8); *United States v. Rahimi*, No. 22-915, slip op. at 1 (June 30, 2023) (granting *certiorari*); *see also* *United States v. Rahimi*, 61 F.4th 443, 457 (5th Cir. 2023) (“Laws that disarmed slaves, Native Americans, and disloyal people may well have been targeted at groups excluded from the political community—i.e., written out of ‘the people’ altogether—as much as they were about curtailing violence or ensuring the security of the state. Their utility as historical analogues is therefore dubious, at best.”).
19. *See, e.g.*, *United States v. Guthery*, No. 2:22-cr-00173, 2023 WL 2696824, at *8 (E.D. Cal. Mar. 29, 2023) (questioning whether or not these types of laws can be used at all because “impermissible bias is intertwined with the historical record,” which “raises questions about how properly to interpret that record in drawing conclusions for the present”).
20. *See* Chris Chambers Goodman & Natalie Antounian, *Dismantling the Master’s House: Establishing a New Compelling Interest in Remediating Systemic Discrimination*, 73 HASTINGS L.J. 437, 443 (2022) (noting that “race-based classifications almost always fail the [Equal Protection Clause’s implementing] test and are struck down as a result”).

harm, stigma, and alienation to marginalized groups.²¹ Call this the Renunciation Approach.²²

Another approach could be called the Abstraction Approach. Using this approach, the lawyer or judge would condemn the historical application of these laws, but abstract from their specific application a broader principle that might be applied consistently with contemporary values and understandings.²³

A third possible approach, which nobody advocates for, would be to neither renounce nor abstract, but to *embrace* these laws.²⁴ Those critical of using sordid statutes at all often conflate the Abstraction Approach with an embracing one. They see any reliance on these laws as tantamount to an endorsement of discrimination. But the abstract and embrace pathways are importantly different.

Consider what the Abstraction Approach looks like in practice. In a dissenting opinion pre-dating *Bruen*, but consistent with its method, then-Judge Amy Coney Barrett argued that history shows the Second Amendment permits disarming dangerous people.²⁵ She cataloged historical laws expressly targeting disfavored groups for disarmament: Catholics, enslaved Black people, and Native Americans.²⁶ She noted that, throughout English and early American history, lawmakers passed legislation “adapted to the fears and threats of that time and place.”²⁷ From that list, Judge Barrett distilled the principle that “founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety.”²⁸ In other words, she abstracted from the particulars of specific racist and bigoted legislation a non-discriminatory rationale that could underwrite contemporary laws. That historical principle, she said, meant that legislatures were not stuck with the specific *applications* of past laws to the groups whom earlier generations feared. Instead, today’s lawmakers could enact group-based prohibitions “based on

21. See Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 109 (2020) (arguing that citing slavery cases creates real dignitary harm, even though lawyers can extract law from facts).

22. See, e.g., *United States v. Hicks*, No. 21-CR-00060, 2023 WL 164170, at *5-*6 (W.D. Tex. Jan. 9, 2023) (declining to rely on these types of laws in a post-*Bruen* challenge).

23. See generally Blocher & Carberry, *supra* note 3 (suggesting this type of approach).

24. See Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. (forthcoming), <https://perma.cc/ATG7-PVPA>, 63 (noting that despite past despicable laws, “it would be absurd to conclude that *today* the Second Amendment permits the government to disarm Black Americans and Native Americans but not domestic abusers”).

25. *Kanter v. Barr*, 919 F.3d 437, 451-69 (7th Cir. 2019) (Barrett, J., dissenting).

26. *Id.* at 457.

27. *Id.*

28. *Id.* at 458.

present-day judgments about categories of people whose possession of guns would endanger the public safety . . .”²⁹ And for Judge Barrett, those modern judgments presumably should be based on statistics about danger, not mere stereotypes about threat.

From this implementation, one can see how different the Abstraction Approach is from one that would embrace or defend these laws as written. And for good measure, Judge Barrett included a disclaimer after compiling the laws she relied on: “It should go without saying that such race-based exclusions would be unconstitutional today.”³⁰ But their unconstitutionality, to say nothing of their stereotyping and subjugating nature, did not render these laws useless for historical archeology. If the past is to be a clue to the constitutionality of gun laws today, Judge Barrett’s Abstraction Approach suggests that these laws can provide hints about earlier generations’ understanding of legislative power divorced from their concrete application to specific groups. Put another way, judges and lawyers can use the principle without embracing the application. The real-world choice thus comes down to whether lawyers and judges ought to deploy this kind of Abstraction Approach or instead reject the continuing relevance of these laws altogether with a Renunciation Approach.

III. To Renounce or to Abstract?

There are massive stakes involved in choosing among alternative approaches. Of course, there are ethical and structural stakes for attorneys. Lawyers have ethical obligations to zealously defend their clients, and those can sometimes require making arguments with which one personally disagrees.³¹ As a structural matter, at the federal level, and in many state governmental arrangements, executive branch officials are generally thought to have a duty to defend legislative enactments when reasonable arguments

29. *Id.* at 464 (emphasis added). Some pro-gun writers have similarly deployed this kind of Abstraction Approach. See Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 262 (2020) (“Like English laws, colonial laws were sometimes discriminatory and overbroad—but even those were intended to prevent danger.”).

30. *Kanter*, 919 F.3d at 458 n.7 (Barrett, J., dissenting).

31. There are, of course, nuances and exceptions that lie beyond the scope of this Essay. See Adam Creppelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529, 532-33 (2021) (arguing that under modern rules of professional responsibility lawyers should generally not cite “overtly racist, factually erroneous cases in the field of federal Indian law”); Simard, *supra* note 21, at 84 (calling on courts to minimize reliance on cases involving slavery to explicate private law doctrines and urging courts to “acknowledge and explain” the context in which the precedential case arose if they do rely on it).

can be made for doing so.³² These twin arguments suggest it might sometimes be incumbent on government lawyers to invoke these laws if doing so gives them the best chance of successfully defending challenged laws.

The choice between these approaches will also have broader and deeper effects among other stakeholders. Lives and community well-being might literally hang in the balance. The choice of approach could be the difference between the states' ability to enact and defend reasonable gun regulations that further public peace and safety and their powerlessness in the face of deep harm.

Choosing an approach is no doubt a difficult and complicated decision. Reasonable arguments can be made for either path. But at least in the Second Amendment context, and so long as *Bruen* remains the reigning methodology, there are more persuasive reasons to adopt the Abstraction Approach than the alternative. Though the horrific bases for, and applications of, discriminatory historical laws should be condemned,³³ these relics need not be blotted out of the historical record altogether. Unless and until the Supreme Court cabins the overriding importance of historical tradition to constitutional law, these laws paint an important historical context that their omission would distort.³⁴ Consider two arguments in favor of the Abstraction Approach.

First, *Bruen* already strips states of many of the ordinary tools of constitutional argument used to defend challenged laws, like those asserting the compelling interest in regulation, the narrowness of the chosen means, and the effectiveness of the law in serving those public interests.³⁵ The decision even circumscribes the historical inquiry itself, requiring the government to produce past positive law to support modern regulations.³⁶ If all discriminatory laws are off-limits, the universe grows smaller still, given the entrenched racism saturating American history.³⁷ And taking that track would

32. Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 513 (2012) (describing this commonly held view but arguing against it); see James C. Ho, *The Office of the Solicitor General: A Decade of Representing Texas Interests*, 47 ADVOC. 80, 82 (2009) (discussing the Texas Solicitor General's duty to defend in most instances).

33. So too should disparate enforcement of contemporary laws be condemned. See Jacob D. Charles, *Firearms Carceralism*, 108 MINN. L. REV. (forthcoming 2024) (highlighting the racial justice costs of increasing reliance on the criminal legal system to deal with gun violence).

34. See Blocher & Ruben, *supra* note 24, at 63-64 (discussing the way that *Bruen's* method should be implemented as to the level of generality when dealing with these types of laws).

35. See RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION 45-46, 77-79 (2001) (explaining various constitutional tests).

36. Charles, *supra* note 7, at 36-37.

37. Winkler, *supra* note 4, at 537 ("For a significant portion of American history, gun laws bore the ugly taint of racism."); see also Darrell A.H. Miller, *Tainted Precedent*, 74 ARK. L. *footnote continued on next page*

provide an incomplete picture of historical understandings about the scope of legislative power.³⁸ In other words, under a test that demands sole reliance on history and tradition, “it is hard to justify ignoring these unseemly laws, which after all help demonstrate the ‘principles’ the Framers thought relevant.”³⁹ Though the best of all possible worlds is one in which contemporary laws are evaluated using contemporary evidence, the best history-bound constitutional universe may well be one in which all relevant historical evidence is used to assess today’s laws.

That approach provides a symmetry with how the historical exercise of gun *rights* are viewed in the courts. If—as seems the case—judges will not interrogate how the Second Amendment itself,⁴⁰ as well as the use of guns and gun rights throughout U.S. history,⁴¹ have been used to further White supremacist ends, then it would be especially incongruous to use the racist history of gun *regulations* to pretermit legislation today.⁴² That move is all the more troubling when one considers that the very communities of color who experience the most concentrated impact of gun violence are often the most supportive of modern gun regulations.⁴³ It would be a sad irony if the fact that

REV. 291, 295 (2021) (“A rule that requires we abandon useful precedent on the grounds that it is contaminated with racism would leave us with precious little of the public good left.”).

38. Winkler, *supra* note 4, at 540-42 (arguing that an approach that renounces reliance on these laws “would likely lead judges to afford legislatures less regulatory authority than the original understanding and historical traditions of the Second Amendment would otherwise permit”); Patrick J. Charles, *Some Thoughts on Addressing Racist History in the Second Amendment Context*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 14, 2022), <https://perma.cc/65NT-93JQ> (arguing against an approach like the Renunciation Approach because it would discard relevant portions of history).

39. Blocher & Carberry, *supra* note 3, at 12; *id.* at 13 (“[T]o fully understand the scope of the regulatory authority the Framers thought they had, one must actually consider the gun laws that they *did* pass, even if we would reject those laws (perhaps for other constitutional reasons) today.”).

40. See CARL T. BOGUS, *MADISON’S MILITIA: THE HIDDEN HISTORY OF THE SECOND AMENDMENT* 11-12 (2023) (arguing that the Second Amendment was designed to protect militias so they could suppress slaves).

41. See ANDERSON, *supra* note 1, at 102-03 (recounting incidents of guns furthering white supremacist purposes).

42. See Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 72 (2022) (“The racial injury exacted by an interpretation of the Second Amendment that would permit the proliferation of guns is not cognizable as such within the racial common sense that the Roberts Court has adopted.”); see also Kami Chavis, *The Dangerous Expansion of Stand-Your-Ground Laws and its Racial Implications*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 18, 2022), <https://perma.cc/34PZ-JZMN> (explaining that “the role of race and guns in America cannot be disentangled”).

43. Winkler, *supra* note 4, at 544 (“Polling data show that minorities and communities of color are among the nation’s strongest supporters of gun control; elected officials who

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our forebears were so explicitly racist in regulating guns meant that contemporary Americans, including Black Americans who favor stricter gun regulation, were prevented from regulating guns today for their own safety.⁴⁴ In sum, one reason to favor the Abstraction Approach is that it takes the Court at its word: the existence of historical tradition is the only factor that matters in Second Amendment litigation.

Second, the Abstraction Approach is consistent with a kind of public-meaning originalism to which justices in the *Bruen* majority have often proclaimed adherence. On one explication of that theory, constitutional meaning is fixed at the time of ratification, but applications to specific disputes are not frozen in time.⁴⁵ For example, Professor Larry Solum, a prominent originalist scholar, has argued that “[f]ixed original public meaning can give rise to different outcomes given changing beliefs about facts.”⁴⁶ Adhering to fixed meaning “does not require constitutional actors to adhere to false factual beliefs held by the drafters, Framers, ratifiers, or the public.”⁴⁷ A central tenet of originalist families of constitutional theory, he writes, holds that meaning remains fixed but “the facts to which the text can be applied change over time.”⁴⁸ As applied to the set of laws Judge Barrett relied on in her circuit court opinion, we might say that early legislatures’ beliefs about the inherent dangerousness of Black or Indigenous people were false. Thus, those applications of a public understanding about the Second Amendment’s scope can be readily discarded;⁴⁹ but we need not also jettison the underlying

represent them are among the most vocal about the need for more gun laws.” (footnote omitted)).

44. The law struck down in *Heller*, for example, was itself backed in the 1970s by a Black-led coalition that was especially concerned about the toll gun violence was taking on Black lives. See JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 71-76 (2017).

45. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 21 (2015) [hereinafter *Fixation Thesis*]; cf. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010) (distinguishing between stages of constitutional explication, including a construction stage where a court “gives a text legal effect (either [b]y translating the linguistic meaning into legal doctrine or by applying or implementing the text”).

46. Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 N.W. U. L. REV. 1243, 1269 (2019).

47. *Id.*

48. *Fixation Thesis*, *supra* note 45, at 21 (emphasis omitted).

49. Even though these beliefs are false and pernicious, that does not mean they do not affect views today, as studies on implicit bias and threat perception reveal. See Joseph Blocher, Samuel W. Buell, Jacob D. Charles & Darrell A.H. Miller, *Pointing Guns*, 99 TEX. L. REV. 1173, 1180-81 (2021) (describing these biases, particularly as they apply in the firearms context).

dangerousness-disarmament principle itself.⁵⁰ Applications can change as beliefs about facts change.⁵¹

Of course, these are not foolproof arguments. There are some good reasons for thinking these laws should be renounced and confined to everlasting censure—and there are also some cynical ones. Start with the good reasons. Such laws are a terrible reminder of de jure discrimination, and their invocation by courts and government today could lead to psychic and dignitary injury to the groups singled out for historical mistreatment. That is no small concern. For members of minoritized groups to see their government citing these laws today could surely be harmful. Public officials could mistakenly be seen as endorsing the underlying judgments if they are not careful to distance themselves from those flawed assumptions.

Similar arguments have been made for sloughing off scurrilous historical case law, as the Court did in *Trump v. Hawaii* when it declared that the “court of history” had overruled the “gravely wrong” decision in *Korematsu*.⁵² But decisional law and historical legislation are different. Because a case’s holding is binding, it would be exceedingly hard to discard appalling applications but keep a case’s underlying rationale. As long as the rationale survived, so too would the risk of its abuse. For that reason, some scholars argue that the Court often should overrule its past “decisions now widely regarded as morally irredeemable.”⁵³ In contrast to court decisions, it is easier to abstract the principles that justified past legislation from the particular applications to specific groups, because the principles do not carry the same risk of ongoing abuse.

Now consider some of the cynical explanations for adopting the Renunciation Approach. Perhaps most prominently: it is a quick way to expand Second Amendment rights.⁵⁴ And race is often used by judges and gun-

50. See Solum, *supra* note 46, at 1268-69 (using *Bradwell v. Illinois* and changing perceptions of women’s ability to perform as competent lawyers to underscore a similar point).

51. See Blocher & Carberry, *supra* note 3, at 13 (“We need not accept their conclusions, of course, in order to care about their premises—their *reasons* for believing certain gun laws to be constitutional. If they thought that gun laws were constitutional so long as they targeted groups of people thought to be dangerous, then arguably that reason is what matters, not the groups to which they affixed that label.”).

52. 138 S. Ct. 2392, 2423 (2018).

53. Daniel B. Rice, *Repugnant Precedents and the Court of History*, 121 MICH. L. REV. 577, 586 (2023).

54. Li, *supra* note 9 at 1861 (underscoring that “racial-justice claims are now one of the most popular genres of constitutional argument marshaled before the Supreme Court in support of expanding Second Amendment rights”); see *United States v. Hicks*, No. 21-CR-00060, 2023 WL 164170, at *6 (W.D. Tex. Jan. 9, 2023) (striking down a federal gun law on Second Amendment grounds and rejecting disclaimers about historical racist laws because “no matter how many times courts or the Government” disavow the

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rights advocates as a one-way ratchet to broaden Second Amendment rights, but it is not used to question the many ways expansive gun rights have been used to harm and subordinate racial minorities.⁵⁵ Indeed, many conservatives who seem quite unconcerned about discriminatory impact in other areas of law invoke racial justice themes when it comes to gun rights.⁵⁶ For example, some of the same legislators advocating for bans on critical race theory, restricting voting rights in ways that disadvantage minority groups, and vocally vilifying immigrants are the same ones who most loudly proclaim gun laws must be discarded because they have been disproportionately enforced against disfavored groups.⁵⁷ As Professor Darrell Miller writes, “[t]hese right-wing leaders have suddenly discovered the merits of concepts like White privilege, anti-Blackness and structural racism—but only when it applies to gun rights, it seems.”⁵⁸ Some judges and advocates are also selectively concerned about bias in the past.⁵⁹ As Professor Daniel Harawa remarks about some of the selectively concerned speakers, these “are white people pointing to

underlying intention of those laws “it doesn’t change the fact that they are citing those historical travesties to support taking someone’s Second Amendment rights today”). Of course, despite what that court says, if the laws *did* accurately convey the original understanding of the scope of legislative power under the Second Amendment, then the federal law under its review would not take away anyone’s Second Amendment right.

55. See Daniel S. Harawa, *NYSRPA v. Bruen: Weaponizing Race*, 20 OHIO ST. J. CRIM. L. 163, 163-64 (2023). There is a parallel here with how race is selectively invoked in the abortion context. See, e.g., Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2029 (2021) (“[R]ather than surfacing race as a means of promoting greater reproductive autonomy and access in service of *Roe v. Wade*, as the reproductive justice movement does, the *Box* concurrence integrates racial injustice into the history of abortion for the purpose of destabilizing abortion rights.”).
56. Blocher & Siegel, *supra* note 17, at 455 (“We would be amazed if these same Justices [who were receptive to race-based claims in Second Amendment law] attacked doctrines that protect prosecutorial discretion in cases alleging selective prosecution on the basis of race or political viewpoint.”).
57. Darrell A. H. Miller, *Conservatives Sound Like Anti-racists—When the Cause Is Gun Rights*, WASH. POST (Oct. 27, 2021, 6:00 AM EDT), <https://perma.cc/2WHK-A3B3>.
58. *Id.*; see also Gregory S. Parks, *When CRT Meets 2A*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 11, 2022), <https://perma.cc/S2WQ-2WJQ> (noting the same dynamic and leveraging Derrick Bell’s concept of interest convergence to explore the phenomenon).
59. Siegel, *supra* note 2, at 910-11 (“Because their commitment to originalism and to history and tradition is selective . . . we can see how the conservative Justices’ claims on the past express value and identity.”); see also Blocher & Siegel, *supra* note 17, at 460-61 (“The Court is ready to denounce racism of the past, but when it comes to the forms of inequality afflicting minority communities in the present, the Court too often interprets the Constitution to license inequality and to obstruct efforts to dismantle it.” (footnote omitted)).

the history of white people discriminating against Black people to further their own white interests. It's perverse."⁶⁰

While there is a mix of good and decidedly bad reasons for preferring the Renunciation Approach, the Abstraction Approach is better suited to the historically bound test *Bruen* demands.⁶¹ If the past determines the scope of legislative authority to regulate guns today, slicing off portions of that history diminishes the regulatory power the founding generation understood the state to possess.⁶²

Still, if public officials take the Abstraction Approach, they should emphasize that these abhorrent laws are not entitled to respect today. They should include clear and unmistakable normative disavowal when citing these laws—not simply neutral abstraction of a broader principle, but abstraction paired with condemnation for past applications.⁶³ This may be the best way to

60. Harawa, *supra* note 11.

61. *See, e.g.*, *United States v. Smith*, No. CR 122-081, 2023 WL 3012007, at *4 (S.D. Ga. Mar. 29, 2023) (“Certainly, such efforts were obviously misguided, but their existence proves a common, historical understanding the Second Amendment allows regulations curtailing gun rights by people legislatures identify as posing heightened risks of criminality or dangerousness.”), *report and recommendation adopted*, No. CR 122-081, 2023 WL 3010178 (S.D. Ga. Apr. 19, 2023); *United States v. Now*, No. 22-CR-150, 2023 WL 2717517, at *8 (E.D. Wis. Mar. 15, 2023) (noting that some historical status-based prohibitions “remain helpful analogues insofar as they underscore that the right to keep and bear arms did not apply to categories of people deemed threats to public safety”), *report and recommendation adopted*, No. 22-CR-150, 2023 WL 2710340 (E.D. Wis. Mar. 30, 2023).

62. Some advocates have argued that these historical laws are not analogous to modern laws because the only guiding principle from this history is sheer racism or subordination. *See, e.g.*, Kostas Moros (@MorosKostas), TWITTER (May 17, 2023, 7:41 AM), <https://perma.cc/MSM3-APFD>. But while plenty of indignities were imposed for no reason other than invidious animus, taking *guns* away was almost certainly motivated by concerns about danger. Blocher & Carberry, *supra* note 3, at 13 (citing legislation announcing safety concerns). After all, forcibly enslaving and violently displacing people engenders resistance, making it likely that white legislators would fear allowing brutally oppressed groups to arm themselves. *See, e.g.*, ANDERSON, *supra* note 1, at 32-33 (arguing that the Second Amendment was designed, at least in part, “to salve Patrick Henry’s obsession about Virginia’s vulnerability to slave revolts . . .”); BOGUS, *supra* note 40, at 102 (adducing evidence of intense southern fears about slave rebellions).

63. When California’s attorneys recently compiled historical gun laws in response to a court’s order for such a compilation, it noted about several invidious regulations:

These laws are morally repugnant and would obviously be unconstitutional today. They are provided only as additional examples of laws identifying certain weapons for heightened regulation . . . Defendants in no way condone laws that target certain groups on the basis of race, gender, nationality, or other protected characteristic, but these laws are part of the history of the Second Amendment and may be relevant to determining the traditions that define its scope, even if they are inconsistent with other constitutional guarantees. Reference to a particular historical analogue does not endorse the analogue’s *application* in the past.

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minimize the broad and diffuse dignitary harms that can occur when the government cites to these laws.

For example, when a Third Circuit panel abstracted from discriminatory laws in a challenge to the felon-in-possession law post-*Bruen*, it footnoted multiple paragraphs with disclaimers that varied on the same theme:

The status-based regulations of this period are repugnant (not to mention unconstitutional), and we categorically reject the notion that distinctions based on race, class, and religion correlate with disrespect for the law or dangerousness. We cite these statutes only to demonstrate legislatures had the power and discretion to use status as a basis for disarmament, and to show that status-based bans did not historically distinguish between violent and non-violent members of disarmed groups.⁶⁴

That explicitly normative approach is preferable to Judge Barrett’s simple descriptive disclaimer that “such race-based exclusions would be unconstitutional today.”⁶⁵

If *Bruen* forces reliance on regulations passed in the days when the law protected race-based chattel slavery, some of those regulations will surely be infected with America’s original sin. But that is the test the Court has demanded. Public officials who adopt the Abstraction Approach and extract neutral principles from these sordid laws owe a duty to clearly and frequently denounce the judgments that led to the appalling application of those principles.

Conclusion

In several areas of constitutional law, the Supreme Court now gives pride of place to history and tradition.⁶⁶ Methods grounded in the past confront numerous problems of historical translation and generate heated disputes over constitutional memory.⁶⁷ The Second Amendment context makes this clear: In

Rather, it can confirm the *existence* of the doctrine and corresponding limitation on the Second Amendment right.

Defendants’ Brief in Response to the Court’s Order Entered on December 15, 2022, at 17 n.17, *Miller v. Bonta*, No. 19-CV-01537 (S.D. Cal. Feb. 10, 2023) (citation omitted).

64. *Range v. Att’y Gen.*, United States, 53 F.4th 262, 276 n.18 (3d Cir. 2022), *rev’d en banc*, 69 F.4th 96 (3d Cir. 2023).

65. *Kanter v. Barr*, 919 F.3d 437, 458 n.7 (7th Cir. 2019) (Barrett, J., dissenting).

66. See generally Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. (forthcoming 2023), <https://perma.cc/XT6Y-QG7E> (grappling with how this method comports with originalism).

67. Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1131 (2023) (arguing that “it is now urgent that we attend to the many kinds of arguments from constitutional memory in our constitutional tradition, inside and outside of courts”).

demanding that current gun laws be justified by reference to historical tradition alone, the Court intensifies the search for ancient antecedents. It makes past regulations decisive, “requiring courts to strike down gun regulations” without such historical foundation “even when they might be narrowly tailored to accomplish the most compelling of governmental interests.”⁶⁸

That test is a problematic one, but it would be more problematic still for courts and counsel to artificially excise what are indisputable traditions of historical gun regulations because they, like so much of American history, are grounded in bigotry. An Abstraction Approach better balances the need for forceful condemnation of past prejudice with proper deference to the modern exercise of legislative power blessed by history and tradition.

68. Bridges, *supra* note 42, at 70.