DUKE CENTER FOR FIREARMS LAW

– Essays on Race and Guns in America –

Some Thoughts on Addressing Racist History in the Second Amendment Context

Patrick J. Charles*

The claim that all gun control is inherently racist is relatively new. The claim grew to prominence in gun rights circles in the 1990s after Robert Cottrol and Raymond Diamond published their seminal 1991 article "The Second Amendment: Toward an Afro-Americanist Reconsideration." That same year National Rifle Association (NRA) assistant counsel Stefan B. Tahmassebi proclaimed that the "history of gun control in the United States has been one of discrimination, oppression, and arbitrary enforcement" against people of color. Not long thereafter, gun rights advocate and writer Clayton E. Cramer boldly declared that "racism underlies [all] gun control laws…" The rest, as they say, is history and the claim that 'all gun control is racist' has latched itself onto our discourse for the foreseeable future.

While these gun rights writers would be correct in noting that gun control has at times been utilized in a way that discriminates against people of color, particularly from American colonization through Reconstruction, the historical claim that 'all gun control is racist' has shown itself to be completely unsupported. What these gun rights writers conveniently omit is that the legal concept of regulating access, ownership, and use of firearms is not something that was originally developed to discriminate or subdue people of color. What we today refer to as gun control predates the advent of firearms, has been around since the Norman Conquest, and has long applied to all segments of society. Still, the fact that people of color have at times been burdened with firearms related rules, regulations, and legal requirements far more severe and disproportionate than those imposed upon whites is historically indisputable.

The question that this essay seeks to answer is: How should the courts address this racist history in the Second Amendment context? This question is particularly relevant in the pending Supreme Court case *New York State Rifle & Pistol Association Inc. v. Bruen*, wherein the petitioners and accompanying *amici*—in the hopes of persuading the Court to adopt strict scrutiny—are constitutionally framing the history of all armed carriage laws as being inherently racist. Indeed, much of the racist history being advanced in *Bruen* is highly exaggerated and at times hypocritical. However, the fact remains that the history of gun control is at times intertwined with our country's history of racism, and it is a history that the courts will have to wrestle with in future Second Amendment cases and controversies. But how should the courts go about it?

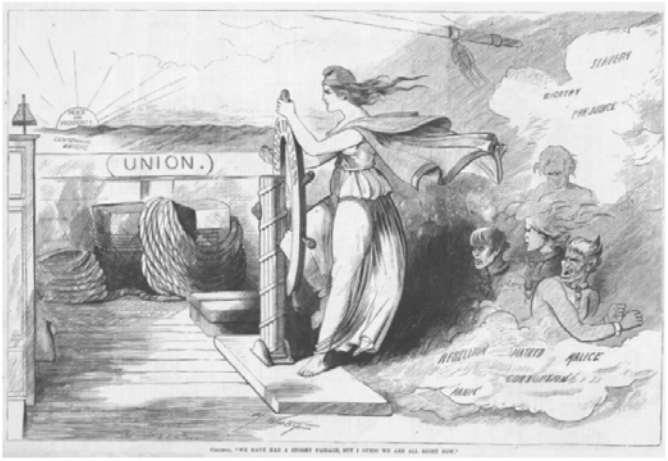
The way some gun rights writers see it, the best way to handle this racist history would be for the courts to jettison significant portions of the historical record when adjudicating the constitutionality of any gun control measure under a text, history, and tradition analysis, particularly any gun control measures enacted from the mid-nineteenth century through the early twentieth century. In other words, what gun rights writers are asking is for the courts to carve out a separate, exclusionary history-in-law exception for the Second Amendment. However, such an

* Senior Historian and Legislative Fellow for the United States Air Force (USAF). The information and analysis contained herein are solely those of the author, and not those of the USAF or the Department of Defense.

exclusionary approach to racist history—or any facet of history for that matter—is not only poorly conceived, but also ill-advised. There are at least three reasons for this.

First and foremost, the existence of racist history is not something that is unique in the Second Amendment context. Rather, racist history underlies many facets of American law, including other amendments within the Bill of Rights, such as the First Amendment and Fourth Amendment, as well as many other areas of government regulation, such as regulations pertaining to property, taxes, registrations, and licenses. Furthermore, as historian Carol Anderson has recently observed, racist history in the Second Amendment context is not a one-way street. Although I am on record taking serious issue with Anderson's historical characterization of the Second Amendment being inherently racist at the time of ratification, Anderson is correct in noting that the Second Amendment has at times been invoked in a manner that is discriminatory towards people of color. Thus, if the courts are going to carve out a special, exclusionary history-in-law construct for the Second Amendment they will also have to consider any racist 'gun rights' history, which will ultimately result in the courts having to jettison even more historical events and periods. What's worse is it would make any text, history, and tradition analysis in the Second Amendment context even more susceptible to historical cherry-picking than already exists.

Second, even if we are to assume that gun rights writers are correct in earmarking most gun control related history from the mid-nineteenth through the early twentieth century as inherently racist (and this is quite the assumption), jurisprudentially sidestepping a thorough and accurate examination of this history is ill-advised. If recent events have taught us anything, it is that society's failure to properly acknowledge, address, and reconcile its racist past can have dire, contemporaneous consequences. The historiography of the Civil War is a principal case in point. While there is widespread academic consensus that slavery was far and away the war's principal cause, few if any historians will dispute that when Southerners outlined their reasons for supporting the war, they often did so in states' rights terms, and certainly many Southerners supported the war for non-slavery-based reasons. However, the historical record is replete with examples that the principal states' right that Southerners were defending was state authority to maintain the institution of slavery without federal interference.



This view of the Civil War as a war over slavery was generally accepted throughout Reconstruction. And come our centennial, as can be seen in the above 1876 *Harper's Weekly* political cartoon of Lady Liberty steering the Constitution towards 'peace and prosperity,' many believed that the days of 'slavery', 'bigotry', 'prejudice', 'hatred', and 'malice' were finally behind the country. Yet unfortunately, not long after Reconstruction Southerners successfully began reframing the Civil War as a revolutionary, 'lost cause' conflict over states' rights, increasingly referred to it as the "war of Northern aggression," and some even went so far as to defend slavery as a necessary and benevolent institution. To this day, due largely to this Southern historical reframing of the causes of the Civil War, the country has yet to fully heal and move on. The recent resurgence of white supremacist ideology, the debates over displaying the Confederate flag, and the debates over retaining Confederate monuments on government property are all cases in point.

The principal takeaway is simply this. No matter whether one sidesteps or whitewashes racist history—to include the courts—the potential for negative societal impacts is large. Conversely, at least in this author's opinion, there is little, if any societal benefit to be gained by not addressing our racist history head-on. To assert otherwise—as some gun rights writers are doing—is to suggest that racist history does not really matter at all.

This brings us to third and last reason why the courts should stay clear from adopting any separate, exclusionary approach to racist history in the Second Amendment context: Existing jurisprudence already provides the courts with two frameworks for acknowledging, addressing, and reconciling the racist history of laws—the 1) the Fourteenth Amendment's equal protection framework and 2) the history-in-law constitutional rights framework recently canonized by the Supreme Court in *Ramos v. Louisiana*.

Beginning with the Fourteenth Amendment's equal protection framework, it was formulated to provide the courts with a flexible, two-pronged approach to correct the wrongs of any racially discriminatory laws. The first prong involves the courts examining whether a law is racially discriminatory on its face. If it is, strict scrutiny applies. Today, however, most race-based equal protection challenges are adjudicated under the second prong, which requires the courts to examine whether a law was adopted with a racially discriminatory motive and the law imposes racially disparate impacts. And if a litigant meets the required evidentiary burden under this second tier, strict scrutiny also applies. Now, in practice, meeting the required evidentiary burden has proven exceedingly difficult for litigants, particularly at the Supreme Court. In theory, however—that is, if we are to take the Supreme Court's pronouncements at face value—the second prong affords litigants great historical flexibility in proving discrimination before the courts. As the Court noted in the 1976 case *Washington v. Davis*, "an invidious discriminatory purpose may often be inferred from the *totality of the relevant facts*, including the fact, if it be true, that the law bears more heavily on one race than another." A year later, in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, the Supreme Court reiterated that the "totality" of the evidence showing racial animus was controlling. And the Court did not bind litigants to solely relying on historical evidence at the time of the law's enactment. Rather, litigants can show the law's discriminatory purpose through official actions taken either some time prior to or after the law's enactment, whether that be through "direct" historical evidence or aggregated "circumstantial" historical evidence.

Of course, the Fourteenth Amendment's equal protection framework is not perfect. This is especially true of the framework's second prong given that the Supreme Court has yet to strike down any law as having an invidious discriminatory purpose. But the problems associated with the Fourteenth Amendment's equal protection framework, at least in this author's opinion, have nothing to do with litigants' ability to present historical evidence of racism before the courts, especially given that the courts have never limited litigants' ability to present different types of historical evidence. Rather, the problems stem from the courts' inability to properly digest, weigh, and adjudicate historical evidence in an objective and equitable manner, which is a history-in-law problem that cuts across many, if not most jurisprudential frameworks.

In addition to the Fourteenth Amendment's equal protection framework as a way for the courts to acknowledge, address, and reconcile the history of any express or inherent racism within our current legal system, the Supreme Court's recent opinion in *Ramos v. Louisiana* provides another. In *Ramos*, the Court determined that history and tradition strongly weigh in favor of holding that the Sixth Amendment requires unanimous verdicts in all criminal trials, state and federal. At issue in *Ramos* were laws in Louisiana and Oregon, both of which allowed juries to return criminal convictions on 10-to-2 verdicts. The Court found that these two laws not only ran in sharp contrast to the laws of the other 48 states and federal courts where jury unanimity is required, but also contradicted nearly 400 years of English and American history and tradition. As part of its history and tradition analysis, the Court highlighted how the Louisiana and Oregon laws were originally adopted with racist aforethought. The extent to which the racist origins of the Louisiana and Oregon laws impacted the outcome in *Ramos* is difficult to ascertain. What is certain is the laws' racial animus was partially persuasive. What is also certain is that *Ramos* provides another jurisprudential framework for litigants to remedy any express or inherent racism within our legal system.

Now, a close reading of the majority opinion in *Ramos* suggests that not all racist history is created equal. While the Fourteenth Amendment's equal protection framework is deferential to admitting both direct and aggregated circumstantial evidence of racism, the *Ramos* majority opinion only relies on direct historical evidence. Yet even when the courts are faced with direct historical evidence of racial animus, as Justice Sonia Sotomayor's concurrence notes, a law may still overcome additional judicial scrutiny if the "legislature actually confronts [it's] tawdry past in reenacting it…" Sotomayor's remarks on the jurisprudential impact that racist history may have on the constitutionality of laws are particularly relevant for *New York State Rifle & Pistol Association Inc. v. Bruen*. For what Sotomayor appears to be messaging is that the historical context of individual laws matters. It is not enough for litigants to claim that a law is racially tainted by pointing to a similar racist law of years past or to some generalized racist history. Instead, there needs to be something more tangible effectively proving that the law at issue is indeed racist or racially tainted.

The reason this is relevant in *Bruen* is that the petitioners and accompanying *amici* are arguing that because some of the first armed carriage licensing laws appeared in the Slave Codes, all armed carriage licensing laws are therefore tainted with racism and should be subject to strict scrutiny analysis. But this line of legal argument is a historical bridge too far. This is because there is no

historical evidence—at least not that this author is aware of—to suggest that the advent and proliferation of armed carriage licensing laws in the mid-to-late nineteenth century were racially motivated, not even in the least bit. Rather, said laws were widely viewed as the best means available to balance the health, safety, and welfare of the municipalities that adopted them with the Second Amendment and self-defense needs of law-abiding residents. It does not help the petitioners and accompanying *amici* in *Bruen* that not one Justice lent it credibility during oral argument. The only Justice to bring up the matter was Sotomayor, who expressed great skepticism and pointed to the Fourteenth Amendment as the proper remedy for dealing with any racial discriminatory effects that may arise from New York's "may issue" concealed carry law.

The fact that no other Justice brought up racism in the context of armed carriage licensing laws is not to say that one or several Justices will not give petitioners' and accompanying *amici*'s racist line of argument any consideration or accept it wholesale. If past is prologue, Justice Clarence Thomas will surely give the argument some thought. The same may be said of Justice Brett Kavanaugh. For in *Ramos*, it was Kavanaugh, writing in concurrence with the majority, who noted the importance of purging "racial prejudice," as well as laws with "racist origins" and "racially discriminatory effects" from our system of government. But naturally this is all just speculation, and we should know more in the coming months.

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