BRUEN'S ENFORCEMENT PUZZLE: UNEARTHING AND ADJUDICATING THE HISTORICAL ENFORCEMENT RECORD IN SECOND AMENDMENT CASES

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The Supreme Court's 2022 decision in New York State Rifle & Pistol Ass'n v. Bruen *brings historical complexity to the fore by instituting a history-focused test for the Second Amendment that demands analogues from the Founding or Reconstruction eras to support modern gun regulations. The majority opinion in* Bruen *considers, in multiple places, how certain historical gun regulations may have been enforced. In each instance, the Court suggests that evidence of racially disparate enforcement of a historical law is relevant to whether that law is part of the American historical tradition and an appropriate analogue. Historical enforcement data appear to be part of a larger inquiry into possible discriminatory taint, an issue the Court has previously addressed in the historical context in cases dealing with criminal procedure, voting rights, and equal protection. This Article seeks to identify lessons from these other areas of constitutional law to inform the treatment of enforcement evidence in Second Amendment cases after* Bruen*, where questions of historical enforcement can be especially nuanced.*

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The Article makes three major contributions to the existing literature. It is the first in-depth scholarly examination of how Bruen *treats enforcement evidence within its historical-tradition test, including by appearing to place the burden of proving non-discrimination on the government. Second, the Article identifies* Bruen*'s focus on possible discriminatory enforcement as a subspecies of historical discriminatory "taint" or legislative animus arguments and explores how* Bruen *may depart in important ways from the Court's past practice. Finally, the Article uses original archival research into the local enforcement of North Carolina's 1879 concealed-carry ban as a case study to demonstrate how assessing possible discriminatory taint for facially neutral historical laws presents unique challenges and to examine whether* Bruen*'s approach is well suited to appreciate and address such complexity.*

INTRODUCTION

The Supreme Court's 2022 decision in *New York State Rifle & Pistol Ass'n v. Bruen* explains that, in the Second Amendment context, "history guide[s] our consideration of modern regulations[, including those] that were unimaginable at the founding."[1] To the *Bruen* majority, the focus is not merely on historical legislative enactments but also on traditions which necessarily ebb and flow over time.[2] In *Bruen*, the Court emphasizes that historical enforcement data can be probative to a court's analogical inquiry, especially to the extent these data suggest that certain facially neutral historical firearm regulations were rarely enforced or enforced in a discriminatory manner.[3] Discriminatory enforcement or nonenforcement, the Court says, is "simply one additional reason to discount the[] relevance" of a statute under the historical framework.[4]

The Court provides little guidance, however, on *how* to implement the enforcement inquiry within its larger historical-analogical test. One might presume that enforcement evidence is only relevant when one of the parties presents such evidence to the Court,[5] but how should judges weigh this evidence? Who bears the burden of proving discriminatory enforcement or nonenforcement, and by what standard must it be proved? What exactly is the "payoff," or outcome, if a judge decides that a historical law was inappropriately enforced or rarely used at some relevant historical point? In terms of disparate enforcement, how much "discriminatory taint"[6] is *too* much? Is evidence of a law's

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1 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).

2 *See, e.g.*, Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023); Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9 (2023); Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023); Michael P. O'Shea, *The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms*, 26 TEX. REV. L. & POL. 103, 111 (2021).

3 *Bruen*, 142 S. Ct. at 2149 (citing Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION 233, 254–57 (Joseph Blocher et al. eds., 2023)) (emphasizing that a review of historical newspaper records regarding nineteenth-century surety laws "found only a handful of [enforcement] examples in Massachusetts and the District of Columbia, all involving black defendants who may have been targeted for selective or pretextual enforcement"); *see also id.* at 2152 n.27 (citing research showing that "Southern prohibitions on concealed carry were not always applied equally, even when under federal scrutiny").

4 *Id.* at 2149 n.25.

5 *Id.* at 2131 n.6 ("Courts are thus entitled to decide a case based on the historical record compiled by the parties.").

6 All credit for this phrase goes to Professor Kerrel Murray, whose 2022 article in the *Harvard Law Review* was a tremendous resource for this piece. W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190 (2022). It seems, at the least, a fair inference that

enforcement only relevant immediately after the law was enacted? If not, how far after enactment is this evidence relevant? May the government also offer evidence of consistent, *non*discriminatory enforcement as support for potential historical analogues? Is the government required to do so whenever a law implicates the Second Amendment? And what would such evidence look like? It is possible the Court may clarify some broader questions regarding *Bruen*'s historical test that have divided courts over the past year[7] in its next Second Amendment case, *United States v. Rahimi*.[8] While *Rahimi* likely will not directly present the question of how to weigh the historical enforcement of facially neutral gun laws,[9] it is possible that the Court will have to confront that issue to the extent any Justices find that the government's potential historical analogues may have been underenforced or disparately enforced around the time of enactment.[10]

The Court has considered similar questions regarding discriminatory enforcement in other areas of constitutional law—when evaluating challenges to jury verdict rules, voting restrictions, and redistricting, and in its equal protection jurisprudence. Often, the question reduces to "whether the legislature that enacted a challenged statute did so with a discriminatory or otherwise constitutionally forbidden intent";[11] enforcement evidence may be relevant both to whether a facially neutral law was enacted with improper intent, and to whether that improper purpose persisted after enactment. While the Court's

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Bruen's two references to enforcement data suggest an attempt to determine whether certain laws are fatally infected with discriminatory legislative taint.

7 *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 71–72 (2023).

8 United States v. Rahimi, 143 S. Ct. 2688, 2688–89 (2023) (mem.) (granting certiorari). Oral arguments in the *Rahimi* case were held on November 7, 2023. Transcript of Oral Argument, *Rahimi*, No. 22-915 (Nov. 7, 2023). This Article went to print before the Court decided *Rahimi*.

9 Rather, the primary question in *Rahimi* (at least based on the briefing and oral argument) appears to be the level of generality courts should use when examining the historical record.

10 For example, the government argues that surety laws from the nineteenth century "confirm that irresponsible individuals were subject to special restrictions that did not (indeed, could not) apply to ordinary, law-abiding citizens." Brief for the United States at 24, *Rahimi*, No. 22-915 (Aug. 14, 2023). The Fifth Circuit rejected that argument, emphasizing the Supreme Court's observation in *Bruen* that surety laws were rarely enforced. *See* United States v. Rahimi, 61 F.4th 443, 459–60 (5th Cir. 2023) (quoting *Bruen*, 142 S. Ct. at 2149), *cert. granted*, 143 S. Ct. 2688 (2023).

11 Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV L. REV. 523, 525 (2016). Many scholars have examined how courts should approach potentially improper legislative motivations. *See, e.g.*, *id.*; Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1240–45 (2018); Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147 (2019).

equal protection jurisprudence sets an extraordinarily high bar for a challenger seeking to strike down a law based on disparate impact,[12] certain Justices have appeared increasingly willing to credit circumstantial evidence of discriminatory intent and potential discriminatory enforcement in recent years.[13] However, the discriminatory enforcement inquiry may present unique issues when conducted through a historical-analogical lens—in other words, when the enforcement at issue is enforcement of a potential analogue to a modern law, rather than the modern law itself or a lineal ancestor.[14] Thus, courts may need to slightly alter approaches used in other areas of constitutional law.[15]

This Article presents the first comprehensive analysis of historical enforcement inquiries under *Bruen*, exploring the pressing and unanswered questions the decision surfaces regarding the enforcement of historical gun regulations. Part I summarizes *Bruen*'s approach to historical enforcement, connects *Bruen*'s enforcement references to possible discriminatory legislative taint, and examines how similar issues are handled in other areas of constitutional law. Part II summarizes

12 *E.g.*, McCleskey v. Kemp, 481 U.S. 279, 298 (1987) ("McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because* of an anticipated racially discriminatory effect [demonstrated by an empirical study]."). *McCleskey* further holds that a discriminatory purpose may *never* be presumed when "there [a]re legitimate reasons" for legislative action. *Id.* at 298–99.

13 *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2273 (2020) (Alito, J., concurring) (referencing the presumed application of Montana's constitutional provision blocking state aid to religious schools when readopted in 1972, observing that "the Montana Supreme Court had only ever applied the provision once—to a Catholic school"); Ramos v. Louisiana, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring in part) ("Although Ramos does not bring an equal protection challenge, the history is worthy of this Court's attention.").

14 For one, because the government may offer numerous potential analogues in any individual case, an enforcement inquiry under *Bruen* will often be complex and multijurisdictional and thus more likely to result in disagreement over questions such as where to look for enforcement evidence and what historical time period is most relevant. *See, e.g.*, United States v. Jackson, 661 F. Supp. 3d 392, 407 (D. Md. 2023) (noting that "historians continue to explore, discover, interpret, and *disagree* about . . . complex historical matters," including the enforcement of historical firearm laws), *appeal docketed*, No. 24-4114 (4th Cir. Feb. 28, 2024).

15 The Court often "borrows" implementing rules from other areas of constitutional law, and *Bruen* itself explicitly signals that its test is derived from "how we protect other constitutional rights." *Bruen*, 142 S. Ct. at 2130 (referencing the First Amendment as a model for Second Amendment law); *see also* Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333 (2021) (chronicling lower-court "borrowing" from other areas of constitutional law in Second Amendment cases); Andrew Willinger, *The Territories Under Text, History, and Tradition*, 101 WASH. U. L. REV. 1 (2023) (arguing that the Court should rely on non–Second Amendment precedent to formulate a coherent theory of territorial relevance under *Bruen*).

perhaps the most important area where discriminatory enforcement may arise in future Second Amendment challenges: facially neutral post–Civil War Southern public carry regulations. This Part also unpacks the complexity involved in determining how historical gun laws were actually enforced by summarizing original archival research on the enforcement of North Carolina's 1879 concealed-carry ban in New Hanover County from 1879 through 1908. The Article concludes by comparing *Bruen*'s approach to the Court's consideration of discriminatory taint in other areas, arguing that *Bruen*'s treatment of discriminatory taint may be ill-suited to the painstaking work of historical enforcement research in important ways and suggesting how doctrine from outside of the Second Amendment might be harnessed to guide courts tasked with examining the enforcement of potential historical analogues under *Bruen*.

I. DISCRIMINATORY ENFORCEMENT & DISCRIMINATORY "TAINT"

A. Bruen*'s Use of Historical Enforcement Data to Suggest Discriminatory Taint*

In *Bruen*, the Supreme Court rejected an approach to Second Amendment challenges honed across more than 1,000 cases over twelve years in the lower courts. That prior approach first asked whether a legal challenge implicated the text of the Second Amendment, and, if so, proceeded to apply some form of means-end scrutiny asking whether a law was sufficiently tailored to accomplish the government's stated objective.[16] In *Bruen*, the Supreme Court found the second, scrutiny-based step inconsistent with its prior jurisprudence and set forth the following test: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[17]

Bruen's approach has created a great deal of uncertainty in the lower courts,[18] and it has already led the Supreme Court to grant certiorari in a subsequent Second Amendment case where the Court may clarify certain aspects of the methodology.[19] While legal scholars have

16 *E.g.*, United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010), *abrogated by Bruen*, 142 S. Ct. 2111.

17 *Bruen*, 142 S. Ct. at 2129–30.

18 *See generally* Charles, *supra* note 7.

19 *See* United States v. Rahimi, 143 S. Ct. 2688, 2688–89 (2023) (mem.) (granting certiorari in case challenging federal prohibition on individuals subject to certain domestic-violence restraining orders possessing firearms for the duration of the order).

only begun to unpack the historical-tradition test and its ramifications, there is general consensus that the test permits, and perhaps requires, careful presentation and consideration of historical nuance and evidence outside of merely the text of enacted statutes.[20] In other words, *Bruen* is not—as some lower-court judges appear to have approached the decision[21]—a mandate to simply tabulate historical legislation at the state level, trim that list according to the Supreme Court's time and geography limitations,[22] and then compare the remaining list of historical laws to the modern law at issue and judge relevant similarity. That simply cannot be the gravamen of *Bruen*'s test. *Bruen* itself looked far beyond a simple count of historical regulations and considered contextual evidence in numerous places.[23] These include two important instances where the Court suggested that uneven or discriminatory enforcement of certain facially neutral[24] firearm laws in specific jurisdictions may be relevant to the analogical inquiry.[25] First, the Court noted that one legal scholar has found that nineteenth-century surety laws were rarely enforced and may have been enforced discriminatorily against Black individuals in certain instances.[26] Here, the Court cited

20 *See* Girgis, *supra* note 2, at 1488 (placing *Bruen* within a category of "living traditionalist" cases that "rely[] on post-ratification practices without an obvious originalist argument"); *see also* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 160 (2023) ("A narrow focus might lead to doctrine being constructed on the basis of unrepresentative traditions . . . .").

21 *See, e.g.*, Antonyuk v. Hochul, 639 F. Supp. 3d 232, 316–43 (N.D.N.Y. 2022), *aff'd in part, vacated in part sub nom.* Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023), *petition for cert. filed sub nom.* Antonyuk v. James, 92 U.S.L.W. 3217 (U.S. Feb. 20, 2024) (No. 23-910); *see also* Minute Entry, Duncan v. Becerra, 366 F. Supp. 3d 1131 (S.D. Cal. 2019) (No. 17-cv-01017), ECF No. 134 (ordering the parties to "meet and confer regarding, a survey or spreadsheet of relevant statutes, laws, or regulations in chronological order").

22 The Court cautions in *Bruen*, for example, that twentieth-century historical evidence is likely *too new* to shed light on the original understanding of the Second Amendment and that laws enacted by territorial legislatures were too *improvisational* to be part of a national tradition. *Bruen*, 142 S. Ct. at 2154 & n.28; *see also* Willinger, *supra* note 15 (describing the Court's insistence that territorial laws do not matter).

23 *See, e.g.*, *Bruen*, 142 S. Ct. at 2141–42 (emphasizing the importance of changing societal attitudes toward the public carrying of handguns); *id.* at 2153–56 (rejecting territorial public carry regulations as analogues).

24 This Article focuses on laws that did not facially discriminate, but where there is some suggestion that the laws were underenforced or applied in a discriminatory manner. For more discussion of facially discriminatory historical gun regulations, see *infra* notes 91–92 and accompanying text.

25 *Bruen*, 142 S. Ct. at 2149 (citing a survey of historical newspapers by Professor Robert Leider to glean the scope of enforcement of surety laws in Massachusetts); *id.* at 2152 n.27 (citing statements from Reconstruction-era congressional hearings showing that "Southern prohibitions on concealed carry were not always applied equally, even when under federal scrutiny").

26 *Id.* at 2149. While this Article focuses on the relevance of past *discriminatory* enforcement, *Bruen*'s treatment of surety laws also suggests some doctrinal role for

legal scholarship that examined historical newspapers to evaluate the use of similar surety laws enacted in ten states and the District of Columbia.[27] Second, the Court observed that Southern concealed-carry bans were often enforced discriminatorily against Black citizens in the post–Civil War era.[28] The Court here did not cite any original research for this proposition, but rather cited statements from congressional debates in 1867 suggesting that Black citizens in certain states were targeted for discriminatory enforcement of public carry laws at that time.[29]

Justice Breyer, in dissent, noted that the enforcement record of a historical law "[is] often less than clear" and that lack of enforcement "may just as well show that these laws were normally followed."[30] In a revealing exchange, Justice Thomas's majority opinion responded to this observation as follows: "[T]he burden rests with the government to establish the relevant tradition of regulation . . . and . . . we consider

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nonenforcement of historical laws, which presents similar methodological questions. *See, e.g.*, Darrell A.H. Miller, *Second Amendment Traditionalism and Desuetude*, 14 GEO. J.L. & PUB. POL'Y 223, 229 (2016) (inquiring into whether "desuetude [is] simply a device to trim historical evidence to fit pre-conceived policy ends, or is . . . governed by neutral rules of application").

27 *See* Leider, *supra* note 3, at 249–57; *see also* Brief of Professor Robert Leider et al. as Amici Curiae in Support of Petitioners at 32, *Bruen*, 142 S. Ct. 2111 (No. 20-843) (noting that, while "[i]t is true that archival research in justice of the peace courts is difficult and many records no longer exist[,] . . . [t]here are indirect ways to search for relevant evidence[, including in] newspapers"). Professor Leider, while recognizing that the method is an "indirect means to determine the scope of enforcement" "[u]ntil someone does archival research," found that newspapers revealed "only one possible incident in Massachusetts of someone prosecuted for peacefully carrying weapons for self-defense" under the state's surety law. Leider, *supra* note 3, at 254. That case may represent a discriminatory use of the law, according to Professor Leider's research, because "the newspaper believed the conviction resulted from the fact that the defendants were poor and African American." *Id.* at 255. There is substantial scholarly debate over the enforcement of historical surety laws, including how to interpret the *absence* of decisional law regarding sureties. Professor Saul Cornell, for example, argues that this "analysis relies largely on newspapers selected by digital searches, a deeply flawed methodology that exacerbates confirmation bias." Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting, 1328–1928*, 55 U.C. DAVIS L. REV. 2545, 2588 n.166 (2022); *see also id.* at 2586–88, 2587 n.159; Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121, 130 n.53 (2015) (arguing that "the lack of Westlaw-searchable case law" regarding sureties is not persuasive evidence of nonenforcement). In any event, Professors Leider and Cornell appear to agree that archival research into contemporary court records, if available, provides the best available evidence of enforcement.

28 *Bruen*, 142 S. Ct. at 2152 n.27.

29 *See id.* (first citing H.R. Exec. Doc. No. 40-57, at 83 (2d Sess. 1867); and then citing H.R. REP. NO. 39-16, at 427 (2d Sess. 1867)).

30 *Id.* at 2180, 2187 (Breyer, J., dissenting).

the barren record of enforcement to be simply one additional reason to discount their relevance."[31]

In other words, to the majority, the burden is squarely on the government to *refute* evidence of nonenforcement (and, presumably, discriminatory enforcement)[32]—meaning that the plaintiff's decision to merely offer the possibility of discriminatory enforcement establishes a presumption of discriminatory taint.[33] Putting aside the critical question of how the burden should be allocated within Second Amendment cases, *Bruen*'s emphasis on enforcement makes some sense in the abstract if—as scholars persuasively argue—*Bruen* is indeed a prime exemplar of the Court's recent embrace of traditionalism as a methodology of constitutional adjudication.[34] As Professor Marc DeGirolami notes, "patterns of enforcement" should be important evidence within traditionalism because "[e]nacted regulations that are never enforced seem . . . weaker as traditions than actively enforced laws."[35] This seems especially true with regard to *discriminatory* enforcement (as opposed to nonenforcement) because discriminatory enforcement more powerfully suggests that a law was not squarely within the American tradition of regulating firearms for public safety reasons—nonenforcement, by contrast, could simply indicate widespread compliance.[36]

Relying on the majority's approach in *Bruen*, lower courts have emphasized that it is the government's burden to establish that a historical law is both analogous and properly within the nation's historical regulatory tradition.[37] Four dissenting Eighth Circuit judges recently observed that, otherwise, "[a]ll sorts of firearms regulations will now be presumptively constitutional, with the burden falling on the

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31 *Id.* at 2149 n.25 (majority opinion).

32 This Article largely assumes that *Bruen* is best read to suggest an identical approach to evaluating both alleged nonenforcement and alleged discriminatory enforcement of potential historical analogues. As both would be reasons to discount the value of the relevant analogue within *Bruen*'s test, it seems fair to presume such claims are evaluated in the same manner absent explicit contrary direction from the Court.

33 One potential explanation here is that this approach reflects the Court's own belief in the relative importance of the Second Amendment and desire to ensure that courts protect the right at the appropriate level. *See Bruen*, 142 S. Ct. at 2156 (explaining that "[t]he constitutional right to bear arms in public for self-defense is not 'a second-class right'").

34 *E.g.*, Girgis, *supra* note 2, at 1497–1501, 1501 n.141 (identifying *Bruen* within a list of recent "[l]iving-traditionalist rulings," *id.* at 1497); DeGirolami, *supra* note 2, at 2 n.3 (making a similar observation).

35 DeGirolami, *supra* note 2, at 37 n.125.

36 As Justice Breyer observed in his *Bruen* dissent, a lack of enforcement may simply mean a law was widely followed because no one would have thought to violate it. *Bruen*, 142 S. Ct. at 2187 (Breyer, J., dissenting).

37 United States v. Jackson, 85 F.4th 468, 469 (8th Cir. 2023) (Stras, J., dissenting from denial of rehearing en banc).

regulated, not the regulator, to establish they are not [constitutional]."[38] As discussed in Section I.B below, this is precisely how the Court has typically approached similar arguments about possible discriminatory legislative motivation *outside* of the Second Amendment—at least, in cases involving facially neutral laws where it is argued that those laws were enacted for improper reasons. Lower courts have also picked up on *Bruen*'s enforcement emphasis, although they struggle to determine precisely when and how such evidence is relevant. For example, in a recent order remanding a challenge to the federal felon possession ban, judges of a Seventh Circuit panel observed that *Bruen* "pa[id] close attention to the enforcement and impact of various regulations" but also left open crucial questions surrounding enforcement evidence.[39] Similarly, a Maryland district judge interpreted *Bruen*'s reference to possible discriminatory enforcement of surety laws as instituting a rule that "two discriminatory statutes" (or, presumably, two statutes where the challenger has even *alleged* discriminatory enforcement) are insufficient to constitute a historical tradition of regulation.[40] By contrast, a district judge in Kentucky found that *Bruen*'s rejection of surety statutes as a possible analogue for New York's licensing law "had little to do with enforcement evidence."[41]

Needless to say, *Bruen* leaves many open questions about how to assess the possible discriminatory enforcement or nonenforcement of historical analogues. These questions include how important such evidence is within the larger analogical inquiry; whether the government bears the burden of proving consistent enforcement for every historical law, or only once a prima facie claim of discriminatory or nonenforcement is raised; what the substantive standard is for showing either consistent or problematic historical enforcement; and how parties should even go about unearthing the enforcement record of a historical gun regulation.

B. The Court's Approach to Discriminatory Taint Outside of the

38 *Id.* at 470.

39 Atkinson v. Garland, 70 F.4th 1018, 1022 (7th Cir. 2023); *see also id.* at 1029 (Wood, J., dissenting) (observing that *Bruen* does not explain "what ratio between incidence of the regulated action and prosecutions is enough to make enforcement 'actual'"); United States v. Daniels, 77 F.4th 337, 358–59 (5th Cir. 2023) (Higginson, J., concurring) (observing that "courts, operating in good faith, are struggling at every stage of the *Bruen* inquiry," including the "issue of enforcement"), *petition for cert. filed*, 92 U.S.L.W. 3085 (U.S. Oct. 5, 2023) (No. 23-376).

40 Kipke v. Moore, Civil Action No. GLR-23-1293, 2023 WL 6381503, at *13 (D. Md. Sep. 29, 2023) (quoting *Bruen*, 142 S. Ct. at 2149).

41 United States v. Combs, 654 F. Supp. 3d 612, 627 (E.D. Ky. 2023), *appeal dismissed*, No. 23-5153, 2023 WL 9785711 (6th Cir. Sept. 12, 2023).

Second Amendment

A natural place to look for guidance on how to operationalize discriminatory-taint claims in Second Amendment cases is the Supreme Court's pronouncements in other areas of constitutional law. This Section will summarize major cases outside the Second Amendment where the Court has evaluated similar arguments about historical discriminatory taint. The focus here will be on cases that, similar to *Bruen*, consider whether and how discriminatory taint from enactment or postenactment circumstances and enforcement impacts modern-day constitutionality, often with a gap of many decades between enactment and constitutional challenge. Cases dealing with claims that laws passed during the late nineteenth and early twentieth centuries were infected with racially discriminatory motivations, and that those motivations cast doubt on the laws' present-day constitutionality, are especially relevant.[42] In such cases, the discriminatory taint inquiry is fundamentally distinct from how it arises under *Bruen* in one major way: the Court is examining discriminatory intent and enforcement evidence that pertains to *the specific law being challenged*, while in *Bruen* the inquiry pertains to potentially analogous historical laws.[43] This Article argues that the difference is largely superficial—although it may be that a slightly different approach is warranted when dealing with historical analogues.[44]

The Court's primary framework for evaluating discriminatory-taint arguments comes from the equal protection context. The Court's precedents require proof that discriminatory intent was a "motivating"

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42 While this is not *identical* to the way that discriminatory-taint arguments surfaced in *Bruen*, because the law being challenged was not a surety statute enacted in the nineteenth century or a Reconstruction-era Southern concealed carry regulation, the interpretive method is highly analogous because the Court is asked to consider how past discriminatory taint matters in a contemporary legal challenge.

43 *See Bruen*, 142 S. Ct. at 2149. The petitioners in *Bruen* did argue that New York's Sullivan Law itself was infected with anti-Italian discrimination and enforced disparately against Italian Americans in the years after the law was enacted in 1911. *See* Brief for Petitioners at 13–14, *Bruen*, 142 S. Ct. 2111 (No. 20-843). At least one scholar disputes the accuracy of this evidence and has conducted his own archival survey suggesting a much lower application against Italian American defendants. *See* Patrick J. Charles, *A Historian's Assessment of the Anti-immigrant Narrative in* NYSRPA v. Bruen, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Aug. 4, 2021), https://firearmslaw.duke.edu/2021/08/a-historians-assessment-of-the-anti-immigrant-narrative-in-nysrpa-v-bruen [https://perma.cc/BKB8-8SZH]. The Court did not ultimately appear to place any significant weight on possible discrimination surrounding the Sullivan Law's enactment.

44 Perhaps, for example, courts should adopt a higher standard of proof when a challenger alleges that the *actual law being challenged* was motivated by an improper discriminatory purpose (since that alone may be a major factor in striking down the law) while allowing discriminatory impact to be proven at a lower evidentiary threshold for analogues.

factor in enacting a law to shift the burden to the government to justify its regulatory choices.[45] The Court has held that, "[s]tanding alone, [evidence of disproportionate racial impact] does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."[46] Under this standard, the Court has rejected statistical evidence of disparate impact as insufficient to make out an equal protection claim and shift the burden to the government when there is any "legitimate reason[]" for the legislature's choices.[47] While evidence of disparate enforcement is normally not sufficient on its own to make out a prima facie equal protection violation,[48] it might be enough to shift the burden to the government if the data show such an overwhelming disparity that it is clear the law was "applied so as invidiously to discriminate on the basis of race."[49]

Two major recent decisions, however, illustrate how such discriminatory-taint arguments have surfaced anew outside of the Second Amendment context and how the Court is increasingly casting the net wider and crediting even circumstantial evidence of discriminatory

45 Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified."); *see also* Washington v. Davis, 426 U.S. 229, 239 (1976).

46 *Davis*, 426 U.S. at 242 (citation omitted).

47 McCleskey v. Kemp, 481 U.S. 279, 299, 298–99 (1987). Scholars contend that this standard is "virtually impossible to satisfy" and that "courts have been especially resistant to statistical evidence of discriminatory purpose." Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449, 454–55 (2022).

48 *See Davis*, 426 U.S. at 242 ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."); *see also* Pers. Adm'r v. Feeney, 442 U.S. 256, 279 n.25 (1979) (stating that evidence of disparate enforcement might create "a strong inference that the adverse effects were desired" but that the "inference is a working tool, not a synonym for proof").

49 *Davis*, 426 U.S. at 241 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)); *see also* Hunter v. Underwood, 471 U.S. 222, 227 (1985) (referring to evidence that an Alabama moral-turpitude provision "disfranchised approximately ten times as many blacks as whites" in the period immediately following its enactment); Hill v. Texas, 316 U.S. 400, 403 (1942) (observing evidence that Texas poll taxes had been applied so as to functionally exclude Black citizens from jury service over a period of decades); Norris v. Alabama, 294 U.S. 587, 596 (1935) ("We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson County [and] that there were negroes qualified for jury service . . . established the discrimination which the Constitution forbids."); *Yick Wo*, 118 U.S. at 374 (remarking that enforcement records indicated that all 200 Chinese applicants for a laundry license in San Francisco were denied under a facially neutral law while eighty non-Chinese applications were granted, and "[t]he fact of this discrimination is admitted"); *cf. Davis*, 426 U.S. at 242 (characterizing the jury exclusion cases as exceptional situations where discrimination application "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds").

intent (which may include discriminatory enforcement evidence) notwithstanding *Washington v. Davis*.[50] First, in *Ramos v. Louisiana*, the Court held that a Louisiana law permitting conviction of criminal defendants based on nonunanimous jury verdicts violated the Sixth Amendment's guarantee of a right to trial by jury.[51] The majority in *Ramos* explained in detail how the outlier approach permitting nonunanimous jury verdicts (which persisted in only Louisiana and Oregon) was tied to racial discrimination in the post–Civil War and Jim Crow eras.[52] Indeed, evidence before the Court strongly suggested that Louisiana's requirement was adopted at the state's 1898 constitutional convention—where the Chairman of the Judiciary Committee remarked that delegates were "here to establish the supremacy of the white race"—out of prejudicial fear that Black jurors would be subject to corruption and refuse to vote to convict any Black defendant (thus allowing the defendant to walk free under a unanimous verdict approach).[53] The majority observed that "courts in both Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States' respective nonunanimity rules," and appeared to find this discriminatory taint relevant to its decision to overrule *Apodaca v. Oregon*, which had upheld state nonunanimous verdict rules.[54] Justice Alito's dissenting opinion, by contrast, stridently rejected the notion that discriminatory historical taint has any contemporary jurisprudential relevance.[55] Justice Alito would instead have adopted the *Davis* and *McCleskey v. Kemp*[56] rule that any conceivable legitimate legislative purpose is sufficient to defeat such an inference: "If Louisiana and Oregon originally adopted their laws allowing nonunanimous verdicts for these [discriminatory] reasons, that is deplorable, but what does that have to do with the broad constitutional question before us? *The answer is: nothing.*"[57] To Justice Alito, then, possible discriminatory taint is simply not relevant *at all* to constitutionality so long as there is *any* reason "why anyone might think that allowing non-

50 *Davis*, 426 U.S. 229. Scholars have asserted that the current Court is more susceptible to closely scrutinizing claims of discrimination in certain cases. *See* Khiara M. Bridges, *The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 28–30 (2022) (arguing that the Court's equal protection jurisprudence has been uneven in its approach to disparate impact arguments based on the race of the challenger).

51 140 S. Ct. 1390 (2020).

52 *Id.* at 1394–95.

53 *See* Kyle R. Satterfield, Comment, *Circumventing* Apodaca*: An Equal Protection Challenge to Nonunanimous Jury Verdicts in Louisiana*, 90 TUL. L. REV. 693, 696–98 (2016).

54 *Ramos*, 140 S. Ct. at 1394, *overruling* Apodaca v. Oregon, 406 U.S. 404 (1972).

55 *Ramos*, 140 S. Ct. at 1426 (Alito, J., dissenting).

56 McCleskey v. Kemp, 481 U.S. 279 (1987).

57 *Ramos*, 140 S. Ct. at 1426 (Alito, J., dissenting) (emphasis added).

unanimous verdicts is good policy"—as the Court has stated repeatedly in its equal protection jurisprudence.[58]

Second, in a decision issued only days later in *Espinoza v. Montana Department of Revenue*,[59] the Court held that Montana's restriction of state scholarship funds to public-school students (and exclusion of those attending religious schools) violated the First Amendment's Free Exercise Clause.[60] While the majority opinion makes no reference to possible discriminatory taint, Justice Alito concurred to note *Ramos*'s reliance on historical discrimination (which he had specifically argued against considering in that case).[61] Justice Alito wrote that, under *Ramos*, the discriminatory, anti-immigrant, and anti-Catholic background of Montana's no-aid provision, initially adopted at the state's constitutional convention in 1889, was an additional ground for striking down that law.[62] Justice Alito's concurrence is perhaps most charitably read as a plea for consistency, arguing that, because "the no-aid provision's terms keep it '[t]ethered' to its original 'bias,' and it is not clear at all that the State 'actually confront[ed]' the provision's 'tawdry past in reenacting it,'" the provision should fall.[63]

A similar issue often arises in redistricting cases where state legislative districts are challenged under the Voting Rights Act or other federal statutory or constitutional provisions. *Abbott v. Perez*, a 2018 decision in which the Court reversed in part a district court order enjoining a Texas redistricting plan based on allegations that the plan violated the Constitution and the Voting Rights Act, is one notable example.[64] The district court in *Perez* required the state to show that "discriminatory taint" stemming from earlier voting maps that a court determined were improperly motivated by race was removed when the state drew new electoral maps.[65] Finding no such evidence and concluding that

58 *Id.* at 1427, 1426–27; *see also McCleskey*, 481 U.S. at 298. The dissent, in fact, levies an even more sweeping broadside against discriminatory-taint arguments, labeling such claims "*ad hominem* rhetoric" that "attempt[] to discredit an argument not by proving that it is unsound but by attacking the character or motives of the argument's proponents." *Ramos*, 140 S. Ct. at 1426 (Alito, J., dissenting). This is by no means a new perspective on the issue. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 638–39 (1987) (Scalia, J., dissenting) (arguing "that determining the subjective intent of legislators is a perilous enterprise" that the Court should avoid, *id.* at 638).

59 140 S. Ct. 2246 (2020).

60 *Id.* at 2262–63.

61 *Id.* at 2267–68 (Alito, J., concurring).

62 *Id.* at 2268–72.

63 *Id.* at 2274 (alterations in original) (quoting *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring in part)).

64 138 S. Ct. 2305, 2313 (2018).

65 *See* Perez v. Abbott, 274 F. Supp. 3d 624, 649 (W.D. Tex. 2017) ("[T]he Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans."), *rev'd*, 138 S. Ct. 2305.

discriminatory aspects (and thus the discriminatory core purpose) of the earlier redistricting plans continued, the district court enjoined the new maps.[66] A majority of the Supreme Court, in an opinion by Justice Alito, roundly rejected the district court's decision to place the burden on Texas to show that the discriminatory taint of earlier plans had been removed—stating that "*[w]henever* a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State."[67] In addition to placing the burden of proof on the plaintiff, *Perez* stressed the potentially disruptive impact of judicial oversight of the redistricting process and emphasized that legislative action enjoys a presumption of "good faith."[68] *Perez* goes further in its criticism of possible overemphasis of historical discriminatory taint:

> "[P]ast discrimination cannot, *in the manner of original sin,* condemn governmental action that is not itself unlawful." . . . The "historical background" of a legislative enactment is "one evidentiary source" relevant to the question of intent. But *we have never suggested that past discrimination flips the evidentiary burden on its head.*[69]

Perez discussed the Court's 1985 decision in *Hunter v. Underwood*,[70] which is especially relevant for present purposes. In *Hunter*, the Court confronted an Alabama state constitutional provision disenfranchising persons "convicted of crimes involving moral turpitude," which was

66 *Id.* at 648–50, 686.

67 *Perez*, 138 S. Ct. at 2324 (emphasis added) (citing Reno v. Bossier Par. Sch. Bd., 520 U.S. 471, 481 (1997)). *Reno* similarly involved Voting Rights Act claims, where the Court has long maintained that the challenger bears the burden of establishing a discriminatory purpose or taint. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plurality opinion); Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301, 1309 (2016) (requiring plaintiff to show "that it is more probable than not that illegitimate considerations were the predominant motivation behind the plan's deviations from mathematically equal district populations"). For an analogous example outside of voting cases, see the line of cases beginning with *Batson v. Kentucky* that generally requires a defendant challenging a peremptory jury strike as impermissibly based on race to first make out a prima facie case of discrimination before shifting the burden back to the state to show race-neutral reasons for the strike. *See* Batson v. Kentucky, 476 U.S. 79, 97–98 (1986); Flowers v. Mississippi, 139 S. Ct. 2228, 2243–44 (2019).

68 *Perez*, 138 S. Ct. at 2324–25. This is also a long-running theme in the Supreme Court's voting jurisprudence. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 915 (1995) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978) (opinion of Powell, J.)) ("[U]ntil a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed.").

69 *Perez*, 138 S. Ct. at 2324–25 (alteration in original) (emphasis added) (citations omitted) (first quoting *Bolden*, 446 U.S. at 74 (plurality opinion); and then quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977)).

70 *Perez*, 138 S. Ct. at 2325 (discussing Hunter v. Underwood, 471 U.S. 222 (1985)).

challenged under the Equal Protection Clause.[71] The Supreme Court found expert testimony regarding the immediate postratification enforcement of the provision (as well as the historical background of its enactment) to indisputably establish racist intent, despite the statute's facial neutrality.[72] In *Hunter*, this evidence was sufficient because there was no contrary evidence in the record and because "[t]he delegates to [Alabama's] all-white convention were not secretive about their purpose."[73] In both *Hunter* and *Ramos*, then, evidence of discriminatory taint from the early Jim Crow era was ultimately relevant to a finding that a modern law or framework initially adopted during that time was unconstitutional *today*. However, in each case, the Court appeared to require almost bulletproof circumstantial evidence of discriminatory intent or enforcement.[74]

As scholars have noted, discriminatory-taint arguments appear across many areas of constitutional and statutory law.[75] Some cases, like *Ramos*, *Espinoza*, and *Hunter*, involve arguments that long-ago

71 *Hunter*, 471 U.S. at 232. The provisions at issue were adopted at Alabama's 1901 constitutional convention, part of a wave of Southern state conventions at that time spearheaded by Democratic majorities and designed to consolidate power and disenfranchise Black citizens. *See* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 140–81 (1974).

72 *See Hunter*, 471 U.S. at 227 (quoting Underwood v. Hunter, 730 F.2d 614, 620 (11th Cir. 1984), *aff'd*, 471 U.S. 222) (citing expert testimony that "estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites" and the appellate court's conclusion that "*[t]his disparate effect persists today*" (emphasis added)).

73 *Id.* at 229. Recognizing the difficulty of discerning discriminatory intent in instances where legislators took greater care to conceal their real motivations, *Hunter* highlights that any discriminatory-taint framework should strive to avoid *endorsing* such legislative secrecy.

74 And, in each case, the Court found it relevant to the discriminatory-intent question that the actual delegates or representatives who initially enacted the provision were *all* white. *See id.* ("The delegates to the all-white convention were not secretive about their purpose."); Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020) (noting that the "avowed purpose of [the 1898 Louisiana constitutional] convention was to 'establish the supremacy of the white race'"); *see also* KOUSSER, *supra* note 71, at 140–81 (describing the road to Democrat- and white-dominated constitutional conventions in various former Confederate states in the late Reconstruction era).

75 *E.g.*, Gabriel J. Chin, *Rehabilitating Unconstitutional Statutes: An Analysis of* Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998)*, 71 U. CIN. L. REV. 421 (2002); Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505 (2018); Fallon, *supra* note 11; Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471, 1473–74 (2018); Murray, *supra* note 6; Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, *in* POLITICAL LEGITIMACY 201, 219–23 (NOMOS LXI, Jack Knight & Melissa Schwartzberg eds., 2019); *see also* Noam Biale, Elizabeth Hinton & Elizabeth Ross, *The Discriminatory Purpose of the 1994 Crime Bill*, 16 HARV. L. & POL'Y REV. 115 (2021) (considering how discriminatory-impact evidence related to the federal one-year mandatory minimum sentence for drug crimes committed in the vicinity of a public housing project might be legally relevant).

discriminatory intent has modern-day consequences; others, like *Perez*, involve instances of improper legislative motivations that are much more recent. Any discriminatory-taint analysis will likely overlap considerably with evidence of historical enforcement of the law at issue. And, as in *Hunter*,[76] enforcement evidence is one way a plaintiff might attempt to show a discriminatory motive behind a facially neutral law (often combined with circumstantial historical evidence surrounding the law's adoption, as in *Ramos* and *Espinoza*). There is little dispute across the cases[77] that this is a high bar not easily met.[78]

Other examples abound. In recent litigation challenging the various national-origin travel bans enacted by former President Donald Trump, courts wrestled with whether Trump's own statements preceding the ban imparted discriminatory taint relevant to an Establishment Clause violation.[79] Dissenting from a decision upholding the ban, Justice Breyer would have focused on how it was enforced to determine whether Muslims were disproportionately denied exemptions and waivers.[80] Returning to the equal protection context, the Court has held that race-neutral education policies may violate the Constitution's guarantee of equal protection when they perpetuate discriminatory objectives traced to the organization of a state's higher education

76 *Hunter*, 471 U.S. at 229–32 (citing evidence that Alabama's moral-turpitude exclusion disproportionally burdened Black citizens).

77 *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (noting that this burden-shifting approach is "a principle well established in a variety of contexts").

78 *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 298 n.20, 312–13 (1987) (rejecting Eighth Amendment challenge to Georgia's capital punishment sentencing framework because "[a]t most, [evidence of possible discriminatory enforcement] indicate[d] a discrepancy that appears to correlate with race," *id.* at 312, and dismissing historical arguments that the framework was a lineal descendant of post–Civil War laws because "we cannot accept official actions taken long ago as evidence of current intent," *id.* at 298 n.20); Wallace v. Jaffree, 472 U.S. 38, 58 (1985) (relying on "*unrebutted* evidence of legislative intent" (emphasis added)).

79 *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 601 (4th Cir.) ("EO-2 cannot be divorced from the cohesive narrative linking it to the animus that inspired it."), *vacated as moot sub nom.* Trump v. Int'l Refugee Assistance, 138 S. Ct. 353 (2017).

80 Trump v. Hawaii, 138 S. Ct. 2392, 2429–31 (2018) (Breyer, J., dissenting). Justice Breyer's dissent also cited data regarding application of the waiver provisions in the ban. *See id.* at 2431–32. The travel ban example illustrates a possible distinction between a law's *enforcement* and its *application*. While *Bruen* appears to contemplate an inquiry into enforcement (i.e., affirmative government efforts to find and prosecute those who violate a law), how a policy that contemplates inevitable interaction with government officials, such as in the asylum context, is applied may present different considerations. That said, judicial assessment of the travel ban's application should be broadly instructional when thinking about discriminatory enforcement in the firearms context.

system.[81] In *United States v. Fordice*, for example, evidence of vast historical racial discrepancies in enrollment at state universities was the primary basis for finding a present-day discriminatory impact.[82]

Three general principles appear across these cases. First, the Court[83] seems to largely treat arguments about the contemporary relevance of past discriminatory taint with a high level of skepticism (even scorn) and set a high bar of evidentiary proof.[84] When one considers the difficulty of demonstrating any unitary intent on the part of a large, multimember legislative body[85] and the almost impossibly strict test the Court has set for the disparate-impact arguments in the equal

81 *See* United States v. Fordice, 505 U.S. 717, 729 (1992) ("If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices."). Notably, in the desegregation context, "[t]he school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation." Freeman v. Pitts, 503 U.S. 467, 494 (1992).

82 *See Fordice*, 505 U.S. at 724–25. The Court in *Fordice* also emphasized evidence that policies granting automatic admission to those who achieved a certain ACT score had a racially disparate impact. *Id.* at 733–35.

83 Lower courts have generally followed the Supreme Court's lead, in areas from equal protection to the Eighth Amendment. For example, in an August 2023 decision that is now vacated pending rehearing en banc, a panel of the Court of Appeals for the Fifth Circuit struck down a Mississippi constitutional provision permanently disenfranchising those convicted of certain crimes—finding that the exclusion amounted to cruel and unusual punishment under the Eighth Amendment. Hopkins v. Hosemann, 76 F.4th 378, 411 (5th Cir.), *vacated pending reh'g en banc*, 83 F.4th 312 (5th Cir. 2023) (mem.). The *Hopkins* panel majority took pains to emphasize that the provision was adopted at an all-white constitutional convention with white-supremacist objectives, that it was "designed to target as disenfranchising offenses those that the white delegates thought were more often committed by black men," and that the provision "ha[d] been remarkably effective in achieving [its] original, racially discriminatory aim" to the present day. *Id.* at 388–89. For this last point, the opinion relied primarily on enforcement evidence showing that, "of the nearly 29,000 Mississippians who were convicted of disenfranchising offenses and have completed all terms of their sentences between 1994 and 2017, 58%—or more than 17,000 individuals—were black. Only 36% were white." *Id.* at 390. The majority further found this discriminatory taint *constitutionally* relevant, noting that "as the provision's *odious origins* make clear, Section 241's infliction of disenfranchisement on only certain offenders has nothing to do with their heightened culpability." *Id.* at 409 (emphasis added). That a law was enacted by a white-supremacist convention and has had a discriminatory impact lasting for over 130 years more clearly suggests discriminatory taint than potential disparate enforcement over a short period of time.

84 *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1426–27 (2020) (Alito, J., dissenting); McCleskey v. Kemp, 481 U.S. 279, 298 n.20 (1987).

85 *See* Fallon, *supra* note 11, at 527 ("Individual legislators may have intentions and purposes, but the legislature as a whole has no collective intent or purpose . . . ."); *see also* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 431 (2005) ("[A] tortuous and largely opaque legislative process makes it difficult if not impossible for judges to retrace all the steps that contributed to the final wording of the enacted text.").

protection context,[86] perhaps this high standard and accompanying skepticism are warranted.[87] Second, the Court consistently requires the party making a claim of discriminatory taint (rather than the government) to shoulder the high initial burden of proving that the "taint" exists by offering discriminatory enforcement and other contextual evidence.[88] This is consistent with the principle that government actions normally enjoy a presumption of good faith and constitutionality.[89] Finally, the Court often expects some connection or through line from historical discriminatory intent or enforcement to modern-day discrimination; rarely do the Justices conclude that discriminatory taint in the abstract is fatal, without reference to a possible continued negative impact on a disfavored group or government failure to disclaim past discrimination.[90]

II. POSTBELLUM SOUTHERN GUN REGULATION AS A CASE STUDY

A. Background and Scholarly Debate

There is substantial scholarly disagreement over the extent to which race motivated the legislators who enacted strict, and often novel, forms of public carry gun regulation in the post–Civil War period. There are two potentially problematic categories of historical gun laws when it comes to discriminatory taint. First, facially

86 *See supra* notes 45–49 and accompanying text.

87 *See, e.g.*, Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 879–80 (arguing that, because it is so difficult to discern any true, unitary legislative motive, judicial overemphasis of potentially improper legislative motives "will leave room for arbitrary results and the wide imposition of value judgments," *id.* at 879).

88 *See, e.g.*, Abbott v. Perez, 138 S. Ct. 2305, 2324–25 (2018).

89 *See, e.g.*, Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 436 (1827) ("It has been truly said, that the presumption is in favour of every legislative act, and that the whole [burden] of proof lies on him who denies its constitutionality."); McCray v. United States, 195 U.S. 27, 56 (1904) ("The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."); Miller v. Johnson, 515 U.S. 900, 915 (1995).

90 This is clearest in *Hunter* and *Ramos*, where the Court found generally that discriminatory intent is especially relevant when provisions continue to have a potential negative impact on members of the disfavored group. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring in part) ("[T]he States' legislatures never truly grappled with the laws' sordid history in reenacting them."); *see also* United States v. Fordice, 505 U.S. 717, 729 (1992); McCleskey v. Kemp, 481 U.S. 279, 298 n.20 (1987) (requiring continuity between discriminatory Reconstruction-era statutes and Georgia's modern-day capital punishment framework); Hopkins v. Hosemann, 76 F.4th 378, 390 (5th Cir.) (noting the continued discriminatory impact of Mississippi's 1890 felon-disenfranchisement provision by citing a study of its application between 1994 and 2017), *vacated pending reh'g en banc*, 83 F.4th 312 (5th Cir. 2023) (mem.).

discriminatory laws, enacted before, during, and shortly after the Founding and including the initial wave of Black Codes passed in Southern states immediately following the Civil War, banned African Americans, Native Americans and Catholics from possessing or carrying weapons.[91] One can expect that the enforcement record for such laws is not especially illuminating—by their terms, the laws *mandated* discrimination and could not have been applied to the white population. There is much debate about these laws in post-*Bruen* litigation, with the government generally arguing that they evince a broader tradition of regulating based on perceived dangerousness, while some judges reject them entirely for purposes of the analogical inquiry.[92]

This Article, however, deals instead with a second category of laws: facially *neutral* regulations that some argue were improperly motivated by race and enforced in a disparate manner, and for which evidence of enforcement may be crucial.[93] Public carry restrictions appeared with increasing frequency in post–Civil War Southern states.[94] Some suggest, however, that these facially neutral regulations—many of which in fact mirrored laws in force before the Civil War—were primarily motivated by racial animus and intended to disarm only the

91 *See, e.g.*, An Act for Disarming Papists, and Reputed Papists, Refusing to Take the Oaths to the Government, ch. 1, 1756 Va. Acts 331; Act of Feb. 8, 1798, ch. 54, § 5, 1798 Ky. Acts 6th Gen. Assemb., 2d Sess. 105, 106 ("No negro, mulatto, or Indian whatsoever, shall keep or carry any gun, powder, shot, club, or other weapon whatsoever . . . ."); Act of Jan. 11, 1841, ch. 30, 1840–41 N.C. Laws 61; Act of Jan. 16, 1854, § 1, 1853 Or. Stat. 257, 257 (setting forth penalties for "any white citizen . . . [who] shall sell, barter, or give to any Indian in this territory any gun, rifle, pistol or other kind of firearms").

92 *See, e.g.*, United States v. Harrison, 654 F. Supp. 3d 1191, 1216 (W.D. Okla. 2023) ("[H]istorical restrictions on slaves and Indians provide no insight into the constitutionality of [modern gun regulations]."), *appeal docketed*, No. 23-6028 (10th Cir. Mar. 3, 2023); Jacob Gershman, *Old Racist Gun Laws Enter Modern-Day Legal Battles*, WALL ST. J. (Feb. 27, 2023, 8:00 AM), https://www.wsj.com/articles/old-racist-gun-laws-enter-modern-day-legal-battles-ed7a0206 [https://perma.cc/NJG6-9PC9]; *cf.* United States v. Daniels, 77 F.4th 337, 354 (5th Cir. 2023) ("[E]ven if we consider the racially discriminatory laws at the Founding, Daniels is not like the minorities who the Founders thought threatened violent revolt."), *petition for cert. filed*, 92 U.S.L.W. 3085 (U.S. Oct. 5, 2023) (No. 23-376). For articles addressing how such laws can or should fit into a text, history, and tradition approach, see Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537 (2022); and Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30 (2023) (arguing that *Bruen*'s method suggests abstracting higher-level regulatory principles from such laws).

93 In fact, this subset of historical laws is where evidence of on-the-ground enforcement most clearly overlaps with the concept of discriminatory taint: since many such laws were presumably intended to be presented as nondiscriminatory regulations complying with the Reconstruction amendments, the best (and perhaps only) evidence of a latent discriminatory intent will be enforcement in the years after enactment.

94 *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 935–38 (2010) (Breyer, J., dissenting) (describing state and local regulations during this period).

Black population and facilitate white supremacy. Prominent gun-rights scholars have argued that "Jim Crow laws [were] the foundation of gun control in America."[95] In this telling, Southern states that could no longer explicitly discriminate against Black citizens enacted facially neutral laws that they often justified by reference to public safety goals, while actually intending that the laws have the effect of disarming Black citizens or thwarting Black gun carrying or ownership.[96] As Clayton Cramer argues, "[t]he apparent goal of the gun control and vagrancy laws [in the post-Reconstruction South] was to intimidate the freedmen into an economically subservient position."[97] These scholars often rely heavily on a handful of frank judicial assessments of the purpose of *certain* Southern gun regulations—for example, the following portion of a concurring opinion in the 1941 Florida Supreme Court case *Watson v. Stone* describing Florida's permit requirement for certain handguns and rifles: "The statute was never intended to be applied to the white population and in practice has never been so applied."[98] Some level these claims even without any proof that is specific to the underlying law (or even state) at issue. Rather, the argument is that the entire *region* was so infected with racism that any gun-related regulation (or, perhaps, any regulation at all) is inherently suspect.[99]

Historians such as Brennan Rivas, however, have shown that the rapid expansion of gun regulation in the South during and immediately following Reconstruction "speaks to the urgency of gun violence in the postbellum South, not a secret white supremacist plot to disarm Black residents."[100] Based on original archival enforcement research

95 David B. Kopel, *The Racist Roots of Gun Control*, ENCOUNTER BOOKS (Feb. 23, 2018) https://www.encounterbooks.com/features/racist-roots-gun-control/ [https://perma.cc/SQ65-LLFT].

96 David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1123 (2010) ("The mere declaration that a statute is enacted for the purpose of public safety is hardly proof that there was no invidious motive."). Notably, this specific framing appears to *assume* an improper motive and place the burden of proof on the party claiming *non*discriminatory intent—an issue discussed in Section I.B.

97 Clayton E. Cramer, *The Racist Roots of Gun Control*, KAN. J.L. & PUB. POL'Y, Winter 1995, at 17, 21.

98 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring specially).

99 *See, e.g.*, Cramer, *supra* note 97, at 21 (noting the "shortage of . . . forthright statements of racist intent"); Nicholas Gallo, Comment, *Misfire: How the North Carolina Pistol Purchase Permit System Misses the Mark of Constitutional Muster and Effectiveness*, 99 N.C. L. REV. 529, 534–36 (2021) (arguing that North Carolina's permitting system for handguns was racially motivated and "inten[ded] . . . to keep minorities from possessing handguns," *id.* at 536, based solely on the presence of the Ku Klux Klan in North Carolina at the time and judicial statements about a Florida permit law enacted nearly thirty years prior).

100 Brennan Gardner Rivas, *The Problem with Assumptions: Reassessing the Historical Gun Policies of Arkansas and Tennessee*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG

in Texas, Rivas asserts that "racially biased enforcement of the deadly weapon law [Texas's 1871 public carry statute] evolved over time and manifested itself during the 1890s . . . [and was] directly related to the collapse of Black voting rights in Texas during that decade."[101] Rivas urges attention to the complexity and nuance of the historical record in the Reconstruction era and contends that "the method most used by gun rights advocates is that of freezing the story at its most convenient time, or flattening the complexities to suit their argument."[102] Similarly, Patrick Charles asserts that broad claims that most or all gun control in the immediate post–Civil War era was racially motivated are incorrect and that "[t]his is particularly true regarding the law of armed carriage, where all persons, not just people of color, were often restricted from carrying dangerous weapons within the public concourse."[103]

It makes little sense to treat post–Civil War Southern gun regulation as a monolith because Southern states varied widely in the degree of Black participation in politics during and immediately after Reconstruction; melding this history together also erases crucial distinctions between the initial Reconstruction period, and its promise of a more equal society, and the latter collapse of such efforts during so-called Southern redemption. One common narrative is that gun control measures "appeared" at the same time that white Southern Democrats began to win large majorities in former Confederate states near the end of Federal Reconstruction.[104] As historian Eric Foner notes, however, "Reconstruction was part of the ongoing evolution of Southern society rather than a passing phenomenon."[105] Moreover, treating Black citizens as "passive victims of the actions of others" ignores their role as "active agents in the making of Reconstruction, whose quest for individual and community autonomy did much to establish

(Jan. 20, 2022), https://firearmslaw.duke.edu/2022/01/the-problem-with-assumptions-reassessing-the-historical-gun-policies-of-arkansas-and-tennessee [https://perma.cc/QCL5-93YU].

101 Brennan Gardner Rivas, *Enforcement of Public Carry Restrictions: Texas as a Case Study*, 55 U.C. DAVIS L. REV. 2603, 2619 (2022).

102 *Id.* at 2622.

103 Patrick J. Charles, *Racist History and the Second Amendment: A Critical Commentary*, 43 CARDOZO L. REV. 1343, 1362 (2022). Charles also argues that the "racist gun control" argument is in substantial tension with "the argument that Southern compulsory arms bearing laws—laws intended to help suppress and subdue slave revolts—were indicative that the Second Amendment protected broad carry rights." *Id.* at 1367 n.119.

104 *See, e.g.*, David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGIS. 223, 323–24 (2024) (observing that in 1874 Arkansas "elected Democratic majorities and ended Reconstruction," *id.* at 323, and that a concealed carry ban followed the next year).

105 Eric Foner, *The Continuing Evolution of Reconstruction History*, OAH MAG. HIST., Winter 1989, at 11, 13.

Reconstruction's political and economic agenda."[106] At times, Black legislators who served *after* the formal end of Reconstruction were involved in enacting gun regulation, including concealed-carry and locational restrictions.[107]

The immediate post-Reconstruction period resulted, for a short period of time, in highly integrated state governments in Southern states, Black participation in the political process, and the election of Black representatives and senators. As Foner notes, "[b]lack officeholding was unknown in the slave South and virtually unheard of in the free states as well," such that the Reconstruction-era inclusion of Black citizens within the political community (and subsequent election of Black politicians at the local, state, and federal levels) was perhaps the most "dramatic . . . break with the nation's traditions" that followed the Civil War.[108] Foner is careful to observe that "[n]owhere in the South did Blacks control the workings of state government, and nowhere did they hold office in numbers commensurate with their proportion of the total population."[109] Yet "over 1,500 blacks occupied positions of political authority in the South," many were "men of uncommon backgrounds and abilities," and "Southern black officeholding did not end immediately with the overthrow of Reconstruction."[110]

B. Legislative Complexity

During this fleeting period of Black participation in Southern-state politics, legislators—including Black representatives and (mostly Republican) whites elected by Black voters—enacted sweeping and, in some cases, unprecedented public carry regulations in certain states. It is important to note here that, as of 1870, the vast majority of Black citizens lived in states of the former Confederacy; thus, the most instructive states for an examination of Black policy preferences during this time period, to the extent such an examination is possible, are

106 *Id.* To return to Arkansas as a case study, *see supra* note 104, Democratic victories in 1874 certainly transformed the political landscape but Black participation in state politics did not immediately end. Some Black leaders broke with the Republican party to form Fusionist coalitions, and the number of Black legislators rose and fell over the following two decades, reaching twelve legislators in 1891. *See* Blake J. Wintory, *African-American Legislators in the Arkansas General Assembly, 1868-1893*, 65 ARK. HIST. Q. 385, 388–92 (2006); *see also* Carl H. Moneyhon, *Black Politics in Arkansas During the Gilded Age, 1876-1900*, 44 ARK. HIST. Q. 222 (1985).

107 For example, nine Black legislators served in Arkansas in 1875 when the State enacted its concealed carry ban. *See* Wintory, *supra* note 106, at 389.

108 ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION, at xi (rev. ed. 1996).

109 *Id.* at xiv.

110 *Id.* at xiv, xvi, xxix.

former Confederate and border states with sizable Black populations.[111] In a number of these states, firearm regulations were enacted in the post–Civil War period with the support of Black legislators specifically to protect the Black population from racist violence perpetrated with firearms.

For example, in 1870, Louisiana passed a law banning the public carry of firearms within a half-mile radius around any voter registration site during election day.[112] The provision was part of a larger bill to "regulate the conduct and to maintain the freedom and purity of elections" and to "prevent fraud, violence, intimidation, riot, tumult, bribery or corruption at elections."[113] Black state representatives in the Louisiana legislature voted 28–0 in favor of the bill, and Black senators voted 5–0 in favor.[114] The bill did not pass with unanimous or near-unanimous support; rather, twenty-six representatives and twelve senators (all white) voted against it. P.B.S. Pinchback, a Black Louisianan who would go on to serve briefly as the state's Lieutenant Governor and acting Governor, was among those voting in favor. This law—and unified Black support for it—is hardly surprising in light of the racialized violence that racked Louisiana in the immediate post–Civil War period.[115] Of note here is the fact that racialized violence was often closely connected to voting as white Democrats used intimidation, threats, and acts of violence (at times, including firearms) to deter Black citizens from running for office and voting in state and federal elections.[116]

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111 According to the 1870 census, there were 4.88 million Black individuals in the United States. Of that number, almost 3.96 million, or 81.1%, lived in states of the former Confederacy. An additional 500,000-plus Black individuals lived in border states such as Kentucky, Maryland, and Missouri. *See* 1 FRANCIS A. WALKER, NINTH CENSUS 5 tbl.1 (Washington, Gov't Printing Off. 1872). The Black population in the North and West at the time was, for the most part, too small to have any meaningful impact on the political process in those states.

112 Act of Mar. 16, 1870, no. 100, § 73, 1870 La. Acts 145, 159–60.

113 *Id.* at 145.

114 *See* DAVID R. POYNTER LEGIS. RSCH. LIBR., MEMBERSHIP IN THE LOUISIANA HOUSE OF REPRESENTATIVES, 1812–2028 (rev. 2024); OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA 235–36 (1870); OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE SENATE OF THE STATE OF LOUISIANA 110 (1870).

115 *E.g.*, Michael J. Pfeifer, *The Origins of Postbellum Lynching: Collective Violence in Reconstruction Louisiana*, 50 LA. HIST.: J. LA. HIST. ASS'N 189, 197 (2009) (describing how the election of 1868 "precipitated a wide-scale 'Counter Reconstruction' across the state as conservative white Louisianians mobilized against the Radical Republicans by forming paramilitary organizations . . . [and] unleashed a vast wave of violence against African Americans and white Republican Unionists").

116 *See id.* *See generally* Lou Falkner Williams, *Federal Enforcement of African American Voting Rights in the Post-Redemption South: Louisiana and the Election of 1878*, 55 LA. HIST.: J. LA. HIST. ASS'N 313 (2014) (explaining the numerous instances of violence committed by

As Brennan Rivas has shown, Texas was at the forefront of public carry regulation in the early 1870s and also had many counties disparately "affected by lynching, electoral fraud, and vicious behavior toward Black citizens."[117] At the time, Texas had the highest murder rate in the country, and Black citizens bore the brunt of this violence, which was rarely prosecuted.[118] In 1871, the Republican-dominated Texas state legislature passed a broad ban on the open and concealed carrying of firearms in public by those without "reasonable grounds for fearing an unlawful attack on [the] person."[119] The law also contained prohibitions on the public carry of firearms at schools, churches, election precincts, shows and other public exhibitions, social gatherings, and other places of public assembly.[120] The law was, arguably, the broadest restriction on public carry up to that point in American history, and it was discussed at length in *Bruen* and has been invoked in a number of post-*Bruen* Second Amendment cases.[121] At the time the law was passed, twelve of the seventy-five representatives in the state legislature were Black (as were two of the twenty-six senators).[122] These fourteen Black legislators voted unanimously in favor of the bill.[123] In both Louisiana and Texas, then, the first Black elected representatives uniformly saw the need for and utility of gun regulations to promote

whites during the 1878 election in Louisiana, many of which involved the shooting of Black voters, candidates, and political leaders).

117 Rivas, *supra* note 100, at 2616; *see also* WILLIAM D. CARRIGAN, THE MAKING OF A LYNCHING CULTURE: VIOLENCE AND VIGILANTISM IN CENTRAL TEXAS, 1836–1916, at 3 (2004). *See generally* STILL THE ARENA OF CIVIL WAR: VIOLENCE AND TURMOIL IN RECONSTRUCTION TEXAS, 1865–1874 (Kenneth W. Howell ed., 2012).

118 *See* Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 98–100 (2016) (noting that "the murder rate in Texas during the period from 1860 to 1868 was forty-five times that in New York," *id.* at 98, and that "between 1865 and 1867, for every white person murdered by a black person, thirty-seven black people were murdered by whites," *id.* at 100).

119 Act of Apr. 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws 1st Sess. 25, 25.

120 *Id.* § 3, at 25–26.

121 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2153 (2022); *see also* Koons v. Platkin, 673 F. Supp. 3d 515, 632 (D.N.J. 2023) (considering the law and concluding it was not representative under *Bruen*), *appeals docketed sub nom.* Koons v. Att'y Gen. N.J., Nos. 23-1900, 23-2043 (3d Cir. argued Oct. 25, 2023); Brennan Gardner Rivas, *An Unequal Right to Bear Arms: State Weapons Laws and White Supremacy in Texas, 1836–1900*, 121 SW. HIST. Q. 284, 295 (2018) (explaining how the 1871 law was a "complete[] overhaul[]" of existing gun laws and forbade carrying firearms in public, with only a few exceptions).

122 *See Texas Legislators: Past & Present*, LEGIS. REFERENCE LIBR. OF TEX., https://lrl.texas.gov/legeleaders/members/lrlhome.cfm (in "Legislature" field select "12th (1871)").

123 *See* Frassetto, *supra* note 118, at 106; *see also* JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE TWELFTH LEGISLATURE 523–32 (Tex. 1871); SENATE JOURNAL OF THE TWELFTH LEGISLATURE OF THE STATE OF TEXAS 552–54 (1871).

public safety, protect Black lives, and safeguard Black political participation.

In 1868, just three years after the end of the Civil War, Florida enacted a ban on manufacturing or selling slungshots and carrying certain concealed weapons, including dirks and pistols.[124] Slungshots were restricted in a number of states in the mid-to-late 1800s—while most states restricted the concealed carry of slungshots, Florida's ban was broader in that it targeted manufacturing and sale.[125] This provision was part of a wide-ranging bill addressing crime, punishment, and criminal procedure.[126] Florida was no exception to the general trend of intense, racialized violence throughout the South during the early years of Reconstruction—and, often, that violence was intimately connected to firearms and other deadly weapons.[127] The Florida slungshot and concealed-carry restrictions passed with the overwhelming support of the eighteen Black representatives and senators then serving in the state legislature: fifteen Black representatives voted in favor with only one opposed, and both Black senators supported the law.[128] In each instance, then, firearms regulation strongly supported by Black representatives and senators was passed during a prolonged wave of racialized violence that included the use of firearms to terrorize and intimidate the state's Black population. Just these three examples demonstrate that stringent gun regulations were passed with overwhelming support from Black legislators serving in the early Reconstruction era. It would be exceedingly strange, then, if these laws were motivated by discriminatory intent or designed to apply in a racist manner.

To be sure, certain gun regulations enacted during this time in Southern states bear the clear hallmarks of discriminatory, racist taint, perhaps meeting even the exacting standard the Court has utilized in

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124 Act of Aug. 6, 1868, ch. 1,637 (no. 13), ch. VII, §§ 11, 14, 1868 Fla. Acts 61, 95.

125 A slungshot is "a rope looped on both ends, with a lead weight or other small, dense item at one end." David Kopel, *Bowie Knife Statutes 1837-1899*, REASON: VOLOKH CONSPIRACY (Nov. 20, 2022, 12:53 PM), https://reason.com/volokh/2022/11/20/bowie-knife-statutes-1837-1899/ [https://perma.cc/69PY-TSTQ].

126 Act of Aug. 6, 1868.

127 *See* DANIEL R. WEINFELD, THE JACKSON COUNTY WAR: RECONSTRUCTION AND RESISTANCE IN POST–CIVIL WAR FLORIDA, at xi–xii (2012) (detailing the early Reconstruction-era period of violence in Florida known as the Jackson County War, during which at least 100 murders of mostly Black citizens took place); Ralph L. Peek, *Aftermath of Military Reconstruction, 1868-1869*, 43 FLA. HIST. Q. 123, 132, 139 (1964) (describing the period of intense racial and political violence in Florida in 1868 and 1869, which involved the use of firearms to murder several Black citizens). *See generally* PAUL ORTIZ, EMANCIPATION BETRAYED: THE HIDDEN HISTORY OF BLACK ORGANIZING AND WHITE VIOLENCE IN FLORIDA FROM RECONSTRUCTION TO THE BLOODY ELECTION OF 1920 (2005).

128 A JOURNAL OF THE PROCEEDINGS OF THE ASSEMBLY OF THE STATE OF FLORIDA, 1st Sess., at 174 (1868); JOURNAL OF THE SENATE, 1st Sess., at 171 (Fla. 1868).

cases such as *Davis*, *McCleskey*, and their progeny.[129] One commonly cited authority on this point is a 1920 Ohio Supreme Court decision where, dissenting from the court's decision to uphold a concealed-carry ban, a judge noted that Southern decisions endorsing concealed-carry laws were suspect because "the race issue there has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions."[130] Yet many scholars focus narrowly on such statements while missing the overpowering evidence that *other* post–Civil War firearms regulation in the South was motivated by a desire to protect Black lives and political freedom.

C. Enforcement Complexity: North Carolina's 1879 Concealed-Carry Ban

1. Historical Context

North Carolina, like many former Confederate states, strongly resisted Black suffrage in the immediate post–Civil War years.[131] The state's white government enacted a series of "Black Codes" in 1865 and 1866, including a ban on interracial marriage, strict vagrancy laws, and rules restricting the right of Black citizens to testify in court.[132] James Browning observes that the intent of such laws was that "[t]he Negro was to be . . . restricted to such an extent that he would be reduced almost to peonage."[133] These laws, which at times maintained facially discriminatory elements even while representing a general move toward facial neutrality with intended discriminatory impact, included laws restricting the unlicensed possession of certain firearms by Black citizens.[134]

After North Carolina—along with other former Confederate states—ratified the Fourteenth Amendment in 1868,[135] Black

129 *See supra* Section I.B; *see also* Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence*, 70 CHI.-KENT L. REV. 1307 (1995).

130 State v. Nieto, 130 N.E. 663, 669 (Ohio 1920) (Wanamaker, J., dissenting).

131 WILLIAM ALEXANDER MABRY, THE NEGRO IN NORTH CAROLINA POLITICS SINCE RECONSTRUCTION 10–11 (1940).

132 James B. Browning, *The North Carolina Black Code*, 15 J. NEGRO HIST. 461, 465, 467 (1930); *see also* Act of Mar. 10, 1866, ch. 40, 1866 N.C. Pub. Laws Spec. Sess. 99.

133 Browning, *supra* note 132, at 471.

134 *See* John Thomas Warlick, IV, "What's Past Is Prologue": North Carolina's Forgotten Black Code 29–30 (2020) (M.A. thesis, University of North Carolina at Charlotte) (ProQuest). *See generally* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 333–42 (1991).

135 The state legislature initially "overwhelmingly rejected" the amendment in 1866, and then passed it two years later—likely under the belief that the amendment's guarantee of substantive rights to free Black citizens would be highly limited. *See* James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 WAKE FOREST L. REV. 89, 90, 112–

legislators continuously made up a small minority of the state legislature during the early Reconstruction period and even after the formal end of Federal Reconstruction in 1876.[136] North Carolina continued to elect Black state legislators well into the 1880s, with seventeen Black representatives elected to statewide office in 1886, for example.[137] Even up to 1894, "when Republicans and Populists united to defeat the Democrats and take over the General Assembly," Black voters continued to exercise substantial political influence in certain areas of the state.[138] Black legislators were represented in state politics until the state passed a literacy test requirement in 1900 that effectively disenfranchised the state's entire Black population—not one Black individual would serve in the North Carolina state legislature from 1900 to 1968.[139] One specific example of the Reconstruction-era influence of Black voters is the city of Wilmington in New Hanover County. In 1860, Wilmington was North Carolina's most populous city and the thirteenth largest city in what would become the Confederacy.[140] The city was, at times during the Reconstruction era, significantly more integrated than the state as whole and "an exceptional case" in North Carolina.[141] William Alexander Mabry notes that, while under

13 (1984) ("The second amendment guarantees the right to bear arms. If the conservatives had suspected that section 1 guaranteed blacks that right, they would have protested angrily because armed blacks terrified them. The silence of conservative opponents about the due process clause proves that no one believed that it protected any substantive rights . . . .").

136 *See* Benjamin R. Justesen, *"The Class of '83": Black Watershed in the North Carolina General Assembly*, 86 N.C. HIST. REV. 282, 282 (2009) ("By the autumn of 1882, the presence of African American legislators had become commonplace in the General Assembly.").

137 *Id.* at 283.

138 *Id.*; *see also* William Alexander Mabry, *Negro Suffrage and Fusion Rule in North Carolina*, 12 N.C. HIST. REV. 79, 85 (1935) ("Though the Negro vote did not contribute very materially to the Fusion victory [of 1894], the overthrow of the Democratic majority in the Legislature soon brought the Negro actively into the political arena."); *id.* at 88 (observing that Fusionist changes to election rules increase Black voting and that "Negro office-holding, exceptional during the years of Democratic rule, became quite common in the Black Belt after" 1895). While Mabry was squarely within the so-called "Dunning School" of historians criticizing Southern Republican Reconstruction governments for corruption and inefficiency, he also allows that "Republican rule in North Carolina . . . [is] not as open to condemnation as that in certain other Southern states." MABRY, *supra* note 131, at 11.

139 Brenda Sullivan, *Even at the Turning of the Tide: An Analysis of the North Carolina Legislative Black Caucus*, 30 J. BLACK STUD. 815, 818 (2000); Milton C. Jordan, *Black Legislators: From Political Novelty to Political Force*, N.C. INSIGHT, Dec. 1989, at 40.

140 *See* N.C. Div. of State Historic Sites & Props., Blockade Running 4 (Dec. 13, 2022), https://historicsites.nc.gov/blockade-runner-activitydocxpdf/open [https://perma.cc/UC42-W5K8].

141 MABRY, *supra* note 131, at 39; *see also* DAVID ZUCCHINO, WILMINGTON'S LIE: THE MURDEROUS COUP OF 1898 AND THE RISE OF WHITE SUPREMACY 67 (2020) ("Nowhere else in the South during post-Reconstruction did whites and blacks so successfully unite in a multiracial political partnership.").

Fusionist control, "the Negro soon came into his own in local and state politics [and i]n New Hanover County forty Negro magistrates were appointed during the years 1895-1899."[142]

North Carolina was among the Southern states to prohibit the concealed carry of certain weapons during the Reconstruction era.[143] Bans on concealed carry were common throughout the 1800s, and "[t]he mainstream approach . . . was to ban concealed carry, to forbid sales to minors, or to impose extra punishment for criminal misuse."[144] The state also regulated guns in other ways during the time period when a small group of Black legislators continued to serve and some Black suffrage was permitted. For example, the North Carolina state legislature passed a law criminalizing the pointing of firearms and a statute banning the sale of certain weapons, including pistols, to minors during this period.[145]

The state's 1879 concealed-carry law passed with substantial support in the state legislature, which included nine Black representatives.[146] Of the nine Black representatives listed in the official compendium of the state legislature, five voted in favor of the concealed-carry ban and four voted against.[147] Both Black state senators voted against advancing earlier versions of the bill, although no voting record is available of the Senate's final roll-call vote on the bill at the end of February 1879.[148] Notable Black representatives voted in favor of the bill, including Stewart Ellison of Wake County, a freed slave and

142 MABRY, *supra* note 131, at 39.

143 The law banned concealed carry of "any pistol, bowie-knife, dirk, dagger, slungshot, loaded cane, brass, iron or metallic knuckles, or other deadly weapon." Act of Mar. 5, 1879, ch. 127, §§ 1, 2, 4, 1879 N.C. Laws 231, 231. The statute also provided that any individual found with such a weapon outside of his or her home would, in the eyes of the law, have presumptively concealed that weapon. The law was ultimately repealed and replaced by a shall-issue permitting system in 1995, which remains in place today. *See Concealed Handguns Reciprocity*, N.C. DEP'T OF JUST., https://ncdoj.gov/law-enforcement-training/law-enforcement-liason/concealed-weapon-reciprocity [https://perma.cc/YG6Z-TDE7].

144 Kopel & Greenlee, *supra* note 104, at 227.

145 Act of Mar. 11, 1889, ch. 527, § 1, 1889 N.C. Laws 502, 502 (statewide law prohibiting pointing of firearms); Act of Mar. 6, 1893, ch. 514, 1893 N.C. Pub. Laws 468 (statewide ban on the sale of certain weapons, including pistols, to minors).

146 *See* J.S. TOMLINSON, TAR HEEL SKETCH-BOOK: A BRIEF BIOGRAPHICAL SKETCH OF THE LIFE AND PUBLIC ACTS OF THE MEMBERS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA (Raleigh, Raleigh News Steam Book & Job Print 1879) (listing nine Black representatives and two Black senators); *see also* MABRY, *supra* note 131, at 24 (stating that the 1879 General Assembly included nine Black representatives).

147 *See* JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA 481–82 (1879) [hereinafter N.C. H.R. JOURNAL].

148 *See* JOURNAL OF THE SENATE OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA 227–29 (1879).

educated businessman residing in Raleigh who "built schools, hospitals and offices for the Freedmen's Bureau and other agencies."[149] Representative John Steele Henderson of Rowan County,[150] a Democrat who ultimately voted *against* the bill, first proposed an amendment to insert a complete ban on "manufactur[ing] any of said arms in the State," which was rejected.[151]

2. Unearthing the Enforcement Record

Some have argued that laws similar to North Carolina's ban were likely enforced in a discriminatory manner, while citing only general evidence about discriminatory enforcement in *other* former Confederate states.[152] *Bruen* itself appears to endorse this general line of argument.[153] In many instances, however, it is possible (though complex) to conduct archival research to determine how historical laws were enforced at the local level. While these records are often difficult to locate and review, some of them do exist and they are crucial to any good-faith effort to understand the full picture of how a law was enforced over time.[154]

a. Methodology

With the assistance of a group of student research assistants, I conducted a review of enforcement records for the 1879 North Carolina concealed-carry ban in New Hanover County from 1879 (when the law was enacted) through 1908. The records are housed at the North Carolina State Archives in Raleigh, where they are organized by county

149 *See* Catherine W. Bishir & Elizabeth Reid Murray, *Ellison, Stewart (1834-1899)*, N.C. ARCHITECTS & BUILDERS: A BIOGRAPHICAL DICTIONARY (2009), https://ncarchitects.lib.ncsu.edu/people/P000337 [https://perma.cc/PWR6-M864].

150 TOMLINSON, *supra* note 146, at 34–35. Henderson's profile notes, "Mr. Henderson is a strong Democrat, but strange as it may seem, received every colored vote cast at the Salisbury and Mocksville precincts." *Id.* at 35.

151 N.C. H.R. JOURNAL, *supra* note 147, at 481–82.

152 *E.g.*, Gallo, *supra* note 99, at 535–36 ("[W]hen taken in context with the actions of surrounding states and the attitudes regarding minorities at the time of enactment, [North Carolina's 1919 permit-to-purchase law was intended] to keep minorities from possessing handguns.").

153 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2152 n.27 (2022) (suggesting that discriminatory enforcement of some "Southern prohibitions on concealed carry" may mean that all such laws are suspect as potential historical analogues).

154 This work has been done in certain instances already, *see, e.g.*, Rivas, *supra* note 101, and has clear advantages over an approach that uses only more easily accessible sources such as historical newspaper databases—as scholars who have used newspaper databases recognize, *see* Leider, *supra* note 3, at 254. Compared to newspaper research, reviewing contemporary court records is more likely to provide a full picture of enforcement over time and avoid various latent biases.

and court and can be viewed by any member of the public.[155] The project focused initially on court minute books, which generally recorded developments in misdemeanor criminal cases over time: arraignments, pleas, trials, and so on. The minute books typically list the defendant's name, the offense(s) charged, the case disposition, and the adjudication and sentence imposed (if any). There are multiple entries for each case, representing each time the court acted with regard to a particular defendant. The records are likely not a comprehensive record of enforcement—for one, certain years within the 1879–1908 timeframe are missing.[156] Research assistants reviewed all enforcement records regardless of outcome—in other words, instances where the defendant received a criminal sentence (after either pleading guilty or a guilty verdict at trial), instances where the defendant was acquitted, and instances where the State ultimately chose not to pursue the case. The court records do not list the race of the defendant.

Race was determined by cross-referencing the available information from these records with other historical materials. This was first done using the genealogical website Ancestry.com, which hosts a database of historical demographic information (race, age, occupation, and so on)[157] that can be searched by name, location, and date.[158] The data were then vetted by cross-referencing with contemporary newspaper accounts, specifically accounts of criminal proceedings published regularly in the Wilmington *Morning Star*, *The Wilmington Messenger*, and *The Semi-weekly Messenger* during the relevant period. These newspaper reports frequently noted the race of defendants in various criminal proceedings.

The initial racial classifications obtained through Ancestry.com yielded a concealed-carry prosecution data set that mirrored the

155 *See Guide to Research Materials in the North Carolina State Archives: New Hanover County*, STATE ARCHIVES OF N.C., https://archives.ncdcr.gov/guide-research-materials-north-carolina-state-archives-new-hanover-county-0 [https://perma.cc/M7Q6-X35T].

156 The project reviewed the following court records: New Hanover County Criminal Court Minutes, 1877–1880 (C.R. 070.331.2); New Hanover County Criminal Court Minutes, 1880–1884 (C.R. 070.331.3); New Hanover County Criminal Court Minutes, 1888–1895 (C.R. 070.331.4); New Hanover County Criminal Circuit Court Minutes, 1895–1901 (C.R. 070.331.5); New Hanover Superior County Court Minutes, 1902–1910 (C.R. 070.311.19 through C.R. 070.311.22).

157 ANCESTRY, https://www.ancestry.com [https://perma.cc/3E94-WJYH]. At times race is indicated as "Mulatto" (or a variant spelling) or "Colored." The results consider these notations to indicate that the individual in question was Black. "Irish" is also used on occasion, and the results consider that notation to indicate that the individual in question was white.

158 Research assistants consulted Ancestry.com records for the census date closest to each arrest and used additional information in the Ancestry.com database to narrow the search; for example, they generally assumed that only those above the age of fifteen and below the age of sixty-five would have been prosecuted for concealed-carry violations.

demographic makeup of New Hanover County during the relevant time period almost exactly: within the set of prosecutions where race was determined through Ancestry.com, 53.9% of prosecutions were marked as Black individuals and the remaining 46.0% were marked as white.[159] After the secondary review of newspaper accounts, those numbers changed substantially as summarized below. The final numbers reflect a level of discriminatory enforcement against the county's Black population. It is difficult to pinpoint the exact reasons for this shift. Many of the defendant names were both difficult to decipher and relatively common. Some surnames, for example, were names that both Black and white county residents had but, for various reasons, the white residents may have been more likely to be accurately recorded in contemporary census data (or, at least, the data that was eventually uploaded to Ancestry.com).

It is worth emphasizing the complexity of the project and the time it took to complete. The project required individual review of thousands of pages of court minute books which have not been digitized. It took a team of six student research assistants, managed by the executive director of the Duke Center for Firearms Law, approximately 500 total hours over the course of a full academic year to review and record the relevant entries, cross-reference them with ancestry databases and other contemporary sources to find the race of the defendant, and then enter the data into a spreadsheet. The secondary newspaper review took an additional 20 hours or more to complete. This work covered approximately thirty years of enforcement of the concealed-carry law in a single North Carolina county; the state had approximately eighty to ninety counties during the relevant time period.[160] A spreadsheet containing the full data set and links to the underlying images of the court records is available at https://firearmslaw.duke.edu/assets/nc-concealed-carry-enforcement-data-1879-1908-(final).xlsx [https://perma.cc/MZ3A-DSUV].

The initial work of even locating the relevant enforcement records was particularly challenging. It appears that misdemeanor violations of the concealed-carry law may have been prosecuted in a variety of different fora depending on the year, location of the offense, and criminal history of the defendant. This review focused on *court* records—records from the county criminal and superior courts—many of

159 For these initial results and more background, see Andrew Willinger, *The History of North Carolina's 1879 Concealed Carry Ban: Part II*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (May 26, 2023), https://firearmslaw.duke.edu/2023/05/the-history-of-north-carolinas-1879-concealed-carry-ban-part-ii [https://perma.cc/DCU2-WL8H].

160 *See NC County Formation*, STATE LIBR. OF N.C., https://statelibrary.ncdcr.gov/genealogy-and-family-history/family-records/nc-county-formation [https://perma.cc/RJ3J-PQUF].

which are preserved and stored at the State Archives. However, concealed-carry cases were also brought in the less formal Wilmington "Mayor's Court," where the city's mayor sat as judge and sentencing authority, and such jurisdiction sharing was not unusual at the time.[161] Based on this author's investigation, it appears highly unlikely that any Mayor's Court records from the relevant time period were preserved and exist today; the only relevant information about proceedings before the Mayor's Court comes in the form of newspaper articles reporting on proceedings and convictions,[162] although there is no way to verify how thorough local newspaper coverage was, and it is almost certain that some proceedings were not reported in the papers. From the contemporary newspaper accounts, it seems that a substantial number of concealed-carry cases were referred from the Mayor's Court to the county criminal court (or vice versa)—meaning that it is often not possible to follow a single case that was brought in the criminal court from start to finish solely from surviving judicial records.[163] The handwriting of the court minute books was often difficult to read, meaning that some number of prosecutions had to be left out of the analysis due to the inability to accurately identify the defendant's name.[164] This is likely a major reason for the divergence between the initial and final

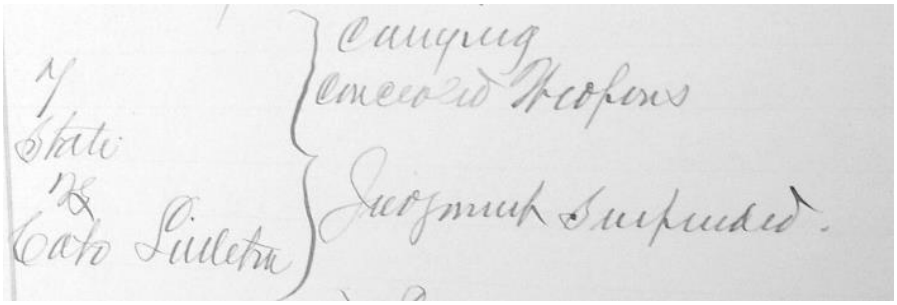
161 One noted historian of the North Carolina state courts informed the author that "[i]t was notorious that the NC court system—if it was a system at all—was a mess until its rationalization in the 1960s." Email from John V. Orth, William Rand Kenan Jr. Professor of Law Emeritus, Univ. of North Carolina at Chapel Hill, to author (Feb. 21, 2023) (on file with author).

162 *See, e.g.*, *Mayor's Court*, MORNING STAR (Wilmington), Feb. 11, 1885 (stating that a case involving a "colored" man who had carried a concealed knife was brought before the Mayor's Court, but that the defendant was released).

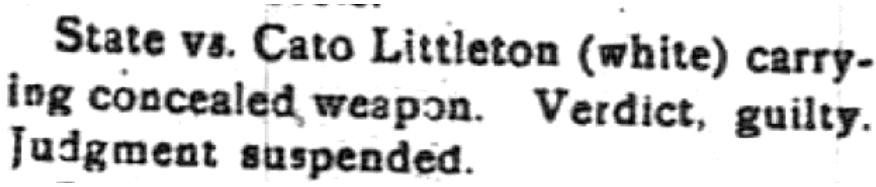
163 *See, e.g.*, *Local Dots*, MORNING STAR (Wilmington), May 26, 1903 (noting that a defendant arrested with "a deadly weapon on his person . . . was bound over to the higher court by Mayor Springer").

164 In fact, at times even contemporary reporters may have struggled to decipher the handwriting of the court reporters. For example, the Wilmington *Morning Star* reported in 1882 that a man named "Tom Chavis" was prosecuted for and convicted of violating the concealed carry law. *Criminal Court*, MORNING STAR (Wilmington), Oct. 5, 1882. "Chavis," however, appears to be a mistranscription of "Chavers" due to the handwriting used in the court reports; a story in the same newspaper two weeks later listed the defendant's name correctly as "Chavers" and reported the race of Mr. Chavers and his codefendant James Cowan. *Convicts of the Criminal Court*, MORNING STAR (Wilmington), Oct. 17, 1882.

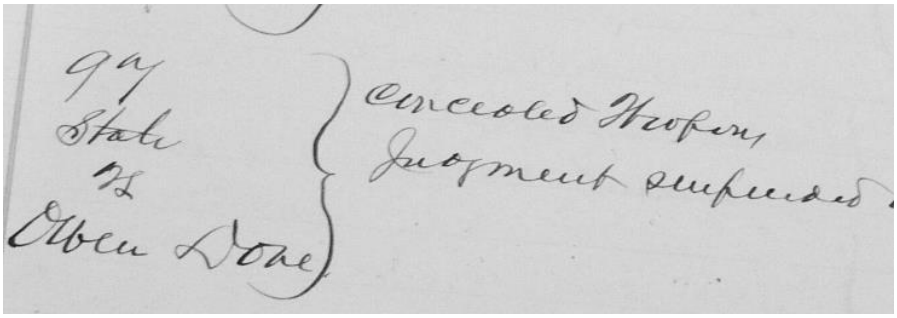
racial classification numbers. As just one example, consider the following entry from the 1896 county criminal court records:



A survey of crime blotters in Wilmington newspapers at the time ultimately revealed this defendant's name (Cato Littleton) and race (white)[165]:



Another example of nearly indecipherable handwriting is below:



A review of contemporaneous newspapers determined that this entry referred to a Black man named Owen Dove.[166]

165 *Criminal Circuit Court*, MORNING STAR (Wilmington), Jan. 8, 1896.

166 As with many other defendants, verifying race through newspapers reports was a multistep process. Several papers reported on Dove's concealed-carry case but without referencing his race. *See, e.g.*, *Criminal Court*, MORNING STAR (Wilmington), Apr. 27, 1897; *The Criminal Court*, WILMINGTON MESSENGER, Apr. 27, 1897; *The Criminal Court*, THE SEMI-WEEKLY MESSENGER (Wilmington), Apr. 30, 1897, at 6. Further research then revealed newspaper coverage identifying Dove as "colored," along with additional background about the facts of the case. *Was He the Shooter?*, WILMINGTON MESSENGER, Apr. 18, 1897, at 4.

While contemporary newspaper accounts were useful for matching defendant names and determining race, they presented several additional challenges and drawbacks. Primarily, the newspaper accounts were not consistent in providing the race of the defendants—perhaps in part because they reported this information only when readily available. And the various Wilmington newspapers sometimes reported this information differently. For example, a Black man—Neal Murphy—was charged under the concealed-carry law in 1906 or 1907, pled guilty, and received a sentence of hard labor. One Wilmington paper reported on this development without any reference to Murphy's race, while noting that another defendant (George Davis) was "colored."[167] An earlier report on the same case in a different newspaper, however, identified Murphy as "colored."[168] While thorough review of the newspaper reports can identify certain trends (such as a tendency to refer to Black defendants by their first and last names and white defendants by their first initial, middle initial, and last name), it is difficult to draw definite conclusions on this basis and we did not attempt to do so. The inconsistent notation of race in newspapers, moreover, might skew the results in important ways. For example, the reports appeared to most frequently identify the race of Black defendants, and op-eds indicate only slightly veiled desire to see the law applied to the Black population specifically.[169] In other words, the Wilmington newspapers may have had a vested interest in the *appearance* of discriminatory enforcement because that is what their readers expected to see.

In sum, the records reviewed are not a comprehensive picture of enforcement of the concealed-carry ban in New Hanover County, and it is unlikely that such a survey could *ever* be performed due to jurisdictional complexity, the potential destruction of relevant records, and the difficulties of relying on inconsistent newspaper reports.[170] The complexity inherent in this project suggests the limits of what we can ever know to a certainty about historical enforcement of laws such as North Carolina's 1879 concealed-carry ban. Moreover, the process for investigating historical enforcement will likely vary substantially by location—for example, Brennan Rivas's similar efforts to unearth the enforcement record of public carry regulations in Reconstruction Texas

167 *Superior Court in Session*, WILMINGTON MESSENGER, Jan. 25, 1907, at 3.

168 *Pithy Locals*, WILMINGTON MESSENGER, Jan. 3, 1907, at 4.

169 *See, e.g.*, *State Press*, WILMINGTON MESSENGER, Sept. 20, 1904, at 6 ("There are times when it is probably necessary for some folks to carry a pistol, but *the habit in some sections, especially among the boys*, is becoming alarming." (emphasis added)).

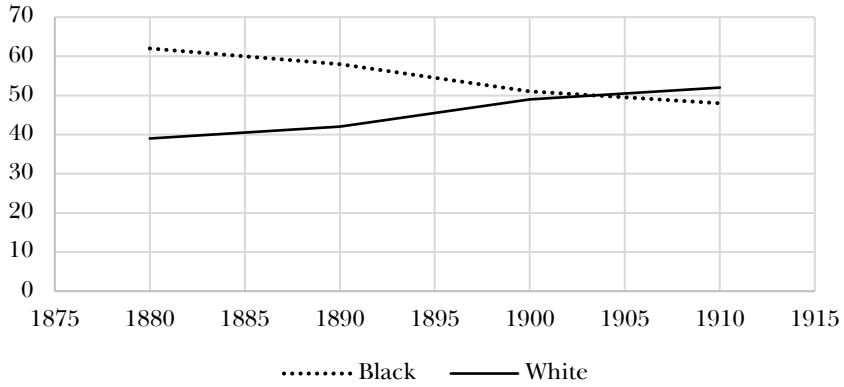
170 *Cf.* Ruben & Cornell, *supra* note 27, at 130–31 n.53 ("[T]raditional case law research is not especially probative of the application of [surety laws] . . . . [I]n many cases those records did not survive the passage of time, and those that did are not well indexed or digitally searchable.").

could not draw on newspaper accounts as a backstop because the contemporaneous Texas newspapers almost never reported on such developments or mentioned the race of criminal defendants.[171]

b. Results

Demographic data for New Hanover County helps provide context for the results. The racial makeup of the county changed dramatically during the period of our study—the percentage of Black county residents declined from 62% to 48% from 1880 to 1910, while the white population correspondingly increased.[172] This decline was due in no small part to the 1898 white supremacist insurrection and massacre that overthrew Wilmington's integrated Fusionist government, permanently banished many prominent Black leaders from the city, and resulted in the deaths of hundreds of Black citizens.

FIGURE 1: DEMOGRAPHIC MAKEUP OF NEW HANOVER COUNTY OVER TIME (PERCENTAGE OF TOTAL POPULATION)



The city of Wilmington itself had a similar demographic makeup in the years leading up to 1900. According to an official City report on the 1898 "race riot," published in 2006, Wilmington itself was 60.3% Black and 39.7% white in 1880 and 56.5% Black and 43.5% white in

171 By contrast, Rivas encountered fewer common surnames in Texas and thus was able to rely more heavily on ancestry databases. *See* Email from Brennan Gardner Rivas to author (Jan. 9, 2024) (on file with author). *See generally* Rivas, *supra* note 101.

172 *See* Willinger, *supra* note 159. A fire in 1921 destroyed a substantial portion of the 1890 census records, and the numbers for that census may be incomplete or based on population trends. *See* Kellee Blake, *"First in the Path of the Firemen": The Fate of the 1890 Population Census*, 28 PROLOGUE 64, 67 (1996).

1890.[173] The white population surpassed the Black population in Wilmington between 1890 and 1900. While impossible to verify, it is likely that most prosecutions in our data set came from Wilmington proper, as opposed to other towns in the county, because most were reported in the Wilmington newspapers without any residency indicator.[174]

Our review uncovered 264 total unique prosecutions under the statewide concealed-carry law. We were unable to determine the race of the defendant with confidence for some of these prosecutions—either because the name was not listed in one of the databases we consulted or because the name was common and associated with both Black and white county residents at the time. Of the 264 total unique prosecutions, we were able to identify the race of the defendant with a high level of certainty for 195 prosecutions. As noted above, this was done first through Ancestry.com and then cross-referenced against contemporary newspaper reports.

TABLE: PROSECUTIONS UNDER CONCEALED-CARRY LAW IN NEW HANOVER COUNTY (1879–1908)

	Number of Prosecutions	**Percentage**
Black	156	80.0%
White	39	20.0%
Total	195	100.0%

That 80% of concealed-carry defendants were Black indicates a strong level of discriminatory enforcement of the concealed-carry law, even in a county (and city) that was over 60% Black in the initial years surveyed. The simmering racial tensions in Wilmington and the surrounding area leading up to the 1898 coup likely contributed to these statistics, although there were a substantial number of Black citizens in leadership and authority positions in the Wilmington city government during the 1890s, all the way up to 1898.[175] Two potentially fruitful avenues of future research that might help provide additional context

173 *See* 1898 WILMINGTON RACE RIOT COMM'N, 1898 WILMINGTON RACE RIOT REPORT 33 (2006).

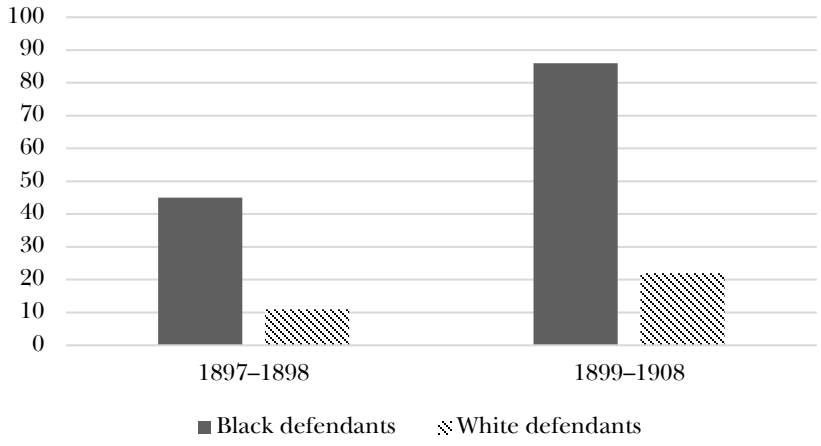
174 Because a few reports did mention that the defendants had merely been passing through the area, it seems likely that those reports that omitted such references generally related to Wilmington residents. *See, e.g.*, *Criminal Court*, WILMINGTON MESSENGER, Sept. 27, 1905, at 8 (describing concealed-carry charges brought against "two Croatans [members of a Native American tribe] who came here on an excursion and when arrested for disorderly conduct were found to have concealed weapons on their person").

175 *See, e.g.*, *Wilmington's Fusion Rule*, SEMI-WEEKLY MESSENGER (Wilmington), Sept. 13, 1898, at 3 (newspaper report, laced with racist vitriol, detailing the number of African-American government officials and leaders in Wilmington, identifying "eighty-six negro office-holders" including three aldermen, thirteen policemen, and forty magistrates).

for these numbers are (1) research into how the law was enforced at the same time in other North Carolina counties with a substantial Black population, and (2) research into how similar public safety laws and regulations were enforced in Wilmington at the same time.[176]

Interestingly, the enforcement picture with regard to the 1879 law in New Hanover County remained relatively stable over time. This is true even when using the 1898 Wilmington insurrection as an inflection point. One might initially suspect that the coup—which was driven in part by white fear that Black citizens were stockpiling firearms[177]—produced a government much more willing to enforce firearm restrictions in a discriminatory manner by targeting the Black population. We reviewed a subset of 164 prosecutions (56 prior to and including 1898 and 108 after that year) in which we could confidently identify the defendant's race *and* the year of the charge.[178] From 1879 to 1898, 80.3% of prosecutions were of Black defendants and 19.6% of prosecutions were of white defendants. From 1899 to 1908, 79.6% of prosecutions were of Black defendants and 20.4% of prosecutions were of white defendants.

FIGURE 2: SAMPLE OF CONCEALED-CARRY PROSECUTIONS BY YEAR



Sentences imposed for concealed-carry violations varied widely. Of the 39 white prosecutions in the data set, only 5 (or 12.8%) resulted

176 *See, e.g.*, *City Court*, DAILY REV. (Wilmington), July 31, 1880 (describing the prosecutions of two "colored" men each charged with selling certain products—vegetables or fresh meat—without an appropriate license).

177 *See, e.g.*, *Negroes Buying Guns*, NEWS & OBSERVER (Raleigh), Nov. 1, 1898, at 1.

178 The exact date of each prosecution was sometimes unclear because some minute book entries were undated and the volumes themselves spanned multiple years.

in a prison sentence or hard labor. By contrast, 39 out of the 156 Black prosecutions resulted in a sentence of prison time or hard labor, or 25%. This disparity, although based on a relatively small sample size, suggests some level of discriminatory sentencing for concealed-carry violations and warrants further research.[179]

If one is to take *Bruen*'s references to enforcement history as a serious directive to examine historical nuance and follow where it leads, even painstaking archival research into historical gun law enforcement may leave more questions than answers. In Wilmington and New Hanover County, for example, it seems quite clear that there was some level of discriminatory enforcement of the concealed-carry law against the Black population from 1879 to 1909. But determining the exact level of discrimination is nearly impossible due to the difficulty of unearthing a complete record—which makes sweeping conclusions about enforcement of the type that would likely be needed for use in judicial proceedings a perilous undertaking.

CONCLUSION

In *Bruen*, the Court frames its holding as merely leveling the playing field: the historical test the Court adopts, it says, "accords with how we protect other constitutional rights."[180] That statement is almost certainly inaccurate at face value, as most other areas of constitutional law do not currently employ a strictly historical-analogical implementing test.[181] However, to the extent the Court is serious about placing the Second Amendment on an equal playing field and limiting judicial discretion, its underarticulated approach to historical enforcement evidence and discriminatory taint within the historical-analogical test should take lessons from other areas of constitutional law.

Bruen appears to place the burden on the government to *refute* any suggestion that historical gun regulations were motivated by discriminatory intent or enforced in a discriminatory manner after enactment. The majority opinion, in a footnote observing scholarly research suggesting that surety laws may have been rarely or discriminatorily enforced, responded to concerns raised in Justice Breyer's dissent by noting that "the burden rests *with the government* to

179 This may reflect other discriminatory aspects of the state criminal system at the time which may have made it far more likely for Black citizens to have criminal history relevant to sentencing, or broad judicial discretion in sentencing that gave expression to judicial (rather than legislative) bias.

180 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022).

181 *See, e.g.*, Blocher & Ruben, *supra* note 20, at 133; *see also* Timothy Zick, *Second Amendment Exceptionalism: Public Expression and Public Carry*, 102 TEX. L. REV. 65, 68 (2023) ("In general terms, *Bruen*'s methodology does not comport or accord with how First Amendment rights are interpreted.").

establish the relevant tradition of regulation . . . [and a] barren record of enforcement [is] simply one additional reason to discount [a historical law's] relevance."[182] Allocating the burden of proof in this way—a principle *Bruen* appears to embrace for both discriminatory enforcement and nonenforcement—is inconsistent with the Court's past decisions outside of the Second Amendment and in substantial tension with the Court's normal approach of considering *any* conceivably proper legislative purpose as conclusively refuting discriminatory taint arguments.

The conventional rule placing the burden of proving a discriminatory legislative motive on the challenger appears to be a recognition of the fact that government action—including passing legislation—is normally entitled to an initial presumption of good faith.[183] This is a long-standing and well-established concept in the law, one that extends not just to legislatures but generally to all government actors.[184] It is also a very difficult presumption to refute, in part because the Court has explained that "[i]nquiries into congressional motives or purposes are a hazardous matter" and that any legislative act which *could have* been enacted for a proper purpose will not be voided due to statements from some legislators suggesting an improper personal motivation.[185] As one commentator notes, "[o]vercoming the shield of good faith is no easy task."[186]

While it is beyond the scope of this Article to propose specific doctrinal rules for future Second Amendment cases, it may be especially important in the Second Amendment context to adopt an approach that is more skeptical than a default presumption of discrimination, once raised. For one, the Second Amendment is an area where the

182 *Bruen*, 142 S. Ct. at 2149 n.25 (emphasis added).

183 *E.g.*, Abbott v. Perez, 138 S. Ct. 2305, 2324 (2018).

184 *See, e.g.*, United States v. Chem. Found., 272 U.S. 1, 14–15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

185 United States v. O'Brien, 391 U.S. 367, 383, 383–84 (1968); *see also* Ramos v. Louisiana, 140 S. Ct. 1390, 1426–27 (2020) (Alito, J., dissenting) (arguing that discriminatory taint should not matter if there is *any* legitimate justification for a law). This is especially relevant in the Second Amendment context, where one would assume that the historical statutes *themselves* are widely accepted to be facially constitutional. There is no argument, for example, that surety laws enacted shortly after 1791 were themselves unconstitutional or that they could not be supported by any proper purpose—indeed, a desire to protect public safety will always be a permissible legislative motivation. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) ("[T]he Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties." (citation omitted)).

186 Aaron J. Horner, Note, *How Difficult Is It to Challenge Lines on a Map?: Understanding the Boundaries of Good Faith in* Abbott v. Perez, 72 BAYLOR L. REV. 370, 380 (2020).

Supreme Court has been especially attentive to the possibility of judicial subjectivity influencing case outcomes,[187] and this is similarly a particular concern with discriminatory-taint claims.[188] Moreover, the tremendous complexity of unearthing historical enforcement records for gun regulations enacted in the 1700s and 1800s,[189] not to mention the fact that those records that do exist may reflect only a piece of the full historical record, counsels in favor of treating discriminatory taint claims cautiously. Such records are difficult to locate and the findings—while they may defy expectations in certain ways—are often unlikely to provide a complete or satisfying picture of how a gun regulation was enforced throughout the relevant historical period.

An approach that sanctions freewheeling reliance on discriminatory-taint claims based on cursory historical research, whenever the evidence aligns with the judge's substantive constitutional analysis, is likely to produce inconsistency, magnify discretion, and lead to judicial decisions that ignore important wrinkles in the historical record. The Court's consideration of legislative discriminatory-taint allegations in other areas of constitutional law holds important lessons that should be used to inform post-*Bruen* judicial analysis.

187 *See, e.g.*, *Bruen*, 142 S. Ct. at 2131 (decrying "judicial deference to legislative interest balancing"); *see also* Duncan v. Bonta, 19 F.4th 1087, 1159 (9th Cir. 2021) (VanDyke, J., dissenting) ("The majority of our court distrusts gun owners and thinks the Second Amendment is a vestigial organ of their living constitution. Those views drive this circuit's caselaw ignoring the original meaning of the Second Amendment and fully exploiting the discretion inherent in the Supreme Court's cases . . . ."), *vacated*, 142 S. Ct. 2895 (2022) (mem.).

188 Judges may inquire into possible discriminatory taint only when it produces an outcome consistent with their views on the substantive issues. For example, in *Ramos*, Justice Alito took a staunch stand against the relevance of *any* discriminatory-taint evidence in dissent while also believing that Louisiana's law was substantively constitutional. *Ramos*, 140 S. Ct. at 1425–27 (Alito, J., dissenting). In *Espinoza*, decided just days later, Justice Alito devoted seven pages to chronicling the sordid history of improper legislative motives for Montana's no-aid-to-religious-students provision and arguing that this discriminatory taint was relevant to the case—where the analysis cast doubt on a law he separately believed to be unconstitutional. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2267–74 (2020) (Alito, J., concurring).

189 *See supra* subsection II.C.2.