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

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ABSTRACT

The Supreme Court's 2022 decision in NYSRPA 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 appears 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 post-*Bruen, *where questions of historical enforcement can be especially nuanced.*

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.*

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INTRODUCTION

The Supreme Court's 2022 decision in *NYSRPA 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 historical firearm regulations were rarely enforced or enforced in a discriminatory manner.[3] Discriminatory or non-enforcement, 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 that evidence to the Court,[5] but how should judges weigh this evidence? Who bears the burden of proving discriminatory enforcement or non-enforcement, and by what standard must it be proved? What exactly is the "pay off," 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*

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[1] NYSRPA v. Bruen, 142 S. Ct. 2111, 2132 (2022).

[2] *See, e.g.*, Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. __ (forthcoming 2023); Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy: *The Role of History and Tradition*, 118 NW. U. L. REV. 1 (forthcoming 2023); Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming 2023); Michael P. O'Shea, *The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms*, 26 TEX. REV. OF L. & POLITICS 103, 111 (2022).

[3] *Bruen*, 142 S. Ct. at 2149 (emphasizing that a review of historical newspaper records regarding 19th-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") (citing Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right To Bear Arms* 15–17, in NEW HISTORIES OF GUN RIGHTS AND REGULATION (J. Blocher, J. Charles, & D. Miller eds.)); *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] *Bruen*, 142 S. Ct. at 2130 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. *See generally* W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190 (2022). It seems, at the least, a fair inference that *Bruen*'s two references to enforcement data are tied to the same project of

much? Is evidence of a law's enforcement only relevant immediately after the law was enacted; if not, how far post-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, 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

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attempting 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. (forthcoming 2023).

[8] *United States v. Rahimi*, __ S. Ct. __, 2023 WL 4278450 (June 30, 2023) (granting certiorari). Oral arguments in the *Rahimi* case will be held on November 7, 2023. *See* Monthly Argument Calendar November 2023, Supreme Ct. of the U.S., available at https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNovember2023.pdf.

[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 19th 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, United States v. 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).

[11] Many scholars have examined how courts should approach potentially improper legislative motivations. *See, e.g.*, Richard H. Fallon, *Constitutionally Forbidden Legislative Intent*, 130 HARV L. REV. 523, 523 (2016); Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1240–45 (2017); Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147 (2019).

intent, and to whether that improper purpose *persisted* after enactment. While the Court's equal protection jurisprudence sets an extraordinarily high bar for a challenger who seeks to strike down a law based on disparate impact,[12] certain Justices have appeared increasingly receptive to related arguments in recent years—both in terms of circumstantial evidence of discriminatory intent and potential discriminatory enforcement.[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 of firearm regulations, connects *Bruen*'s enforcement references to possible discriminatory legislative taint, and examines how similar issues are handled

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

[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 multi-jurisdictional 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, __ F. Supp. 3d __, 2023 WL 2499856, at *11 (D. Md. Mar. 13, 2023) (noting that "historians continue to explore, discover, interpret, and *disagree* about [] complex historical matters" including the enforcement of historical firearm laws).

[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*).

in other areas of constitutional law including criminal procedure, voting rights, and equal protection. Part II summarizes perhaps the most important area where the discriminatory enforcement issue may arise in future Second Amendment challenges: facially neutral Reconstruction era 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 is 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 12 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 perform 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, means-end scrutiny 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 test 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

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[16] *E.g.*, United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).
[17] NYSRPA v. Bruen, 142 S. Ct. 2111, 2129-30 (2022).
[18] *See generally* Charles, *supra* note __.

methodology.[19] While legal scholars have 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 looks far beyond a simple count of historical regulations and considers contextual evidence in numerous places.[23] These include two important instances where the Court suggests that uneven or discriminatory enforcement of certain firearm laws in specific jurisdictions may be relevant to the analogical inquiry.[24] First, the Court notes that one legal scholar has found that 19th-century surety laws were rarely enforced and may have been enforced discriminatorily against Black individuals in certain instances.[25] Here, the Court cites to legal

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[19] *See* United States v. Rahimi, __ S. Ct. __, 2023 WL 4278450 (Mem) (June 30, 2023) (granting certiorari in case challenging federal prohibition on individuals subject to certain domestic-violence restraining orders possessing firearms for the duration of the order).

[20] *See* Girgis, *supra* note __, at 11 (placing *Bruen* within a category of "living traditionalist" cases that "rely[] on post-ratification practices without an obvious originalist argument"); *see also* Joseph Blocher and Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. __, at 59 (forthcoming 2023) ("A narrow focus might lead to doctrine being constructed on the basis of unrepresentative traditions.").

[21] *See, e.g.*, Antonyuk v. Hochul, __ F. Supp. 3d __, 2022 WL 16744700, at *58-80 (N.D.N.Y. 2022), *appeal docketed*; *see also* Duncan v. Becerra, No. 3:17-cv-1017 (S.D. Cal.), Docket No. 134, Dec. 12, 2022 (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 20th 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 __ (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] *Id*. at 2149 (citing a survey of historical newspapers by Professor Robert Leider to glean the 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").

[25] *Bruen*, 142 S. Ct. 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 *non*-enforcement of historical laws, which presents similar methodological questions. *See, e.g.*, Darrell A.H. Miller, *Second Amendment Traditionalism and Desuetude*,

scholarship that examined historical newspapers to evaluate the use of similar surety laws enacted in ten states and the District of Columbia.[26] Second, the Court observes that Southern concealed-carry bans were often enforced discriminatorily against Black citizens in the post-Civil War era.[27] The Court here does not cite to any original research for this proposition, but rather to 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.[28]

Justice Breyer, in dissent, notes 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."[29] In a revealing exchange, Justice Thomas' majority opinion responds to this observation as follows:

> [T]he burden rests with the government to establish the

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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").

[26] *See* Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right To Bear Arms*, 249-57, in NEW HISTORIES OF GUN RIGHTS AND REGULATION (J. Blocher, J. Charles, & D. Miller eds.) (2023); *see also* Brief of Professors Robert Leider & Nelson Lund, & the Buckeye Firearms Ass'n as Amici Curiae in Support of Petitioners at 32, *Bruen*, 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, *Constitutional Liquidation,* at 254. That case may represent a discriminatory use of the law, according to Professor Leider's research, because "the newspaper believed that 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." *See* Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting, 1328-1928*, 55 U.C. DAVIS L. REV. 2545, 2586-88 & n.159, n.166 (2022); Eric M. Ruben and 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 non-enforcement). 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.

[27] *Bruen*, 142 S. Ct. at 2152 n.27.

[28] *See id.* (citing H. R. Exec. Doc. No. 57, 40th Cong., 2d Sess., 83 (1867); see also H. R. Rep. No. 16, 39th Cong., 2d Sess., 427 (1867)).

[29] *Id.* at 2180, 2187 (Breyer, J., dissenting).

> relevant tradition of regulation, and, . . . we consider the barren record of enforcement to be simply one additional reason to discount their relevance.[30]

In other words, to the majority, the burden is squarely on the government to *refute* evidence of non-enforcement (and, presumably, discriminatory enforcement[31])—meaning that the plaintiff's decision to merely offer the possibility of discriminatory enforcement establishes a presumption of discriminatory taint.[32] 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 interpretation.[33] 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."[34] This seems especially true with regard to *discriminatory* enforcement (as opposed to non-enforcement) because discriminatory enforcement more powerfully suggests that a law was not squarely within the American tradition of regulating firearms for public safety reasons—non-enforcement, by contrast, could simply indicate widespread compliance.[35]

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.[36] Four dissenting Eighth Circuit judges recently observed that,

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[30] *Id.* at 2149 n.25.

[31] This Article largely assumes that *Bruen* is best read to suggest an identical approach to evaluating both alleged non-enforcement 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 reasonable to believe such claims are evaluated in the same manner (absent explicit contrary direction from the Supreme Court).

[32] 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'").

[33] *E.g.*, Girgis, *supra* note __, at 1497-1500 (identifying *Bruen* within a list of recent "[l]iving-traditionalist rulings"); DeGirolami, *supra* note __ at 2-4 (making a similar observation).

[34] DeGirolami, *supra* note __, at 30 n.126.

[35] 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).

[36] United States v. Jackson, 2023 WL 5605618, at *2 (8th Cir. Aug. 30, 2023) (Stras, J., dissenting from denial of rehearing).

otherwise, "[a]ll sorts of firearms regulations will now be presumptively constitutional, with the burden falling on the regulated, not the regulator, to establish they are not [constitutional]."[37] As discussed in Part III.A *infra*, this is precisely how the Court has typically approached similar arguments about possible discriminatory motivations 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 more generally, although they have often struggled 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.[38] 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.[39] 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."[40]

Needless to say, *Bruen* leaves many open questions about how to assess any evidence of possible discriminatory enforcement 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 non-enforcement 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.

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[37] *Id.* at __.

[38] 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 (Higginson, J., concurring) (observing that "courts, operating in good faith, are struggling at every stage of the *Bruen* inquiry," including "the [] issue of enforcement").

[39] Kipke v. Moore, __ F. Supp. 3d __, 2023 WL 6381503, at *13 (D. Md. Sep. 29, 2023) (quoting *Bruen*, 142 S. Ct. at 2149).

[40] United States v. Combs, __ F. Supp. 3d __, 2023 WL 1466614, at *12 (E.D. Kentucky Feb. 2, 2023).

B. The Court's Approach to Discriminatory Taint outside of the 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 if or how discriminatory taint from enactment or post-enactment 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 19th and early 20th centuries were infected with racially discriminatory motivations, and that those motivations cast doubt on the laws' present-day constitutionality, are especially relevant.[41] 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.[42] 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.[43]

The Court's primary framework for evaluating discriminatory taint arguments comes from the equal protection context. The Court's precedents

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[41] 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 19th 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.

[42] *Bruen*, 142 S. Ct. at 2149, 2152 n.27. The petitioners in *Bruen* did argue that New York's Sullivan Law 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, *NYSRPA v. Bruen*, No. 20-843, at 14 (July 13, 2021). 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). The Court did not ultimately appear to place any significant weight on possible discrimination surrounding the Sullivan Law's enactment.

[43] 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.

require proof that discriminatory intent was a "motivating" factor in enacting a law to shift the burden to the state to justify its regulatory choices.[44] The Court has held that, "standing 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."[45] 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.[46] While evidence of disparate enforcement is normally not sufficient on its own to make out a prima facie equal protection violation,[47] it might be enough to shift the burden to the state 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."[48]

Two major recent decisions, however, illustrate how such discriminatory-taint arguments have surfaced anew outside of the Second Amendment and how the Court is increasingly casting the net wider and crediting even circumstantial evidence of discriminatory intent (which may include, in certain cases, discriminatory enforcement evidence) notwithstanding

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[44] Vill. 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).

[45] Washington v. Davis, 426 U.S. 229, 242 (1976).

[46] McCleskey v. Kemp, 481 U.S. 279, 298 (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 and Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 454-55 (2022).

[47] *See Washington*, 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 of Massachusetts 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").

[48] *Id.* at 241; *see also* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (similar result as *Hunter*, where enforcement records indicated that all 200 Chinese applicants for a laundry license in San Francisco were denied under a facially neutral law while 80 non-Chinese applications were granted, and "[t]he fact of this discrimination is admitted"); Norris v. Alabama, 294 U.S. 596 (1934) ("We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson County, that there were negroes qualified for jury service . . . established the discrimination which the Constitution forbid."); 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); *cf. Washington*, 526 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").

Washington v. Davis.[49] First, in *Ramos v. Louisiana*, the Court held that a Louisiana law permitting conviction of criminal defendants based on non-unanimous jury verdicts violated the Sixth Amendment's guarantee of a right to trial by jury.[50] The majority in *Ramos* explained in detail how the outlier approach permitting non-unanimous jury verdicts (which persisted in only Louisiana and Oregon) was tied to racial discrimination in the post-Civil War and Jim Crow eras.[51] 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).[52] 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*,[53] which upheld state non-unanimous verdict rules.[54] The dissenting opinion by Justice Alito, by contrast, stridently rejected the notion that discriminatory historical taint has any contemporary jurisprudential relevance.[55] Justice Alito would instead have adopted the *Washington* and *McCleskey* rule that any conceivable legitimate legislative purpose is sufficient to defeat such an inference:

> If Louisiana and Oregon originally adopted their laws allowing non-unanimous 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.*[56]

To Justice Alito, then, the possible discriminatory taint is simply not relevant

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[49] Scholars have asserted that the current Court is more susceptible to closely scrutinizing claims of discrimination in certain cases. *See* Khiara M. Bridges, *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).

[50] Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

[51] *Id.* at 1394-95.

[52] *See* Kyle R. Satterfield, *Circumventing* Apodaca: *An Equal Protection Challenge to Nonunanimous Jury Verdicts in Louisiana*, 90 TULANE L. REV. 693, 696-98 (2016) (Student Comment).

[53] 406 U.S. 404 (1972).

[54] *Ramos*, 140 S. Ct. at 1394.

[55] *Id.* at 1426 (Alito, J., dissenting).

[56] *Id.*

at all to constitutionality so long as there is *any* reason "why anyone might think that allowing non-unanimous verdicts is good policy"—as the Court has stated repeatedly in its Equal Protection jurisprudence.[57]

Second, in a decision issued only days later in *Espinoza v. Montana Department of Revenue*,[58] 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.[59] While the majority opinion makes no reference to possible discriminatory taint, Justice Alito concurred to note *Ramos*' reliance on historical discrimination (which he had specifically argued against considering in that case).[60] 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.[61] 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 tethered to its original bias, and it is not clear at all that the State actually confronted the provision's tawdry past in reenacting it," the provision should fall.[62]

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 where 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.[63] 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.[64] Finding no such evidence and

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[57] *Id.* at 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 it is unsound but by attacking the character or motive of the argument's proponents." *Id*. at 1426. 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).

[58] 140 S. Ct. 2246 (2020).

[59] *Id.* at 2262-63.

[60] *Id.* at 2267-68 (Alito, J., concurring).

[61] *Id.* at 2268-72 (Alito, J., concurring).

[62] *Id.* at 2274 (quoting *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring)).

[63] Abbott v. Perez, 138 S. Ct. 2305 (2018).

[64] Perez v. Abbott, 274 F. Supp. 3d 624, 649 (W.D. Tex. 2017), *rev'd and remanded,* 138 S. Ct. 2305 (2018) ("[T]he Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.").

concluding that discriminatory aspects (and thus the discriminatory core purpose) of the earlier redistricting plans continued, the district court enjoined the new maps.[65] 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."[66] In addition to placing the burden of proof on the plaintiff, *Abbott* stressed the potentially disruptive impact of judicial oversight of the redistricting process and emphasized that legislative action enjoys a presumption of "good faith."[67] *Abbott* goes further in its criticism of possible over-emphasis of historical discriminatory taint:

> Past 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*.[68]

Abbott discuses the Court's 1984 decision in *Hunter v. Underwood*,[69] 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

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[65] *Id.* at 648-50, 686.

[66] *Abbott*, 138 S. Ct. at 2324 (quoting Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 481 (1997)) (emphasis added). *Reno* similarly involved VRA 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, 62 (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).

[67] *Abbott*, 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 ("[U]ntil a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed.").

[68] *Id.* at 2324-25 (internal punctuation and citations omitted) (emphasis added).

[69] Hunter v. Underwood, 471 U.S. 222 (1985).

challenged under the Equal Protection Clause.[70] The Supreme Court found expert testimony regarding the immediate post-ratification enforcement of the provision (as well as the historical background of its enactment) to indisputably establish racist intent, despite the statute's facial neutrality.[71] 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."[72] 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 and/or enforcement.[73]

As scholars have noted, discriminatory taint arguments appear across many areas of constitutional and statutory law.[74] Some cases, like *Ramos,*

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[70] *Id.* at 223-24. The provisions at issue was 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 KOUSSE, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, 140-181 (1974).

[71] *See id.* at 227 (citing expert testimony that "estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. *This disparate effect persists today*").

[72] *Hunter*, 471 U.S. 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.

[73] 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 Hunter*, 471 U.S. at 229 ("The delegates to the all-white convention were not secretive about their purpose."); *Ramos*, 140 S. Ct. at 1394 (noting that the "avowed purpose of [the 1898 Louisiana constitutional] convention was to 'establish the supremacy of the white race'"); *see also* Kousse, *supra* note __, at 140-181 (describing the road to Democrat- and white-dominated constitutional conventions in various former confederate states in the late Reconstruction era).

[74] *E.g.*, Murray, *supra* note __; Fallon, *supra* note __; Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, *in* NOMOS LXI: POLITICAL LEGITIMACY 201, 219–23 (Jack Knight & Melissa Schwartzberg eds., 2019); Gabriel J. Chin, *Rehabilitating Unconstitutional Statutes: An Analysis of* Cotton v. Fordice, 71 U. CIN. L. REV. 421 (2002); Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505 (2018); Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471, 1473–74 (201); *see also* Noam Biale, Elizabeth Hinton, and Elizabeth Ross, *The Discriminatory Purpose of the 1994 Crime Bill*, 16 HARV. L & POL'Y REV. 602 (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).

Espinoza, and *Hunter*, involve arguments that long-ago discriminatory intent has modern-day consequences; others, like *Abbott*, 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*,[75] enforcement evidence is one primary 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[76] that this is a high bar not easily met.[77]

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.[78] 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.[79] 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

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[75] *Hunter*, 471 U.S. at 229 (citing evidence that Alabama's moral-turpitude excluision disproportionally burdened Black citizens).

[76] *See Arlington Heights*, 429 U.S. at 265 (noting that this burden shifting approach is "a principle well established in a variety of contexts").

[77] *See, e.g.*, McCleskey, 481 U.S. at 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"; 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"); Wallace v. Jaffree, 472 U.S. 38, 58 (1985) (relying on "*unrebutted* evidence of legislative intent").

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

[79] 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.

higher education system.[80] 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.[81]

Three general principles appear across many of these cases. First, the Court[82] 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.[83] When one considers the difficulty of demonstrating any unitary intent on the part of a large legislative body[84] and

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[80] 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).

[81] *See id.* 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.

[82] 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 re-hearing *en banc*, a panel of the Fifth Circuit Court of Appeals 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. Secretary of State Delbert Hosemann, 76 F.4th 378, 411 (5th Cir. 2023), *vacated pending rehearing*, 2023 WL 6304869 (Sep. 28, 2023). 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 388-90. 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.

[83] *See, e.g.*, *Ramos*, 140 S. Ct. at 1426-27 (Alito, J., concurring); *McCleskey*, 481 U.S. at 289 n.20.

[84] *See* Fallon, *Constitutionally Forbidden Legislative Intent*, *supra* note __, 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 the steps that contributed to the final

the almost impossibly high bar the Court has set for the disparate-impact arguments in the Equal Protection context,[85] perhaps this high standard and accompanying skepticism are warranted.[86] 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 contextual evidence.[87] This is consistent with the principle that government actions normally enjoy a presumption of good faith and constitutionality.[88] Finally, the Court often requires some connection or through-line from historical discriminatory intent or enforcement to modern-day discrimination; rarely does it conclude that discriminatory taint in the abstract is fatal, without reference to a possible continued negative impact or government failure to disclaim past discrimination.[89]

II. POST-BELLUM 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

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wording of the enacted text.").

[85] *See supra* notes 44-48 and accompanying text.

[86] *See, e.g.*, Rick Hasen, *Bad Legislative Intent*, 2006 WISC. L. REV. 843, 879-80 (2006) (arguing that, because it is so difficult to discern any true, unitary legislative motive, judicial over-emphasis of potentially improper legislative motives "will leave room for arbitrary results and the wide imposition of value judgments").

[87] *See, e.g.*, *Abbott*, 138 S. Ct. at 2324-25.

[88] *See, e.g.*, Brown v. Maryland, 25 U.S. 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*, 515 U.S. at 915.

[89] This is, perhaps, 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*, 140 S. Ct 1390, 1410 (Sotomayor, J., concurring) ("[T]he States' legislatures never truly grappled with the laws' sordid history in reenacting them."). *See also McCleskey*, 481 U.S. at 289 n.20 (requiring continuity between discriminatory Reconstruction era statutes and Georgia's modern-day capital punishment framework); *Fordice*, 505 U.S. at 729; *Hopkins*, 76 F.4th at 390 (noting the continued discriminatory impact of Mississippi's 1890 felon-disenfranchisement provision by citing a study of its application between 1994 and 2017).

taint. First, facially discriminatory laws, often passed close in time to the Founding but 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.[90] 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.[91]

This Article, however, deals instead with a second category of laws: facially *neutral* regulations that some argue were improperly motivated by race and/or enforced in a disparate manner, and for which evidence of enforcement may shed crucial light on these questions.[92] Public carry restrictions appeared with increasing frequency in post-Civil War southern states.[93] 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 Black

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[90] *See, e.g.*, "An Act for Disarming Papists and Reputed Papists, refusing to take the oaths to the Government," (1756), Hening, *Statutes at Large* 7:35; 1798 Ky. Acts 106, § 5 ("No negro, mulatto, or Indian whatsoever, shall keep or carry any gun, powder, shot, club, or other weapon whatsoever . . . ."); Acts of the General Assembly of North Carolina, **"**Free negroes not to keep or carry arms," Crimes and Punishments, 1840-1 Chapter 30; 1853 Or. Laws 257, An Act to Prohibit the Sale of Arms and Ammunition to Indians, § 1 (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").

[91] *See, e.g.*, Jacob Gershman, *Old Racist Gun Laws Enter Modern-Day Legal Battles,* WALL ST. JOURNAL (Feb. 27, 2023); United States v. Harrison, __ F. Supp. 3d __, 2023 WL 1771138, at *20 (W.D. Okla. 2023) ("[H]istorical restrictions on slaves and Indians provide no insight into the constitutionality" of modern gun regulations); *cf.* United States v. Daniels, __ F. 4th __, 2023 WL 5091317, at *14 (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."). 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); Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 75 STAN. L. REV. ONLINE 30 (2023) (arguing that *Bruen*'s method suggests abstracting higher-level regulatory principles from such laws).

[92] 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 non-discriminatory regulations complying with the Reconstruction amendments, the best (and perhaps) only evidence of a latent discriminatory intent will be enforcement in the years post-enactment.

[93] *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 935-37 (Breyer, J., dissenting) (describing state and local regulations during this period).

population and facilitate white supremacy. Prominent gun-rights scholars have argued that "Jim Crow laws [were] the foundation of gun control in America."[94] 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.[95] 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."[96] 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."[97] 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.[98]

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."[99]

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[94] David B. Kopel, *The Racist Roots of Gun Control*, adapted from KOPEL, THE TRUTH ABOUT GUN CONTROL (2013), available at https://perma.cc/SQ65-LLFT.

[95] 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 further in Part III.B.

[96] Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J. L. & PUB. POL'Y 17, 21 (Winter 1995).

[97] Watson v. Stone, 148 Fla. 516, 524 (1941).

[98] *See, e.g.*, Cramer, *supra* note __, at 21 (noting the "shortage of forthright statements of racist intent"); Nicholas Gallo, *Misfire: How the North Carolina Pistol Purchase Permit System Misses the Mark of Constitutional Muster and Effectiveness*, 99 N.C. L. REV. 530, 535-36 (2021) (Student Note) (arguing that North Carolina's permitting system for handguns was racially motivated and "inten[ded] [] to keep minorities from possessing handguns," 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 30 years prior).

[99] Brennan Gardner Rivas, *The Problem with Assumptions: Reassessing the Historical Gun Policies of Arkansas and Tennessee*, DUKE CENTER FOR FIREARMS LAW SECOND THOUGHTS BLOG (Jan. 20, 2022).

Based on original archival enforcement research in Texas, Rivas asserts that "racially biased enforcement of the deadly weapon law [Texas' 1871 statute] evolved over time and manifested itself during the 1890s, . . . directly related to the collapse of Black voting rights in Texas during that decade."[100] 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."[101] Similarly, Patrick Charles asserts that broad claims that 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."[102]

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.[103] As historian Eric Foner notes, however, "Reconstruction was part of the ongoing evolution of Southern society rather than a passing phenomenon." [104] 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

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

[101] *Id.* at 2622.

[102] 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 "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 1367-68 & n.119.

[103] *See, e.g.*, David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, at 111-12 (unpublished manuscript), available at https://davekopel.org/2A/LawRev/The%20History%20of%20Bans%20on%20Types%20of%20Arms%20Before%201900.pdf (observing that in 1874 Arkansas "elected Democratic majorities and ended Reconstruction," and that a concealed carry ban followed the next year).

[104] Eric Foner, *The Continuing Evolution of Reconstruction History*, 4 OAH MAGAZINE OF HISTORY 11, 13 (1989).

Reconstruction's political and economic agenda."[105] At times, Black legislators who served *after* the formal end of Reconstruction were involved in enacting gun regulation, including concealed carry and locational restrictions.[106]

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.[107] 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."[108] Yet "over 1,400 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."[109]

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

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[105] Foner, *supra* note __, at 13. To return to Arkansas as a case study, *see supra* note __, 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 12 legislators in 1891. *See* Blake J. Wintory, *African-American Legislators in the Arkansas General Assembly, 1868-1893*, 65 THE ARKANSAS HISTORICAL QUARTERLY 385, 388-92 (Winter 2006); *see also* Carl H. Moneyhon, *Black Politics in Arkansas during the Gilded Age, 1876-1900*, 44 THE ARKANSAS HISTORICAL QUARTERLY 222, 222 (Autumn 1985).

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

[107] ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION xi (1993).

[108] *Id.* at xiv.

[109] *Id.* at xiv-xxix.

of Black policy preferences during this time period, to the extent such an examination is possible, are former confederate and border states with sizable Black populations.[110] 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.[111] The provision was part of a larger bill to "regulate the conduct and to maintain the freedom and purity of elections" and to "prevent frauds, violence, intimidation, riot, tumult, bribery or corruption at elections."[112] Black state representatives in the Louisiana legislature voted 28-0 in favor of the bill, and Black senators voted 5-0 in favor.[113] The bill did not pass with unanimous or near-unanimous support; rather, 26 representatives and 12 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 wracked Louisiana in the immediate post-Civil War period.[114] 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.[115]

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[110] According to the 1870 census, there were 4.88 million Black individuals in the United States. Of that number, 3.96 million, or 81.8%, lived in states of the former confederacy. An additional 500,000-plus Black individuals lived in border states such as Kentucky, Maryland, and Missouri. 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.

[111] Act of Mar. 16, 1870, No. 100, § 73, 1870 La. Acts 145, 159.

[112] *Id.* at 145.

[113] DAVID R. POYNTER LEGIS. RSCH. LIBR., MEMBERSHIP IN THE LOUISIANA HOUSE OF REPRESENTATIVES 1812–2024 (July 11, 2023), https://house.louisiana.gov/H_PDFdocs/HouseMembership_History_CURRENT.pdf; A.L. LEE, OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES, Jan. Reg. Sess., at 236 (La. 1870); A.L. LEE, OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE SENATE, Jan. Reg. Sess., at 110 (La. 1870).

[114] *E.g.*, Michael T. Pfeifer, *The Origins of Postbellum Lynching: Collective Violence in Reconstruction Louisiana*, LOUISIANA HISTORY: THE JOURNAL OF THE LOUISIANA HISTORICAL ASSOCIATION, Vol. 50, No. 2 (Spring 2009), at 197 (describing how the election of 1868 "precipitated a wide-scale 'Counter Reconstruction' across the state as conservative white Louisianans mobilized against the Radical Republicans by forming paramilitary organizations . . . [and] unleashed a vast wave of violence against African Americans and white Republican Unionists").

[115] *See generally* Lou Falkner Williams, *Federal Enforcement of African American*

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."[116] 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.[117] 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."[118] 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.[119] 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.[120] At the time the law was passed, 12 of the 75 representatives in the state legislature were Black (as were 2 of the 26 senators).[121] These 14 Black legislators voted *unanimously* in favor of the bill.[122] In both Louisiana and Texas, then, the

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Voting Rights in the Post-Redemption South: Louisiana and the Election of 1878, 55 LOUISIANA HISTORY: THE JOURNAL OF THE LOUISIANA HISTORICAL ASSOCIATION 313 (Summer 2014) (explaining the numerous instances of violence committed by whites during the 1878 election in Louisiana, many of which involved the shooting of Black voters, candidates, and political leaders).

[116] Brennan Rivas, *Enforcement of Public Carry Restrictions: Texas as a Case Study*, 55 U.C. Davis L Rev. 2603, 2616 (2022); *see also* William D. Carrigan, The Making of a Lynching Culture: Violence and Vigilantism in Central Texas, 1836-1916, at 3 (Univ. Ill. Press 2004); Kenneth Howell, ed., *Still the Arena of Civil War: Violence and Turmoil in Reconstruction Texas, 1865-1874*

[117] *See* Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 98–100 (2016–2017) (noting that "the murder rate in Texas during the period from 1860 to 1868 was forty-five times that in New York," and that "between 1865 and 1867, for every white person murdered by a black person, thirty-seven black people were murdered by whites").

[118] Act of Apr. 12, 1871, Ch. 34, §1, 1871 Tex. Gen. Laws 1st Sess. 25.

[119] *Id.* §3 at 25–26.

[120] *See Bruen*, 142 S. Ct. at 2153; *see also Koons v. Platkin*, __ F. Supp. 3d __, No. CV 22-7463 (RMB/AMD), 2023 WL 3478604, at *76 (D.N.J. May 16, 2023); *see also* Brennan Rivas, *An Unequal Right to Bear Arms: State Weapons Laws and White Supremacy in Texas, 1836-1900*, 121 Southwestern Historical Quarterly 284, 295 (2018).

[121] LEGISLATIVE REFERENCE LIBRARY OF TEXAS, *Texas Legislators: Past & Present*, https://lrl.texas.gov/legeleaders/members/lrlhome.cfm?CFID=88159589&CFTOKEN=50296729 (last visited July 30, 2023).

[122] *See* Frassetto, *supra* note __, at 106. *See* also H.J. of Tex., 12th Leg., R.S. 523-32 (1871), available at https://lrl.texas.gov/scanned/Housejournals/12/03091871_523.pdf; S.J. of Tex., 12th Leg., R.S. 552-54 (1871), available at https://lrl.texas.gov/scanned/Senatejournals/12/03291871_538.pdf.

first Black elected representatives uniformly saw the need for and utility of enacted gun regulations to promote 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 slung-shots and carrying certain concealed weapons, including dirks and pistols.[123] Slung-shots were restricted in a number of states in the mid-to-late 1800s—while most states restricted the concealed carry of slung-shots, Florida's ban was broader in that it targeted manufacturing and sale.[124] This provision was part of a wide-ranging bill addressing crime, punishment, and criminal procedure.[125] 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.[126] The Florida slung-shot and concealed carry restrictions passed with the overwhelming support of the 18 Black representatives and senators then serving in the state legislature: 15 Black representatives voted in favor with only one opposed, and both Black senators supported the law.[127] 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

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[123] Act of Aug. 6, 1868, Ch. 1637, No. 13, Ch. 7, §11, 14, 1868 Fla. Acts and Resols. 61, 95.

[124] 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*, THE VOLOKH CONSPIRACY (Nov. 20, 2022).

[125] Act of Aug. 6, 1868, Ch. 1637, No. 13 at 61.

[126] *See* DANIEL R. WEINFELD, THE JACKSON COUNTY WAR: RECONSTRUCTION AND RESISTANCE IN POST-CIVIL WAR FLORIDA 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 FLORIDA HISTORICAL QUARTERLY 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).

[127] A JOURNAL OF THE PROCEEDINGS OF THE ASSEMBLY, 1st Sess., at 174 (Fla. 1868); S. 15, JOURNAL OF THE SENATE, 1st Sess., at 171 (Fla. 1868).

states bear the clear hallmarks of discriminatory, racist taint, perhaps meeting even the exacting standard the Court has utilized in cases such as *Washington*, *McCleskey*, and their progeny.[128] 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 upholding 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."[129] 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.[130] The state's white government enacted a series "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.[131] 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." While some have noted that North Carolina's Black Codes were potentially more lenient than those enacted in other Southern states,[132] that may be a distinction with no practical difference because "de jure race neutrality does not necessarily mean de facto race progressivism, or even moderation."[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

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[128] *See supra* Part I.B; *see also* Robert J Cottrol and Raymond T. Diamond, *"Never Intended to be Applied to the White Population*,*"* 70 CHI.-KENT L. REV. 1307 (1995).

[129] *State v. Nieto*, 101 Ohio St. 409, 430 (1920).

[130] WILLIAM ALEXANDER MABRY, THE NEGRO IN NORTH CAROLINA POLITICS SINCE RECONSTRUCTION 11 (1940).

[131] James B. Browning, *The North Carolina Black Code*, 15 JOURNAL OF NEGRO HISTORY 461, 461-73 (Oct. 1930); *see also* N.C. Public Laws, 1865-1866.

[132] *See generally* Theodore Brantner Wilson, THE BLACK CODES OF THE SOUTH (1965).

[133] John Thomas Warlick, IV, *"What's Part is Prologue: North Carolina's Forgotten Black Code* (2020) (Master's Thesis), at xx.

Black citizens.[134]

After North Carolina—along with other former confederate states—ratified the Fourteenth Amendment in 1868,[135] Black 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 17 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

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[134] *See* Warlick, *supra* note __, at 29-30; *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, 112-13 (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 THE N.C. HISTORICAL REV. 282, 282 (July 2009) ("By the autumn of 1882, the presence of African American legislators had become commonplace in the General Assembly.").

[137] *Id.* at 283.

[138] *See id.*; *see also* William A. Mabry, *Negro Suffrage and Fusion Rule in North Carolina*, 12 THE N.C. HISTORICAL REV. 79 (1935) (noting that, "[t]hough 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 ad that in certain other Southern states." Mabry, THE NEGRO IN NORTH CAROLINA POLITICS, *supra* note __, at 11-12.

[139] Brenda Sullivan, *Even at the Turning of the Tide: An Analysis of the North Carolina Legislative Black Caucus*, 30 JOURNAL OF BLACK STUDIES 815, 818 (2000).

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 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 "the 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 either 8 or 9 Black representatives.[146] Of

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[140] *See Blockade Runner Activity*, N.C. HISTORIC SITES (Dec. 13, 2022), at 4, available at https://historicsites.nc.gov/blockade-runner-activitydocxpdf.

[141] Mabry, THE NEGRO IN NORTH CAROLINA POLITICS, *supra* note __, 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.").

[142] Mabry, THE NEGRO IN NORTH CAROLINA POLITICS, *supra* note __, 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." 1879 N.C. Sess. Laws 231, *An Act to Make the Carrying of Concealed Weapons a Misdemeanor*, ch. 127, §§1, 2, 4. 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 Justice, available at https://ncdoj.gov/law-enforcement-training/law-enforcement-liason/concealed-weapon-reciprocity.

[144] Kopel and Greenlee, *supra* note __, at 4.

[145] 1889 N.C. Sess. Laws 502, An Act Making It a Misdemeanor to Handle Fire-arms in Certain Ways, ch. 527, § 1 (statewide law prohibiting pointing of firearms); 1893 N.C. Sess. Laws 468–69 (statewide ban on the sale of certain weapons, including pistols, to minors).

[146] *See* J.S. Tomlinson, *Tar Heel Sketchbook: A Brief Biographical Sketch of the Life and Public Acts of the Members of the General Assembly of North Carolina* (Raleigh, 1879) (listing eight Black representatives and two Black senators); *see also* Mabry, *supra* note __, at 24 (stating that the 1879 General Assembly included nine Black representatives).

the 8 Black representatives listed in the official compendium of the state legislature, 5 voted in favor of the concealed carry ban and 3 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 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] As with the voting information described in Part II.B *supra*, this suggests that there is more to the law than meets the eye.

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

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[147] JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA, Session 1879, at 481-82.

[148] JOURNAL OF THE SENATE OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA, Session 1879, at 227-29.

[149] *See* Profile in *N.C. Architects & Builders: A Biographical Dictionary*, N.C. STATE UNIV. LIB., available at https://ncarchitects.lib.ncsu.edu/people/P000337.

[150] Tomlinson, *supra* note __, 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.*

[151] JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA, Session 1879, at 481.

[152] *E.g.*, Gallo, *supra* note __, at 535-36 (arguing that, "when 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] intent[ed] to keep minorities from possessing handguns").

[153] *See Bruen*, 142 S. Ct. at 2152 n.27 (suggesting that discriminatory enforcement of some "Southern prohibitions on concealed carry" may mean that all such laws are suspect as potential historical analogues).

of how a law was enforced over time.[154]

With the assistance of a tremendous 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) until 1908. The records are housed at the North Carolina State Archives in Raleigh, where they are organized by county and court and can be viewed by any member of the public.[155] The project focused 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). The records are likely not a comprehensive record of enforcement—for one, certain years within the 1879-1908 timeframe were missing.[156] Research assistants reviewed all enforcement regardless of outcome—in other words, instances where the defendant received a criminal sentence (either after entering a guilty verdict at trial or pleading guilty), 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, including contemporary newspapers (which often reported on concealed-weapons prosecutions, at times listing the race of the defendant) and public ancestry databases.[157]

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

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[154] This work has been done in certain instances already, *see, e.g.*, Rivas, *supra* note __, and has clear advantages over an approach that uses only more easily-accessible sources such as historical newspaper databases—as scholars have used newspaper databases recognize. *See* Leider, *Constitutional Liquidation, supra* note __, 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.

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

[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] *See, e.g.*, ANCESTRYDNA, available at http://www.ancestry.com. 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.

court minute books which have not been electronically scanned or otherwise digitized. It took a team of six student research assistants, managed by the Center's executive director, 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. This work covered approximately 30 years of enforcement of the concealed carry law in a single North Carolina county; the state had approximately 80 to 90 counties during the relevant time period.[158] The data was then vetted and cross-referenced with ancestry databases and contemporary newspaper accounts, specifically accounts of criminal proceedings published regularly in *The Wilmington Morning Star*, *The Wilmington Messenger*, and *The Semi-Weekly Messenger*. A spreadsheet containing the full data set and links to the underlying images of the court records is available at ____.[159]

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 which are preserved and stored at the State Archives. However, concealed carry cases were likely also brought in the less formal Wilmington "Mayor's Court," and such jurisdiction-sharing was not unusual at the time.[160] 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,[161] 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 country criminal court to the Mayor's Court—meaning that it is often not

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[158] *See NC County Formation*, STATE LIBRARY OF N.C., available at https://statelibrary.ncdcr.gov/genealogy-and-family-history/family-records/nc-county-formation.

[159] Link to come

[160] 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 Prof. John V. Orth to Andrew Willinger (Feb. 21, 2023).

[161] *See, e.g.*, *Mayor's Court*, THE WILMINGTON MORNING STAR (Feb. 11, 1885), at 1 (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).

possible to follow a single case that was brought in the criminal court from start to finish solely from judicial records. The handwriting of the court minute books was often difficult to decipher, 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.[162]

While contemporary newspaper accounts were useful for matching defendant names, 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 weapons 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."[163] An earlier report on the same case in a different newspaper, however, identified Murphy as "colored."[164] 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, 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 concern with application of the law to Black defendants specifically.[165]

In sum, the records we 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

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[162] 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 many named "Tom Chavis" was prosecuted for and convicted of violated the concealed carry law. *Criminal Court*, THE WILMINGTON MORNING STAR (Oct. 5, 1882), at 1. "Chavis," however, appears to be a mis-transcription 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 co-defendant James Cowan. *Convicts of the Criminal Court*, THE WILMINGTON MORNING STAR (Oct. 17, 1882), at 1.

[163] *Superior Court in Session*, THE SEMI-WEEKLY MESSENGER (Jan. 25, 1907), at 3.

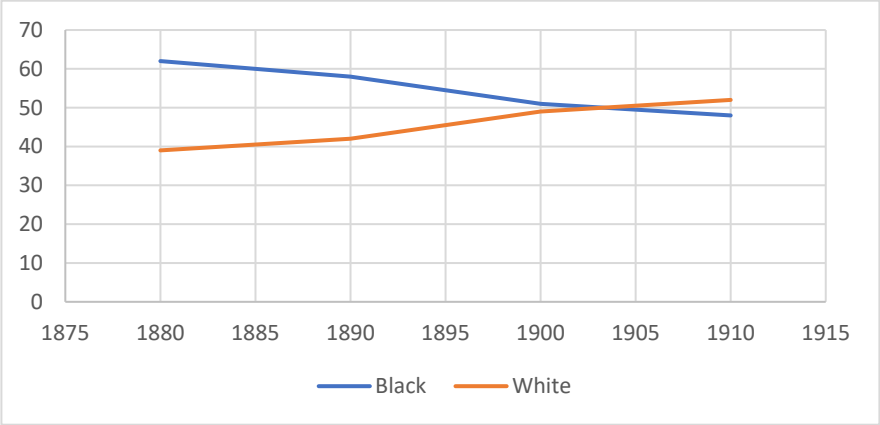
[164] *Pithy Locals*, THE WILMINGTON MESSENGER (Jan. 3, 1907), at 4.

[165] *See, e.g.*, *State Press*, THE WILMINGTON MESSENGER (Sep. 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).

of relying on inconsistent newspaper reports.[166]

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.[167] 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.

Table 1: Demographic Makeup of New Hanover County over Time (percentage of total population)



The city of Wilmington itself was even more heavily Black in the years leading up to 1900. According to an official report on the 1898 "race riot," Wilmington itself was 60.3% Black and 39.7% white in 1880 and 56.5% Black and 43.5% white in 1890.[168] The white population surpassed the Black

[166] *Cf.* Eric M. Ruben and Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121, 130-131 n.53 (2015) (noting that "traditional case law research is not especially probative of the application of [surety laws] . . . [because] in many cases those records did not survive the passage of time, and those that did are not well indexed or digitally searchable").

[167] *See generally North Carolina county-level tables from U.S. Decennial Census*, accessed through https://www.socialexplorer.com/. 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 GENEALOGY NOTES 1 (1996), https://www.archives.gov/publications/prologue/1996/spring/1890-census.

[168] *See 1898 Wilmington Race Riot Report*, 1898 Wilmington Race Riot Commission

population in Wilmington between 1900 and 1910 (as it did for the county as a whole). While impossible to verify, it is likely that most of the 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.

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 many 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.

Table 2: 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%

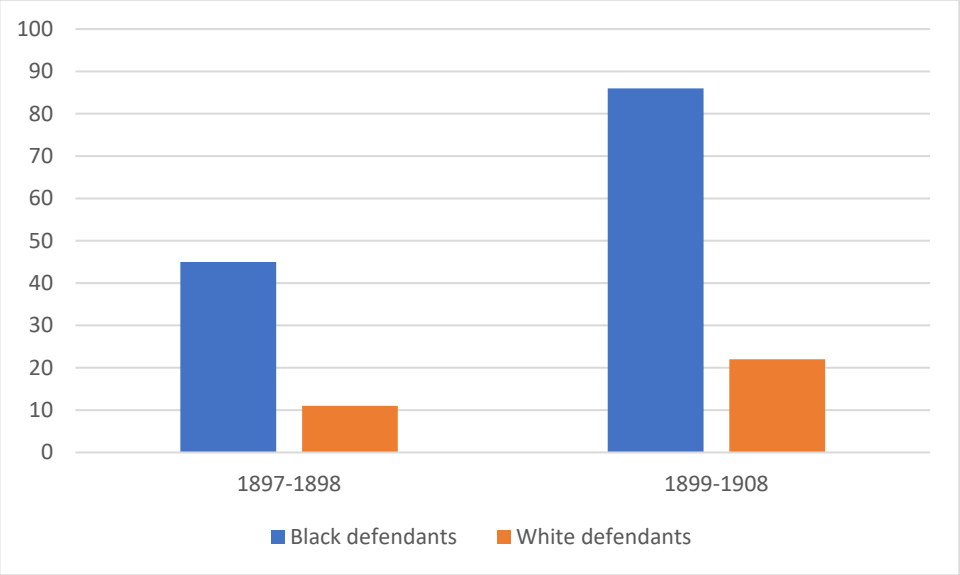
Interestingly, the enforcement picture with regard to the 1879 law remained relatively stable over time. This is true even when using the 1898 Wilmington insurrection as an inflection point. One might initially suspect that the coup—which was driven in part by white fear that Black citizens were stockpiling firearms[169]—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 date) in which we could confidently identify the defendant's race *and* the year of the charge.[170] 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.

(LeRae Umfleet, Principal Researcher), N.C. DEP'T OF CULTURE RESOURCES (May 31, 2006).

[169] *See, e.g.*, *Negroes Buying Guns*, THE NEWS & OBSERVER (Nov. 1, 1898).

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

Table 3: Sample of Concealed Carry Prosecutions by Date



Sentences imposed for concealed carry violations varied widely. Of the 39 white prosecutions in the data set, only 5 (or 12.8%) resulted 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.[171]

If one is to take *Bruen*'s references to enforcement history as a serious directive to examine historical nuance and follow where it leads, the record may be more complex than initially expected. As with the evidence of prosecutions before and after the 1898 Wilmington insurrection, enforcement data can be counterintuitive and detailed archival research (and the accompanying challenges and complexities) is crucial for claims about historical regulatory enforcement.[172] Perhaps most importantly, it is likely the case that even painstaking archival research into historical gun law enforcement will lead to more questions than answers—and that a definitive

[171] 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 which gave expression to judicial (rather than legislative) bias.

[172] *See, e.g.*, Rivas, *supra* note __, at 2620 (identifying the "need to prioritize the accuracy of [] history . . . and venture into the proverbial weeds of historical context — almost universally driven by local imperatives, and therefore *complicated*").

picture of how a law was enforced during a crucial historical period is impossible to reconstruct. In Wilmington and New Hanover County, for example, it seems quite clear from the data that there was some level of discriminatory enforcement of the concealed carry law against the Black population from 1879-1909. 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."[173] 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.[174] However, to the extent the Court is serious about placing the Second Amendment on an equal playing field and limiting judicial discretion, its under-articulated 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 establish the relevant tradition of regulation . . . [and a] barren record of enforcement [is] simply one additional reason to discount [a historical law's] relevance."[175] Allocating the burden of proof in this way—a principle *Bruen* appears to embrace for both discriminatory enforcement and non-enforcement—is inconsistent with the Court's past decisions outside of the Second Amendment and in substantial tension with

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[173] *Bruen*, 142 S. Ct. at 2130.

[174] *See, e.g.*, Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. (forthcoming), at 13-14; *see also* Timothy Zick, *Second Amendment Exceptionalism: Public Expression and Public Carry*, 102 TEX. L. REV. 1, 4 (2023) ("In general terms, *Bruen*'s methodology does not 'comport' or 'accord' with how First Amendment rights are interpreted.").

[175] *Bruen*, 142 S. Ct. at 2149 n.25.

the Court's normal approach of considering *any* conceivably proper legislative purpose as conclusively refuting discriminatory taint claims.

The conventional rule placing the burden of proving a discriminatory legislative motive on the challenger appears to be a recognition of the fact that governmental actions—including passing legislation—are normally entitled to an initial presumption of good faith.[176] 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.[177] 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.[178] As one commentator notes, "[o]vercoming the shield of good faith is no easy task."[179]

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 Supreme Court has been especially attentive to the possibility of judicial subjectivity influencing case outcomes,[180] and this is similarly a particular concern with discriminatory

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[176] *E.g.*, *Abbott*, 138 S. Ct. at 2324.

[177] *See, e.g.*, United States v. Chemical Foundation, 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.").

[178] United States v. O'Brien, 391 U.S. 367, 383–84 (1968); *see also Ramos*, 140 S. Ct. at 1426-27 (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. 57-00, 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.").

[179] Aaron J. Horner, *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).

[180] *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 (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

taint claims.[181] Moreover, the tremendous complexity of unearthing historical enforcement records for gun regulations from the 1700s and 1800s,[182] not to mention the fact that those records that do exist may reflect only a piece of the full historical record, counsel 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 free-wheeling reliance on discriminatory taint claims based on cursory historical research, whenever the evidence aligns with the 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.

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the Supreme Court's cases.").

[181] 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 the Louisiana's law was substantively constitutional. *Ramos*, 140 S. Ct. at 1426-27 (Alito, J., dissenting). In *Espinoza*, decided just days later, Justice Alito devoted eight 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 case doubt on a law he separately believed to be unconstitutional. *Espinoza*, 140 S. Ct. at 2267-74 (Alito, J., concurring).

[182] *See* infra Part II.B.