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ESSAY

RACE, RAMOS, AND THE SECOND AMENDMENT STANDARD OF REVIEW

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*Gun control in the United States has a racist history. Nevertheless, federal courts and academics have invoked Southern gun restrictions enacted after the Civil War to suggest that history supports stringent regulation of the right to bear arms. We argue that courts' reliance on these restrictions is illegitimate. Drawing on original research, we reveal how the post-war South restricted gun-ownership for racist reasons, deployed its new laws to disarm free Blacks, yet allowed whites to bear arms with near impunity. We then show how modern reliance on these laws contravenes the Supreme Court's decision in *Ramos v. Louisiana*, which deemed similarly tainted statutes unconstitutional. Since the Court will soon consider the validity of modern limits on concealed carry, placing Southern gun restrictions in their proper historical context matters today more than ever. While Southern gun control after the Civil War might tell us something about how the South sought to preserve white supremacy, it tells us almost nothing about the true scope of the Second Amendment.*

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INTRODUCTION

Imagine that a federal court must decide whether some challenged state action impermissibly burdens a constitutional right; say, the First-Amendment right to peacefully assemble. To discern how “fundamental” that right is, the court surveys the historical burdens past state legislatures have imposed upon it. It turns out that several states throughout the South enacted unlawful-assembly statutes from about 1870 to 1920. Relying on those historical restrictions, the court determines that it was then broadly agreed that states could curtail peaceful assembly. And that historical evidence, in the court’s view, shows that such a right must not be very “fundamental.” So on that basis, it upholds a modern law that likewise infringes the right to assemble.

But imagine, too, that the historical evidence the court relied upon was “tainted.” Further research reveals that Southern states enacted unlawful-assembly statutes in that period for racist reasons and enforced them disproportionately against racial minorities. Fearing newly freed slaves’ participation in political life, states passed facially neutral restrictions that they deployed in practice to bust up minority gatherings. The modern court invoking these laws apparently never discerned that critical context, taking them instead at face-value. Would anyone think the court wise to have relied on such tainted history in diluting modern assembly rights?

The answer, surely, is “no.” As the Supreme Court explained last year in *Ramos v. Louisiana*, laws enacted for racially discriminatory reasons that continue to burden constitutional rights deserve special scrutiny.¹ “[T]he racially discriminatory reasons” for which states originally adopted such laws cannot simply be “[l]ost in the accounting.”² To the contrary, laws’ “racially biased origins . . . uniquely matter,” especially when those laws continue to burden rights enshrined in the Constitution.³ In *Ramos* itself, for instance, the Court deemed unconstitutional tainted state laws that denied criminal defendants their Sixth-Amendment right to be convicted only by a unanimous jury.⁴

But if it’s really so clear that courts must discount racially tainted laws in their calculus of how “fundamental” society considers a right, then something has gone seriously awry in our federal courts in the context of

¹ 140 S. Ct. 1390, 1410 (2020).

² *Id.* at 1401.

³ *Id.* at 1408 (Sotomayor, J., concurring).

⁴ *Id.* at 1394–95.

another constitutional guarantee: the Second Amendment. In its *Heller* decision, the Supreme Court recognized that the Second Amendment protects an individual right to keep arms.⁵ Two years later, the Court's *McDonald* decision incorporated that right against the states.⁶ And recently, the Court agreed to hear a challenge to New York's concealed-carry restrictions in the case *New York State Rifle & Pistol Association v. Corlett* ("NYSRPA IP").⁷ But for the last decade, the Court has said nothing further about the scope of the individual right. So the task of grappling with basic questions that remain in *Heller*'s wake, like the Second Amendment's standard of review, has fallen to the lower courts. In that process, many courts have latched on to the sort of evidence that we just agreed was suspect: Southern gun restrictions enacted from about 1870 to 1920—the South's race-relations "nadir."⁸ Modern courts claim that those laws establish a historical consensus that states enjoy wide latitude to curtail the right to bear arms. And just as often, those courts have invoked such laws without a hint of appreciation that they might be marred by racial taint.

⁵ *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

⁶ *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 780 (2010). Uncertainty lingers over how the Second Amendment was incorporated against the states. In *McDonald*, four Justices opted to incorporate the Second Amendment via the Fourteenth Amendment's Due Process Clause. *Id.* at 742. Justice Thomas wrote alone to suggest that the Fourteenth Amendment's Privileges or Immunities Clause was the proper vehicle to accomplish incorporation. *Id.* at 838 (Thomas, J., concurring). Whether the right is incorporated under the Due Process Clause or the Privileges or Immunities Clause matters. The Due Process Clause protects *persons*, while the Privileges or Immunities Clause extends only to *citizens*. See U.S. Const. amend. XIV. Lower courts have largely ignored this distinction. See Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 *Stan. L. Rev.* 795, 833 (2017) (noting that "lower courts have given little outward sign of even recognizing *McDonald* as a case calling for analysis under the *Marks* framework"); see also Maxwell L. Stearns, *Constitutional Law's Conflicting Premises*, 96 *Notre Dame L. Rev.* 447, 504 (2020) (discussing the significance of Justice Thomas's separate concurrence in *McDonald*). We take the position that though five Justices agreed to the judgment that the Second Amendment applies to the states, whether it does so via the Due Process Clause or, instead, the Privileges or Immunities Clause remains an open question. We also note that the clauses' distinct language may affect the outcome in certain cases. Consider, for instance, whether a *non-citizen* may challenge a state law that restricts public carriage of firearms.

⁷ *N.Y. State Rifle & Pistol Ass'n v. Corlett*, 804 F.3d 242 (2d Cir. 2015), *cert. granted*, (Apr. 26, 2021) (No. 20-843).

⁸ Rayford W. Logan, *The Negro in American Life and Thought: The Nadir, 1877–1901* (1954); see also Alton Hornsby, Jr., ed., *A Companion to African American History* 312, 381, 391 (2008).

Though hardly unique, the Ninth Circuit's decision in *Young v. Hawaii* provides the latest example of this trend.⁹ There, a majority of the en banc Ninth Circuit affirmed Hawaii's functional ban on bearing arms outside the home. As part of its analysis, the majority presented a historical survey of state gun regulations, focusing in particular on the post-war American South, where such regulations were common. Its survey of Southern cases and statutes, the majority said, revealed that it was then "broadly agreed" that "firearms [] could be banned from the public square."¹⁰ Indeed, the majority reasoned, the legislatures of states like Texas, Alabama, Georgia, and Louisiana evidently did not think those gun-control laws inconsistent with the right to bear arms. Since that historical conception apparently tolerated copious restrictions on the right, the plaintiffs had no firm historical basis to challenge Hawaii's law.

Writing in dissent, Judge O'Scannlain urged caution about drawing too much from the "legislative scene following the Civil War."¹¹ He noted that the antebellum South had a long history of explicitly race-based bans on gun ownership, and he suggested that Southern states might have been up to something similar after the war, too. Post-war "Black Codes," for example, sought to infringe "freedmen's fundamental constitutional rights."¹² And he noted that the majority offered "no enforcement history" for the later, ostensibly race-neutral statutes that it invoked.¹³

For the majority, though, Judge O'Scannlain's warning was hardly a speedbump in its path to affirming Hawaii's law. In its 113-page opinion, the majority devoted a solitary footnote to his concern about the racial motivations behind the Southern laws the majority relied upon. It "[d]id not disagree" that the Black Codes were a relevant part of "the post-Civil War history."¹⁴ But it happily noted that soon after the Black Codes' advent, the nation adopted the Fourteenth Amendment to facilitate anti-discrimination laws and to bolster freedmen's rights. Thus, according to the majority, "it is not clear how th[e] history" of racially discriminatory Southern laws—supposedly snuffed out by the Fourteenth Amendment—"informs the issue before us."¹⁵

⁹ *Young v. Hawaii*, 992 F.3d 765, 773 (9th Cir. 2021) (en banc).

¹⁰ *Id.* at 801.

¹¹ *Id.* at 839 (O'Scannlain, J., dissenting).

¹² *Id.* at 840.

¹³ *Id.* at 844.

¹⁴ *Id.* at 822 n.43.

¹⁵ *Id.*

It is that remarkable statement this Essay seeks to correct. Southern race discrimination via gun-control statutes did not evaporate in 1868. Sadly, it persisted long after and even through facially neutral statutes. By missing that insight, the *Young* majority and like-minded courts have erred by uncritically invoking gun-control laws from the postbellum South as serious evidence that a broad historical consensus supported limiting gun rights. In response, this Essay employs original primary-source research to establish two key points. First, the desire to limit Black gun ownership often motivated Southern states' enactment of gun-control laws from around 1870 to 1920. Indeed, white society considered Black gun ownership conducive to chaos and disorder. Second, these racially biased motivations led to disproportionate enforcement of gun-control measures against Black citizens. In other words, these laws do not necessarily show a Southern distaste for the right to bear arms. But they certainly show disdain for exercise of that right *by Blacks*. So it is ironic—indeed, perverse—that courts should deploy these same tainted laws 150 years later to once again dilute American citizens' constitutional rights.

The case against courts' laundering of these racially tainted statutes proceeds in three parts. Part I details the present circuit split on the Second-Amendment standard of review and how various courts of appeals have deployed tainted historical statutes to dilute that standard. Part II presents the historical evidence that these Southern statutes were both racially motivated and unfairly enforced, even when neutral on their face. And Part III shows why continued reliance on such tainted statutes cannot be squared with the Supreme Court's decision in *Ramos*. Put simply, when courts evaluate modern restrictions on the right to keep and bear arms, they should reject sullied statutes and rely instead on untainted historical evidence.

I. A SPLINTERED STANDARD AND A TAINTED RECORD

Like its neighbors in the Bill of Rights, the Second Amendment anticipates that citizens may exercise in distinct ways the right that it protects. By the Amendment's terms, individuals may “keep . . . Arms” for self-defense, but they may also “bear” them.¹⁶ The Supreme Court's last words on the subject focused on the former issue—whether states may

¹⁶ U.S. Const. amend. II.

ban the “keeping” of commonly used arms.¹⁷ Though answering *that* question in the negative, the Court gave no definitive guidance about the validity of state bans on the *bearing* of guns via open or concealed carry. Lacking further direction, lower courts have intractably split on whether states may restrict the right to bear arms and on the standard of review that courts must apply to such restrictions.

Some courts have endorsed the view that states may not ban citizens from carrying handguns for self-defense outside the home. The Seventh and D.C. Circuits are notable examples.¹⁸ Both shunned reliance on the “tiers of scrutiny” framework familiar to other areas of constitutional law, instead extending *Heller* to protect the bearing of arms outside the home. In reaching that conclusion, the Seventh Circuit declined “another round of historical analysis” to determine the scope of the “bear” right.¹⁹ In its view, *Heller* had already “decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.”²⁰ But other circuits have resisted that conclusion. The First, Second, Third, Ninth, and Tenth Circuits have all adopted an “intermediate scrutiny” standard, under which they have upheld laws severely restricting the right to bear arms.²¹ And critically, circuits in this camp—along with legion academic commentators—have all relied upon postbellum Southern gun control to bolster their rejection of that right.²²

¹⁷ *District of Columbia v. Heller*, 554 U.S. 570, 581–82 (2008); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 780 (2010).

¹⁸ *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

¹⁹ *Moore*, 702 F.3d at 942.

²⁰ *Id.*

²¹ *Gould v. Morgan*, 907 F.3d 659, 673 (1st Cir. 2018); *Drake v. Filko*, 724 F.3d 426, 430 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Peterson v. Martinez*, 707 F.3d 1197, 1208 (10th Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012).

²² Many academics have relied on racially tainted postbellum Southern gun-control laws to reinforce their anti-gun-rights arguments. See Eric J. Mogilnicki & Alexander Schultz, *The Incomplete Record in New York State Rifle & Pistol Association v. City of New York*, 73 SMU L. Rev. F. 1, 4–6 (2020); David T. Hardy, *The Rise and Demise of the “Collective Right” Interpretation of the Second Amendment*, 59 Clev. St. L. Rev. 315, 339 (2011) (referencing facially neutral Southern gun control laws passed after the Civil War as historical evidence of constitutional limitations on the Second Amendment); Joseph Blocher, *Firearm Localism*, 123 Yale L. J. 82, 119 n.193, 120 n.195 (2013) (citing postbellum Southern gun-control laws without acknowledging possible tainted motivation for their enactment); see also Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 Tex. A&M L. Rev. 95, 95 (2016) (fighting back against the “current state of scholarship on Second Amendment history [that] paints post-Civil War firearms regulations

First to address the public-carry question was the Second Circuit in the 2012 case *Kachalsky v. County of Westchester*.²³ The dispute involved a New York law that requires citizens to show “proper cause” before obtaining a handgun-carry license—a requirement difficult to meet in practice.²⁴ To analyze that restriction’s validity, the Second Circuit reviewed the “history and tradition of firearm regulation” to select the appropriate level of scrutiny.²⁵ In so doing, the court detailed those historical laws that it thought supported “restrictions on the public carrying of weapons.”²⁶ Among them were several postbellum Southern statutes that, in various ways, restricted gun ownership. Examples the Circuit cited included an 1870 law from Virginia, an 1871 law from Texas, an 1880 law from Kentucky, 1881 laws from Arkansas and North Carolina, and an 1885 law from Florida. That historical survey led the Circuit to conclude that “[i]n the nineteenth century, laws directly regulating concealable weapons for public safety became commonplace and far more expansive in scope.”²⁷ Thus, in its view, “extensive state regulation of handguns has never been considered incompatible with the Second Amendment.”²⁸ And with that historical gloss, the Circuit settled on intermediate scrutiny to uphold New York’s “proper cause” requirement.²⁹

Likewise, in the 2013 case *Drake v. Filko*, the Third Circuit looked back to the South to judge a current law in the North.³⁰ The New Jersey law at issue required handgun-license applicants to demonstrate their “‘justifiable need’ to publicly carry a handgun.”³¹ In response to the appellants’ contention that this requirement violated the Second Amendment, the Third Circuit claimed that “[i]t remains unsettled whether the individual right to bear arms for the purpose of self-defense

as racist efforts by Southern states to prevent blacks from defending themselves against racial violence.”); Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & Contemp. Prob. 55, 62–64 nn.34–48 (2017) (listing a host of gun restrictions in different states).

²³ *Kachalsky*, 701 F.3d at 81.

²⁴ *Id.* at 84.

²⁵ *Id.* at 101.

²⁶ *Id.* at 90.

²⁷ *Id.* at 95.

²⁸ *Id.* at 100.

²⁹ *Id.* at 96.

³⁰ *Drake v. Filko*, 724 F.3d 426, 433 (3d Cir. 2013).

³¹ *Id.* at 429.

extends beyond the home.”³² To select the appropriate level of scrutiny, the Third Circuit followed *Kachalsky* and undertook a review of historical gun regulations. The Circuit cited *Kachalsky* several times for the proposition that “19th Century” history undermined the notion that self-defense outside the home belongs to “the core of the [Second] Amendment.”³³ Thus, after settling on intermediate scrutiny, the Third Circuit upheld New Jersey’s “justifiable need” requirement.³⁴

Dissenting, Judge Hardiman objected to the majority’s repeated invocation of *Kachalsky*. In his view, the Southern statutes that *Kachalsky* marshaled were distinguishable from New Jersey’s “justifiable need” requirement.³⁵ For instance, he argued, Southerners considered those historical bans permissible only because the weapons they targeted were not the sort of “arms” thought core to the right.³⁶ And “[t]o the extent that th[ose] state laws prohibited the carry of weapons used in war”—in other words, “arms”—“they were struck down.”³⁷ So Judge Hardiman thought the historical statutes had “little bearing” on modern laws regulating concealed carry.³⁸ But he left his criticism there, mentioning no further concern about possible racial taint.

In their own respective treatments of the issue, the First and Tenth Circuits have also invoked *Kachalsky* to reject Second-Amendment claims. In the 2013 case *Peterson v. Martinez*, the Tenth Circuit parried a challenge to a Colorado concealed-weapons law after concluding “that the carrying of concealed firearms is not protected by the Second Amendment[.]”³⁹ Citing *Kachalsky*, the Circuit noted that “concealed carry bans have a lengthy history” and that “most states banned concealed carry in the nineteenth century.”⁴⁰ Thus, it concluded, “the Second Amendment does not confer a right to carry concealed weapons.”⁴¹ Likewise, the First Circuit relied on *Kachalsky* to conclude “that there is no national consensus, rooted in history, concerning the right to public

³² Id. at 430.

³³ Id. at 436.

³⁴ Id. at 440.

³⁵ Id. at 451 (Hardiman, J., dissenting).

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013).

⁴⁰ Id. at 1211.

⁴¹ Id.

carriage of firearms.”⁴² Rather, the restrictions *Kachalsky* detailed led the Circuit to suggest that history “conflict[ed]” about the scope of the right to bear arms.⁴³ And given that supposed conflict, the court upheld the targeted restriction under intermediate scrutiny.⁴⁴

While most Circuits have been content to recycle *Kachalsky*, the Ninth Circuit offered a broader defense of why history undercuts the right to publicly bear arms. In its aforementioned *Young* decision, the en banc Ninth Circuit considered whether Hawaii’s functional ban on public carry violates the Second Amendment.⁴⁵ Judge Bybee, writing for the majority, held that it does not. Much of the historical record he dissected—for instance, the Statute of Northampton, ancient English treatises, and early colonial restrictions—falls well outside this Essay’s scope.⁴⁶ But after analyzing *those* sources, the majority, like its sister-circuits, discussed several postbellum Southern statutes. It noted that Tennessee enacted a law in 1870 banning “publicly or privately carry[ing] a dirk, swordcane, Spanish stiletto, belt or pocket pistol[,] or revolver.”⁴⁷ Three years later, Texas restricted “the carrying of ‘any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife.’”⁴⁸ The Louisiana Constitution of 1879, likewise, “provided that the right to keep and bear arms did ‘not prevent the passage of laws to punish those who carr[ied] weapons concealed.’”⁴⁹ And Alabama, for its part, not only “prohibited persons from carrying a ‘pistol concealed,’ but [] also made it ‘unlawful for any person to carry a pistol about his person on premises not his own or under his control.’”⁵⁰

The majority then offered “several observations” about these statutes.⁵¹ First, it said, this historical survey revealed that “states broadly agreed that small, concealable weapons, including firearms, could be banned from the public square.”⁵² And “[s]econd, although many of the states had constitutional provisions that guaranteed some kind of right to keep and

⁴² *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018).

⁴³ *Id.*

⁴⁴ *Id.* at 676.

⁴⁵ *Young v. Hawaii*, 992 F.3d 765, 773 (9th Cir. 2021) (en banc).

⁴⁶ *Id.* at 788–805.

⁴⁷ *Id.* at 806.

⁴⁸ *Id.* at 800.

⁴⁹ *Id.* at 817.

⁵⁰ *Id.* at 811.

⁵¹ *Id.* at 801.

⁵² *Id.*

bear arms, state legislatures evidently did not believe that the restrictions [] discussed here were inconsistent with their state constitutions.”⁵³ All told, then, the relevant history supposedly undercut any “general right to carry arms into the public square for self-defense.”⁵⁴

Judge O’Scannlain’s dissent, as we mentioned, broached several important criticisms of the majority’s reasoning. First, it noted the lack of any “record of enforcement” for the statutes at issue.⁵⁵ Merely symbolic gun laws that state governments never enforced presumably tell us little about the polity’s true thoughts on the right to bear arms. Next, Judge O’Scannlain observed that Southern states had long sought to regulate the possession of weapons *by Blacks*. In support of that point, he noted several sources from the 1860s that decried Southern attempts to strip freedmen of their right to keep and bear arms—a right those sources described as fundamental.⁵⁶

The majority swept aside those points, however, with almost-blithe facility. It noted that soon after stories of the Black Codes emanated from the South, the nation ratified the Fourteenth Amendment.⁵⁷ Its Privileges or Immunities and Equal Protection Clauses “guaranteed that all citizens would enjoy the same rights as ‘white citizens,’ including Second Amendment rights.”⁵⁸ But, said the majority,

those provisions do not tell us anything about the substance of the Second Amendment, any more than an equal right to enter into contracts or inherit property tells us whether the state may alter the Statute of Frauds or the Rule Against Perpetuities, so long as it does so for all citizens.⁵⁹

And with that, in an opinion that purported to exhaustively survey the historical evidence, the majority dismissed concerns about how race and discrimination might have informed its analysis.

⁵³ Id. at 801–02.

⁵⁴ Id. at 813.

⁵⁵ Id. at 847 (O’Scannlain, J., dissenting).

⁵⁶ Id. at 839–41, 847.

⁵⁷ Id. at 822 n.43.

⁵⁸ Id.

⁵⁹ Id.

II. “EVERY NEGRO IN THE CITY A WALKING ARSENAL”: THE RACIAL MOTIVATIONS UNDERLYING POSTBELLUM SOUTHERN GUN CONTROL

For about the first two-hundred years of American history, the colonies and early states enacted various racially explicit gun bans. By frustrating slaves’ ability to rebel, these laws preserved white supremacy and the slave-based American economy. As early as 1640, for example, Virginia prohibited Blacks, slave and free, from carrying weapons.⁶⁰ And it enacted a more extensive “act for preventing Negroes Insurrections” in 1680.⁶¹ The law forbade “any negroe or other slave to carry or arme himselfe with any club, staffe, gunn, sword or any other weapon of defence or offence.”⁶² A slave could possess such arms only with “a certificate from his master, mistris or overseer” for “perticuler and necessary occasions.”⁶³ Without a permit, a slave in possession of arms would be “sent to the next constable, who [was] hereby enjoyned and required to give the said negroe twenty lashes on his bare back.”⁶⁴ Those lashes, the law specified, were to be “well layd on.”⁶⁵

Similar laws pervaded other jurisdictions. In 1740, for instance, South Carolina enacted a statute making it illegal “for any slave, unless in the presence of some white person, to carry or make use of fire-arms.”⁶⁶ A slave could bear arms only with a “license in writing from his master, mistress or overseer.”⁶⁷ Whites who discovered slaves in possession of unlicensed weapons could seize the arms on the spot. If the slave resisted and seriously injured the white person, the law subjected the slave to a mandatory penalty of death.⁶⁸ In the same vein, Florida, Georgia, Texas,

⁶⁰ T. Markus Funk, Comment, Gun Control and Economic Discrimination: The Melting-Point Case-in-Point, 85 J. Crim. L. & Criminology 764, 796 (1995) (“In 1640, Virginia set up the first recorded restrictive legislation which prevented blacks from owning a firearm”).

⁶¹ Act X: An Act for Preventing Negroes Insurrections (June 1680), *reprinted in* 2 The Statutes at Large; Being a Collection of all the laws of Virginia, From the First Session of The Legislature in The Year 1619, 481 (William Waller Hening ed., n.d.), <https://encyclopediavirginia.org/entries/an-act-for-preventing-negroes-insurrections-1680/>. [https://perma.cc/X98X-PEP3]. Many of the historical sources we have quoted employ non-standard English. Rather than flagging each idiosyncrasy with a [sic] notation, we have chosen

instead to present the source-language as it originally appeared.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 1741-32 S.C. Acts 168, § 23.

⁶⁷ *Id.*

⁶⁸ *Id.* §§ 23–24.

Louisiana, North Carolina, and Mississippi passed their own racially explicit gun bans from around 1800 to 1860.⁶⁹ Louisiana forbade slaves from possessing weapons, while Florida authorized whites to enter Black persons' homes to search for and seize any firearms.⁷⁰ Mississippi, too, heavily restricted slaves' and free Blacks' possession of arms. As late as 1865, it barred any "freedman, free negro or mulatto" from possessing "fire-arms of any kind" without a license from "the board of police of his or her county."⁷¹

Soon after, of course, Mississippi and the broader South lost the American Civil War. One consequence was the panoply of new laws the United States imposed upon that region that aimed to secure the fundamental rights of free Blacks. Those included several Civil Rights and Enforcement Acts, along with the Fourteenth Amendment. The latter's ratification sought to ensure that freedmen might enjoy "the privileges or immunities of citizens of the United States," along with "the equal protection of the laws."⁷² In the *Young* Court's view, apparently, the advent of these guarantees heralded the end of invidious discrimination via Southern gun-control restrictions.⁷³

But as this Essay shows, that was unfortunately not the case. Rather, Judge O'Scannlain's dissenting appraisal was nearer the mark in three respects. First, to the extent that Southern states enacted new gun bans after the Civil War, race appears to have often motivated their decision to do so.⁷⁴ Second, Southern states enforced these laws against their white

⁶⁹ Black Code, ch. 33, sec. 19, Laws of La. 150, 160 (1806); Act of April 8, 1811, ch. 14, sec. 3, Laws of La. 50, 52–54 (1811); An Act to Govern Patrols, secs. 8–9, Acts of Fla. 52, 55 (1825); Act of Jan. 28, 1831, Fla. Laws 28, 30 (1831); Act of Dec. 23, 1833, sec. 7, 1833 Ga. Laws 226, 228 (1833); An Act Concerning Slaves, ch. 58, sec. 6, 1841 Laws of Tex. 171, 172 (1841); *State v. Newsom*, 27 N.C. 250 (1844) (upholding North Carolina's race-based ban); Act of Jan 1, 1845, ch. 87, 1845 Acts of N.C. 124; Act of Mar. 15, 1852, ch 206, sec. 1, 1852 Laws of Miss. 328; Act of Dec. 19, 1860, no. 64, Sec. 1, 1860 Acts of Ga. 56; see also Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bills of Rights*, 41 *Baylor L. Rev.* 629, 653 (1989) ("On November 6, 1866, the Texas legislature passed its first gun control measure, which was also the closest Texas came to adopting a black code provision to disarm freedmen.").

⁷⁰ Black Code, ch. 33, sec. 19, Laws of La. 150, 160 (1806); Act of Dec. 17, 1861, ch. 1291, sec. 11, 1861 Fla. Laws 38, 40.

⁷¹ *Certain Offenses of Freedmen*, 1865 Miss. Laws p. 165, §1, reprinted in 1 *Documentary History of Reconstruction* 289 (Walter L. Fleming ed. 1950).

⁷² U.S. Const. amend. XIV.

⁷³ *Young v. Hawaii*, 992 F.3d 765, 822 n.43 (9th Cir. 2021) (en banc).

⁷⁴ Robert J. Cottrol & Raymond T. Diamond, "Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a

populations only loosely. Third, to the extent that Southern states *did* enforce such laws, they enforced them disproportionately against their Black citizenry.⁷⁵ We examine these points in turn.

A. How Race Informed the South's Perceived Need for Gun Control

Across both time and space in the Reconstruction and Jim Crow South, white society reflected antipathy for the newfound phenomenon of Black gun ownership. Southern whites understood the relationship between guns and power. Precisely because the keeping of arms undergirds security and autonomy,⁷⁶ the antebellum South had denied that right to its Black population. So when, for instance, Black militias formed after the war's end to protect voting freedmen and to repel lynch mobs, whites lamented Blacks' nascent capacity for self-defense. That capacity engendered "[t]he white man's fundamental enmity," in other words, because it impugned his "position of authority."⁷⁷

In response, whites crafted narratives that reframed Black gun ownership not as a means of legitimate self-defense, but as a source of disorder and chaos. Already by 1866, a Norfolk periodical lamented "a mania which seems to exist among a portion of the negro population for carrying concealed weapons."⁷⁸ Likewise, a writer in Memphis,

National Jurisprudence?, 70 *Chicago-Kent L. Rev.* 1307, 1318 (1995) ("Free blacks were subject to a variety of measures meant to limit black access to firearms through licensure or to eliminate such access through outright prohibitions on firearms ownership.").

⁷⁵ F. Smith Fussner, *That Every Man Be Armed, the Evolution of a Constitutional Right*, 3 *Const. Comment.* 582, 585 (1986) (reviewing Stephen P. Halbrook, *That Every Man Be Armed* (1984)) ("After the Civil War the states of the old Confederacy tried to use pretexts of various kinds to keep blacks from acquiring and using arms."); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 *BYU L. Rev.* 1359, 1415–16 (1998) (noting that "gun control in the nineteenth century was almost exclusively a Southern phenomenon. In the post-Civil War period, the Southern gun laws were clearly aimed at controlling the Freedmen; although written in racially neutral terms, the laws were meant for, and applied almost exclusively to, blacks.").

⁷⁶ Noted constitutional commentator St. George Tucker described the Second Amendment as "the true palladium of liberty" and "[t]he right of self defense [a]s the first law of nature." 1 *St. George Tucker, Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 300 (1803). Frederick Douglass likewise famously remarked "that the liberties of the American people were dependent upon the Ballot-box, the Jury-box, and the Cartridge-box[.]" *The Life and Times of Frederick Douglass: From 1817–1882*, 333 (John Lobb ed., 1882).

⁷⁷ Otis A. Singletary, *The Negro Militia Movement During Radical Reconstruction*, *LSU Historical Dissertations and Theses*, at vii (1954).

⁷⁸ *Virginia News, Alexandria Gazette and Virginia Advertiser*, Dec. 6, 1866, at 1.

Tennessee complained in 1867 that “[n]early all the negroes in th[is] city carry concealed weapons.”⁷⁹ “As a natural consequence,” the author wrote, “colored shooting affrays are becoming very frequent.”⁸⁰ In 1871 South Carolina, Black gun ownership was said to have “brought the negroes into troubles, for without [arms], they would not have arrayed themselves in hostility to the white people.”⁸¹ And later writers in both South Carolina and Tennessee explicitly connected Black gun ownership to election fraud and voter intimidation. In 1879, for instance, a Democratic paper in South Carolina rued that the state’s Republican governor had, “in violation of every right of a free citizen, [disarmed] the whites . . . while the negro militia, in the midst of a heated political contest, [was] not only allowed to keep their rifles and muskets, but encouraged to use[] them, to menace the whites, and overawe and intimidate colored voters.”⁸² This show of force supposedly corrupted “the free choice of the voter,” thus rigging the system in favor of Republicans.⁸³ In Mississippi too, alleged Republican encouragement for “negroes to carry pistols to the polls” had led to an “inexcusably brutal outrage” in 1881: when a white voter tried to cane a Black man at a polling place over a supposed insult, another Black man pulled a gun, shooting and killing the white assailant.⁸⁴

These narratives on disorder and chaos persisted over time. In 1882, Kentucky’s *Daily Evening Bulletin* opined that “[t]his thing of negroes carrying concealed deadly weapons is a growing evil that should receive the strictest enforcement of the law.”⁸⁵ An 1883 column from Jacksonville, Florida likewise warned that “every negro in the city” had become “a walking arsenal.”⁸⁶ Jacksonville police reported that “a large proportion of the negroes in this city are provided with a dirk knife, razor[,] or pistol”—a trend the column suggested should merit severe punishment.⁸⁷ In Georgia too, the Lyons *Morning News* argued in 1893 for a new concealed-weapons law, since “[a]lmost every negro that one

⁷⁹ Locals in Brief, Public Ledger, July 20, 1867, at 1.

⁸⁰ Id.

⁸¹ The Fight at Carmel Hill, The Courier, Mar. 17, 1871, at 1.

⁸² J.H. Evins, Unexampled Forbearance of the Whites, The Weekly Union Times, Apr. 4, 1879, at 1.

⁸³ Id.

⁸⁴ Murder at Marion, The Memphis Daily Appeal, Nov. 11, 1881, at 1.

⁸⁵ The State of Lewis at Large, Daily Evening Bulletin, Nov. 22, 1882, at 1.

⁸⁶ Crimes in Jacksonville, The Savannah Morning News, Sept. 5, 1883, at 1.

⁸⁷ Id.

meets is armed.”⁸⁸ “Some of them,” according to the editor, even “carr[ie]d two pistols and a Winchester rifle”—a behavior that “cursed” the population and merited “strictly enforced” legislative countermeasures.⁸⁹

One incident in North Carolina that drew on these narratives of chaos and disorder deserves special examination. Around the fall of 1898, white-supremacist Democrats, led in part by future North Carolina congressman John D. Bellamy, organized white resistance to the city of Wilmington’s biracial government. Bellamy and other prominent figures conspired to foment anger among white citizens about this so-called “Negro Rule” before the congressional elections of 1898.⁹⁰ After several increasingly violent attacks on Wilmington’s Black citizens, Bellamy’s associate Alfred Waddell assembled a posse of about 2,000 whites.⁹¹ After equipping itself at Wilmington’s armory, the posse roamed the streets, killing the Black persons they could find and destroying Wilmington’s Black-owned businesses.⁹² Perhaps 60 Black citizens perished, while thousands of others fled and took shelter in nearby swamps.⁹³

Yet when Bellamy was later sued for his role in the massacre, he reframed the event as a “race riot” that ensued only after “a negro mob” had armed itself in “utter disregard . . . for law and order.”⁹⁴ Bellamy argued that this was to be expected: “[N]egroes constantly carry concealed weapons,” he testified, “and . . . the razor, the pistol, the slingshot[,] and the brass knuckle seem to be their inseparable accompaniments as a class.”⁹⁵ “[A]lthough there are some very respectable law-abiding and property acquiring citizens of that race,” he conceded, “it is a very small portion of them.”⁹⁶ So, in Bellamy’s view, the posse’s brutality did not stem from the violent white-supremacist movement that he had cultivated. The true culprit, he said, was Black

⁸⁸ The Concealed Weapon Evil, *The Morning News*, Sept. 8, 1893, at 6.

⁸⁹ *Id.*

⁹⁰ LeRae Umfleet, et al., 1898 Wilmington Race Riot Report, North Carolina Dep’t of Cultural Resources 59–60, 76, 78, 83–84, 125, 371 (May 31, 2006).

⁹¹ 1898 Wilmington Race Riot Report *supra* note 90, at 129.

⁹² *Id.* at 121, 133.

⁹³ *Id.* at 1.

⁹⁴ *Dockery v. Bellamy: The Taking of Depositions Resumed*, *The Semi-Weekly Messenger*, Apr. 14, 1899, at 3.

⁹⁵ *Id.*

⁹⁶ *Id.*

citizens' carriage of arms. Bellamy eventually prevailed in the litigation, allowing him to take his seat in Congress.⁹⁷ But while his actions were especially horrific, his rhetoric was familiar—that Black citizens' possession of arms had instigated violence and disorder.

These themes continued to reverberate throughout the South during and after the turn of the twentieth century. In 1899, for instance, Cheneyville, Louisiana passed an ordinance that aimed to restrain the “custom among a certain class of worthless negroes to carry concealed weapons upon their persons[.]”⁹⁸ Similar rhetoric surfaced soon after in Georgia. In a 1901 lecture delivered at a Valdosta prison, Judge Estes of the Valdosta superior court opined that it was hard to believe the “worthless[.]” “pistol toting negroes of the present generation are the descendants of the . . . good old negroes of the former days.”⁹⁹ A 1907 Mississippi paper, likewise, bemoaned “negro . . . pistol toting” and suggested “that there is needed extreme legislation for suppression of pistol toting; especially for protection of lives of the peace officers who are called on almost daily to arrest turbulent and recklessly murderous negroes.”¹⁰⁰

Other contemporary sources were just as frank about the racial bias that had motivated Southern gun-control measures. While debating a 1901 South Carolina proposal, State Senator Stanwix Mayfield introduced an amendment requiring applicants for a concealed-carry permit to pay the princely sum of \$50.¹⁰¹ “If a man thinks he ought to go armed let him pay a license,” Mayfield argued.¹⁰² Moreover, “[n]egroes will not take out a license and one-half of the population will thus be eliminated.”¹⁰³ And that was the problematic half, in Mayfield's view, since “[t]here is little trouble” arising from concealed carry “among white people.”¹⁰⁴ In a similar vein, Charles R. Tarter of Brevard County, Florida suggested in 1907 to Virginia's *Clinch Valley News* some lessons that Virginia might take from Florida's treatment of “the race problem.”¹⁰⁵ In Florida, Tarter

⁹⁷ 1898 Wilmington Race Riot Report *supra* note 90, at 200–01.

⁹⁸ To Restrain Worthless Negroes, *New York Tribune*, Aug. 14, 1900, at 1.

⁹⁹ The Good Old Negroes: Judge Estes' Lecture to Prisoners at Valdosta, *The Morning News*, Nov. 24, 1901, at 9.

¹⁰⁰ The Pistol Toting Negro in Evidence, *The Greenville Times*, Dec. 28, 1907, at 1.

¹⁰¹ Synopsis of the Daily Proceedings of the House and Senate, *The Yorkville Enquirer*, Feb. 16, 1901, at 1.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Charles R. Tarter, The Race Problem in Florida, *Clinch Valley News*, June 28, 1907, at 2.

opined, “[w]e have no race problem [] in Brevard [C]ounty.”¹⁰⁶ Rather, “[t]he ‘n—r’ is held in humble submission here.”¹⁰⁷ One aspect of that “submission” was Brevard County’s law requiring that whoever wished to carry a long gun have a bond guaranteed by “two good men.”¹⁰⁸ As Tarter explained, “[i]t’s purpose was to keep fire arms out of the negroes hands[,] and it did all it was intended for. No negro can get a bond accepted,” and “few ever try.”¹⁰⁹ In Tarter’s view, such a restriction bolstered law and order. “There has never been an assault, or an insult offered a white woman by a n—r in this county,” he claimed, and “in fact, there’s practically but few cases of criminal assault ever in the state.”¹¹⁰

Sources in Alabama, too, connected Black gun ownership to themes of disorder and the status of white supremacy. In 1907, Alabama State Senator Evans Hinson warned that “black belt negroes are better armed than whites.”¹¹¹ Thus, he thought, Alabama needed a “new law regarding carrying weapons.”¹¹² Though laws on the books regulated possession of pistols, he thought the law should also cover long guns. Otherwise, he worried that “negroes would have on hand for immediate use incomparably more improved firearms than would the whites.”¹¹³ Thus, he feared that whites might be outgunned in the event of a future “race riot.”¹¹⁴ Alabama newspaperman Edward Ware Barrett, owner of Birmingham’s *Age-Herald*,¹¹⁵ likewise suggested that Black citizens’ gun ownership placed respectable whites under siege. “A man with a home and family,” Barrett remarked, “feels that he cannot go out of town without employing an armed squadron to protect his home against pistol

¹⁰⁶ Id.

¹⁰⁷ Id. (racial slur censored).

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ Id. (racial slur censored).

¹¹¹ Evans Hinson, *Black Belt Negroes are Better Armed Than Whites*, *The Age-Herald*, May 1, 1907, at 9.

¹¹² Id.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ George M. Cruikshank, *2 A History of Birmingham and Its Environs: A Narrative Account of Their Historical Progress, Their People, and Their Principal Interests*, 180 (1920).

toting negroes[.]”¹¹⁶ Otherwise, he feared, they might “go out to shoot up his servants and endanger[] the lives of his wife and children.”¹¹⁷

So what has this historical survey told us? A couple of things, we think. First, it shows that racist attitudes about Black gun ownership pervaded the post-war American South. White society, or at least those portions of it captured in the cited periodicals, thought Black gun ownership a particularly dangerous reality; one conducive to disorder and corrosive to the Southern social fabric. It was a problem, the sources tell us, in need of novel restrictions and “extreme legislation.”¹¹⁸ Second, and concomitantly, it reveals that courts today should hesitate to invoke Southern gun restrictions as evidence about Southern society’s views on the right to bear arms *generally*. To the contrary, this evidence reflects Southern society’s specific desire to counter a particular “problem”: its disdain for *Black citizens’* keeping and bearing of arms. Parts II.B and II.C, in turn, present the evidence for that observation’s logical corollaries: that Southern states did not enforce these restrictions rigorously against *whites*, but enforced them with alacrity against *Blacks*.

*B. Southern States’ Under-Enforcement of Gun Control Laws
Against White Society*

As noted above, Judge O’Scannlain also criticized the *Young* majority’s statutory survey for omitting a serious discussion of the laws’ “enforcement history.”¹¹⁹ The majority conceded that the question of enforcement was “a fair one.”¹²⁰ Unenforced statutes may eventually fall “into desuetude,” the majority noted, rendering such legislative proscriptions “merely symbolic.”¹²¹ But after admitting that enforcement questions were “beyond the materials that [it] ha[d] seen,” the majority incongruously argued that the Southern statutes it cited were “*not* merely symbolic.”¹²² Instead, it suggested that the statutes’ commonality across the South was somehow self-proving evidence of their enforcement. And

¹¹⁶ Edward Ware Barrett, Ned Brace Talks About Things At Home and Makes A Few Suggestions, *The Age-Herald*, Jan. 7, 1912, at 28.

¹¹⁷ *Id.*

¹¹⁸ *The Pistol Toting Negro in Evidence*, *The Greenville Times*, Dec. 28, 1907, at 1.

¹¹⁹ *Young v. Hawaii*, 992 F.3d 765, 844 (9th Cir. 2021) (en banc) (O’Scannlain, J., dissenting).

¹²⁰ *Id.* at 823.

¹²¹ *Id.*

¹²² *Id.* (emphasis added).

the majority noted that it *had* assembled a few Southern cases involving weapons prosecutions, which it claimed “*proves that the statutes were enforced.*”¹²³

The majority’s leap from confessing that it had no evidence of enforcement history to its conclusion that it had “prove[n]” the statutes’ enforcement was sophistical.¹²⁴ A few instances of enforcement in reported cases do not show that such laws were enforced *broadly* or that Southerners considered them an enforcement priority. Indeed, one scholar has labeled reasoning like the majority’s the “lonely fact” fallacy.¹²⁵ Having identified a few discrete historical examples, the majority then assumed without support that those data points represented general trends.

But they did not, at least according to the evidence we have uncovered. To the contrary, contemporary Southern sources consistently noted two important points. First, the carrying of concealed weapons throughout the postwar South was extremely common. And second, Southern states rarely enforced their laws against that practice. (Save for those occasions when the unfortunate defendant belonged to a racial minority; a trend we discuss in Part II.C.) So Judge O’Scannlain’s dissent was nearer the mark yet again. For the laws the majority cited often *were* “merely symbolic.”¹²⁶

Already in 1880, for example, a Mississippi periodical observed that the state’s concealed-weapons law “[wa]s not enforced anywhere in the State.”¹²⁷ And it pointed out the likelihood that “the concealed weapon law will never be strictly enforced in this or any other State, unless the law should go further and give officers the right to search every man to ascertain whether he had concealed weapons on his person or not.”¹²⁸ Such a law, it said, would be both “unconstitutional,” given its imposition on liberty, and “absurd,” given the resources required to enforce it.¹²⁹ Likewise, Louisiana’s *Meridional* noted in 1878 that the state had “an act prohibiting persons from carrying concealed weapons,” but that it was “not enforced[.]”¹³⁰ The author suggested that some enforcement might be wise, since “one cannot travel fifty yards from the parish seat” without

¹²³ *Id.* (first emphasis added).

¹²⁴ *Id.*

¹²⁵ Ilan Wurmin, *Law Historians’ Fallacies*, 91 N.D. L. Rev. 161, 203 (2015).

¹²⁶ *Young*, 992 F.3d at 823.

¹²⁷ *Concealed Weapons*, *St. Landry Democrat*, Feb. 7, 1880, at 4.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *The Lafayette Advertiser*, Mar. 30, 1878, at 2.

meeting persons armed with concealed pistols.¹³¹ South Carolina's *Weekly Union Times* sounded similar themes in 1880. It noted that while "[t]he law against carrying concealed weapons may be enforced in the towns and cities where special ordinances are passed . . . the State laws on this subject are not worth the paper they are written on, from the fact that they will never be enforced."¹³² Predictably, "nobody [was ever] tried for the offence."¹³³

These themes persisted throughout the South for decades. Mississippi's *Magnolia Gazette* noted in 1883 that a new weapons law might be desirable. But the column's author doubted that "it can or will be done," given the practical difficulties of enforcing such a statute.¹³⁴ "The law as it exists," the author noted, "is almost inoperative."¹³⁵ Five years later, South Carolina's *Laurens Advertiser* observed that "the law in regard to carrying concealed weapons[] [wa]s never enforced," given that citizens lacked any "sense of duty" to obey it.¹³⁶ And in Kentucky, similar laws' enforcement fared no better. In 1891, for instance, Kentucky Governor John Y. Brown simply stopped enforcing the state's concealed-weapons law for several years.¹³⁷

Again, it must be said, the rarity of prosecutions did not stem from the rarity of concealed carry. To the contrary, a Missouri periodical noted in 1897 that "[t]housands of the so called 'best men' of every community in many of the southern states carry daily the faithful revolver in the pistol pocket."¹³⁸ It was *despite* that fact that only "at rare intervals . . . men are prosecuted for carrying concealed weapons."¹³⁹ Indeed, prosecutions were rare not because carrying was rare, but because there was so "much looseness in the enforcement of the statutes[.]"¹⁴⁰

Turn-of-the-century South Carolina was no more enthusiastic about enforcing its own concealed-weapons law. *The Union Times* wondered in 1900 why the "law against carrying concealed weapons is not more

¹³¹ *Id.*

¹³² Sins Which the Law Cannot Reach, *The Weekly Union Times*, Nov. 12, 1880, at 1.

¹³³ *Id.* Likewise, Richmond, Virginia's *Daily State Journal* reported a concealed-weapons prosecution in 1872. But it noted that this was "the first case of the kind for some time." Carrying Concealed Deadly Weapons, *The Daily State Journal*, Jan. 10, 1872, at 1.

¹³⁴ An Alarming State of Affairs, *Magnolia Gazette*, Aug. 30, 1883, at 1.

¹³⁵ *Id.*

¹³⁶ Dials, *The Laurens Advertiser*, May 2, 1888, at 3.

¹³⁷ W.P. Walton, *Semi-Weekly Interior Journal*, Nov. 20, 1891, at 2.

¹³⁸ Concealed Weapons, *The Age Herald*, Oct. 10, 1897, at 4.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

rigidly enforced.”¹⁴¹ It noted that there were “few convictions for violations” and that no one seemed willing to report fellow citizens for concealed carrying.¹⁴² Perhaps members of South Carolina’s legislature took heed. For a year later, *The Yorkville Enquirer* reported the passage of a new concealed-weapons law. But it predicted that the new law, like its predecessors, would have little practical consequence. “Other concealed weapon laws,” the paper noted, “have been indifferently enforced.”¹⁴³ Thus, “there is reason to fear this one will not fare any better.”¹⁴⁴ That prediction proved accurate. As South Carolina’s *Anderson Intelligencer* noted in 1905, while the “statute books” had a new law “against the carrying of concealed weapons . . . the enforcement of it is a regular farce.”¹⁴⁵ “Occasionally some poor, unfortunate fellow” was fined,¹⁴⁶ but the law did little overall to deter Southerners’ prolific carriage of arms.

Enforcement also lagged in Arkansas and Alabama. Birmingham’s *Age-Herald* reported in 1912 that “there seems to be practically no enforcement” of “[t]he law against carrying concealed deadly weapons.”¹⁴⁷ And Arkansas’s *Daily Picayune* noted in 1921 that “[t]he law against carrying concealed weapons is not enforced, as witness the courts.”¹⁴⁸ Yet, that journal remarked, there was apparently “no inclination for repeal.”¹⁴⁹ So the law was indeed symbolic, rather than a robust proscription.¹⁵⁰

Indeed, this Part has shown that much the same could be said for concealed-weapons laws *across* the South. As the cited sources reflect, contemporary Southerners considered the laws “inoperative” and their enforcement impractical.¹⁵¹ “[I]ndifferent[]” enforcement had rendered

¹⁴¹ Carrying Concealed Weapons, *The Union Times*, Oct. 26, 1900, at 1.

¹⁴² *Id.*

¹⁴³ *The Yorkville Enquirer*, Feb. 16, 1901, at 1.

¹⁴⁴ *Id.*

¹⁴⁵ Editorial Bull’s Eyes, *The Yorkville Enquirer*, Oct. 10, 1905, at 1.

¹⁴⁶ *Id.* Contemporary court records from South Carolina also seem to confirm that the state’s concealed-weapons law was not an enforcement priority. *The Watchman and Southron* reported in 1903 that one South Carolina police court processed 448 arrests throughout 1902. Doings of the Police Force for 1902, *The Watchman and Southron*, Feb. 25, 1903, at 1. But only a paltry three of those were for carrying concealed weapons. *Id.*

¹⁴⁷ The Grand Jury’s Report, *The Age-Herald*, Oct. 28, 1912, at 1.

¹⁴⁸ A Celebration, *The Daily Picayune*, Jan. 8, 1921, at 1.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ An Alarming State of Affairs, *Magnolia Gazette*, Aug. 30, 1883, at 1.

the statutes “not worth the paper they [were] written on” and “a regular farce.”¹⁵² As a result, convictions came only at “rare intervals.”¹⁵³ And those convicted appear to have been the “unfortunate fellow[s]” who simply happened to stand out from the rest of their gun-toting countrymen.¹⁵⁴

Given these sources’ depiction of the South’s spotty gun-control regime, one might wonder whether those laws were ever seriously enforced against *any* segment of Southern society. The answer to that question, it turns out, is “yes.” For contemporary evidence also suggests that despite the laws’ “indifferent[]” enforcement as to the South’s alleged best men—its whites—the same laws quite often ensnared its Black citizens.¹⁵⁵ Of course, we uncovered no evidence that Blacks *carried* guns at a higher rate than whites in this period. Instead, sources remarked that the pistol was the Southern gentleman’s constant companion. But as Part II.C now reveals, Blacks almost certainly were *punished* at a much higher rate for concealed carry.

C. How Southern States Disproportionately Enforced Their Gun-Control Laws Against Racial Minorities

We now turn to the third way that the historical sources we uncovered vindicate Judge O’Scannlain. Recall how he admonished the majority to temper its enthusiasm for “the legislative scene following the Civil War” given his suspicion that such laws, though facially neutral, “sought to suppress the ability of freedmen to own guns.”¹⁵⁶ His intuition was correct, but his critique—much like the majority opinion—lacked a key piece of evidence: the laws’ enforcement history. Without it, the majority brushed aside Judge O’Scannlain’s concerns and appointed the statutes it cited as serious evidence of Southerners’ appetite for gun control.

That was a mistake. As this Part reveals, contemporaneous evidence suggests that the Reconstruction and Jim Crow South enforced these laws

¹⁵² Sins Which the Law Cannot Reach, *The Weekly Union Times*, Nov. 12, 1880, at 1; *The Yorkville Enquirer*, Feb. 16, 1901, at 1; Editorial Bull’s Eyes, *Yorkville Enquirer*, Oct. 10, 1905, at 1.

¹⁵³ Concealed Weapons, *The Age-Herald*, Oct. 10, 1897, at 4.

¹⁵⁴ Editorial Bull’s Eyes, *The Yorkville Enquirer*, Oct. 10, 1905, at 1.

¹⁵⁵ *The Yorkville Enquirer*, Feb. 16, 1901, at 1.

¹⁵⁶ *Young v. Hawaii*, 992 F.3d 765, 839, 847 (9th Cir. 2021) (en banc) (O’Scannlain, J., dissenting).

“almost exclusively” against Blacks.¹⁵⁷ That is perhaps unsurprising, given our background knowledge about that period in Southern history and the evidence of the laws’ racial motivations detailed in Part II.A. At the same time, though, it guts the *Young* majority’s view that racially disparate enforcement ceased after the Fourteenth Amendment’s ratification. Precisely because these laws were *not* equally applied to all citizens, singling out Black citizens instead, they may tell us something about a tool the postwar South used to preserve white supremacy. But they tell us almost nothing about a broad Southern consensus in favor of diluting the right to keep and bear arms.

A year after the Civil War’s end, for instance, the city of Norfolk, Virginia deployed a recently passed concealed-weapons law to disarm free Blacks. Indeed, “[u]nder a recent law of the city of Norfolk, . . . the police arrested a large number of negroes for carrying concealed weapons.”¹⁵⁸ The seizure was especially significant, since it was alleged “that a negro rising was planned for Christmas week[,] in which the authorities were to be overturned.”¹⁵⁹ Later in 1904, Virginia authorities similarly suggested that they had defused a “race riot” with concealed-weapons arrests.¹⁶⁰ Fearing an “outbreak by the blacks” after a lynching, authorities arrested “[m]any negroes” for weapons possession.¹⁶¹ These “culprits” were then “severely dealt with . . . under the Virginia law covering concealed weapons.”¹⁶² So, much like Virginia’s 1680 “negroes insurrections” law sought to suppress slave revolts with a racially explicit weapons ban, Virginia’s later, facially neutral laws were apparently thought to serve a similar purpose.¹⁶³

South Carolina, too, enforced its concealed-weapons law along racial lines. South Carolina Republican Ellery M. Brayton complained to the federal Congress in 1887 about how disparate enforcement infected the statute. “[T]he law against carrying concealed weapons,” he noted, “is enforced almost exclusively against negroes.”¹⁶⁴ And even when the law

¹⁵⁷ Elections a Farce: The Republicans of South Carolina Issue a Strong Address to Congress, *The Indianapolis Journal*, Jan. 18, 1889, at 7.

¹⁵⁸ Miscellaneous News Items, *Bedford Inquirer*, Dec. 21, 1866, at 1.

¹⁵⁹ *Id.*

¹⁶⁰ Another Race Riot is Feared in Norfolk, *The Evening Journal*, Oct. 26, 1904, at 1.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*; see *supra* notes 61–65 and accompanying text.

¹⁶⁴ Elections a Farce: The Republicans of South Carolina Issue a Strong Address to Congress, *The Indianapolis Journal*, Jan. 18, 1889, at 7. Contemporary arrest records from

was enforced against whites, their sentences vis-à-vis Black offenders were radically disparate. An 1883 periodical noted that two South Carolina offenders—one Black, one white—were both tried during the same term of court for the offense of carrying concealed weapons.¹⁶⁵ The white offender received the opportunity to pay a fine. But the Black offender got six months' time at the penitentiary.¹⁶⁶ How, the periodical wondered, could one possibly distinguish those cases?¹⁶⁷

The situation in South Carolina apparently did not improve with time. In 1891, a South Carolina judge recommended that “the law against carrying concealed weapons . . . be more rigidly enforced.”¹⁶⁸ The paper agreed: “[a]s it is the law is a dead letter, and only an occasional negro is brought to trial for the offense.”¹⁶⁹ Another source, this time in 1893, also pointed out South Carolina's enforcement disparity. Twelve Black inmates, it noted, languished “in the South Carolina penitentiary for the simple offense of carrying concealed weapons, a thing that about every white man in the state does.”¹⁷⁰ But while whites did so freely, Black offenders faced hard labor in the convict-lease system.¹⁷¹

Famed journalist and early civil-rights activist Ida B. Wells similarly criticized the South for its obvious enforcement hypocrisy regarding concealed weapons. In a 1900 address, she noted that “[t]here is a law in the south against carrying concealed weapons.”¹⁷² “White men carry them with impunity,” she pointed out.¹⁷³ “[B]ut if the negro is caught with a

South Carolina reflect the racial enforcement disparity. In 1905, for instance, one South Carolina court handled thirty-four concealed weapons arrests; thirty offenders were Black and just four were white. *The Sinners' Record: Annual Summary of Arrests—Charges, Convictions and Acquittals in Recorder's Court, The Watchman and Southron*, Feb. 1, 1905, at 1.

¹⁶⁵ Sentences of Court, *The Anderson Intelligencer*, Nov. 15, 1883 (quoting the *Abbeville Press and Banner*).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* After noting this race-based sentencing disparity, the original column in the *Abbeville Press and Banner* lamented, “Does not such discriminations [sic] against the brother in black offend our sense of justice?” *Id.* Yet when the same column was reprinted in *The Anderson Intelligencer*, the *Intelligencer* defended judges' discretion to impose disparate sentences.

¹⁶⁸ “The Easter Egg,” *The Newberry Herald and News*, Mar. 19, 1891, at 1.

¹⁶⁹ *Id.*

¹⁷⁰ Outrages on the Negro: Rev. Dr. Seaton Says that They Must be Stopped, What Prison Records Show, *The Evening Star*, Aug. 14, 1893, at 7.

¹⁷¹ *Id.*

¹⁷² Ida B. Wells, Negro Lynching: Deprecated by Speakers and a Remedy Suggested, *Topeka State Journal*, Feb. 17, 1900, at 5. *The Anti-Lynching Crusaders*, *Republican and Herald*, Feb. 19, 1900, at 2.

¹⁷³ *Id.*

gun[,] he is fined \$50 and put in the chain gang for 60 days.”¹⁷⁴ She was incorrect only insofar as a mere 60 days’ imprisonment was apparently a *light* sentence for a Black offender.¹⁷⁵

Much like Wells, periodicals across the South noted the enforcement disparity between white “Southern gentlemen” and Black offenders. As the *Houston Daily Post* remarked in 1902, “[t]here is one law for the ‘n—r and the Chinaman’ who tote pistols . . . and there is another law for the gentleman who arms himself[.]”¹⁷⁶ In other words, minorities risked severe punishment if caught with weapons. Yet “[g]entlemen of high social and commercial standing” could “walk the streets or ride the roads” while armed without question.¹⁷⁷ Similarly, a South Carolina paper noted in 1911 that while “[t]here are laws upon the statute books against the carrying of concealed weapons, and occasionally some insignificant ‘n—r’ is haled before the courts and fined . . . but it is very rare that a white man is made to pay the penalty.”¹⁷⁸ A Missouri periodical, too, noted in 1903 that both Blacks and whites often carried concealed weapons. But it was Black offenders, not whites, that police made the enforcement priority. Indeed, East St. Louis had begun a “roundup of [the] lawless negro class” with “concealed weapons in their possession.”¹⁷⁹ Believing that most crimes were “committed by negroes” whose concealed weapons “enabl[ed them] to commit crime quicker,” the police had arrested “a score of negroes” in recent days.¹⁸⁰ And in Kentucky, too, there was one law for the white “gentleman” but another for the Black offender. As one writer noted in 1908, “[w]hen old Kentucky tries to convict a white lawbreaker[,] she has an awful job.”¹⁸¹ When a white lawyer shot at someone else, for example, “[h]e got off with a light fine for the

¹⁷⁴ *Id.*

¹⁷⁵ For instance, one 1893 survey of the rolls of a South Carolina penitentiary revealed that twelve Black prisoners were serving ten-year sentences “for the simple offense of carrying concealed weapons.” *Outrages on the Negro: Rev. Dr. Seaton Says that They Must be Stopped, What Prison Records Show*, *The Evening Star*, Aug. 14, 1893, at 7. The prisoners had been given such lengthy sentences, the source suggested, so that they could be impressed into the “lease system of convict labor” then prevalent in the South. *Id.*

¹⁷⁶ *The Gentleman Outlaw*, *Houston Daily Post*, Aug., 14, 1902, at 4 (racial slur censored).

¹⁷⁷ *Id.*

¹⁷⁸ *The People Alone Responsible*, *The Manning Times*, Nov. 1, 1911, at 8 (racial slur censored).

¹⁷⁹ *Police Start on Roundup of Lawless Negro Class*, *The Republic*, May 11, 1903, at 5.

¹⁸⁰ *Id.*

¹⁸¹ *Public Ledger*, October 15, 1908, at 2.

offense.”¹⁸² “[A]nd a jury refused to fine him for carrying a pistol.”¹⁸³ But “a N——r,” he noted, “would have been given the limit in half an hour.”¹⁸⁴

Likewise, South Carolina openly celebrated the use of its weapon laws to disarm Black citizens. In 1911, two South Carolina periodicals commended the efforts of a particular magistrate, William M. Dorroh, to seize Blacks’ firearms. *The Herald and News* noted that Magistrate Dorroh had “achieved State-wide mention for his fine record in disarming negroes of their concealed weapons.”¹⁸⁵ And *The Yorkville Enquirer*, too, praised Dorroh for his “fine record in the enforcement of the concealed weapons law since he has been in office.”¹⁸⁶ But it was a “fine record” precisely because it was so biased against Blacks.¹⁸⁷ “Thirty-eight is the number of pistols he has taken from negroes in sixty days,” the *Enquirer* observed.¹⁸⁸ While it was “a large number of pistols secured at a good rate per day,” even still, “it would take Magistrate Dorroh a considerable time to disarm all the negroes” in his township.¹⁸⁹ In the meantime, though, “he [was] being generally commended for his efforts.”¹⁹⁰

Perhaps a final quotation in the *Atlanta Constitution*, from a column penned in 1910, best captures the themes we have developed in this Part: “It has not as yet been shown that the Afro-American is more addicted to the habit of pistol-toting than his white brother, but it is evident that he is much more liable to arrest. For centuries, all over the world, it has been regarded as the prerogative of a gentleman to carry arms and a Southern gentleman knows that, in such case, no peace officer is apt to interfere with him. Indeed, one of the class, when challenged for violating the law against carrying concealed weapons remarked, very truthfully, ‘That law was made for n——rs.’”¹⁹¹

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* (racial slur censored).

¹⁸⁵ Various and All About, *The Herald and News*, Aug. 29, 1911, at 8.

¹⁸⁶ South Carolina News, *The Yorkville Enquirer*, July 7, 1911, at 2.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ The Pistol-Toters, *The Appeal*, July 2, 1910, at 2 (racial slur censored).

III. WHY THE RACIALLY BIASED ORIGINS OF SOUTHERN GUN CONTROL
UNIQUELY MATTER AFTER *RAMOS*

While Part II dealt largely in original research, scholars have long made the broader point that gun control in the United States has racist origins. What has been less clear, though, is why those origins matter today. Some who support a narrow view of the Second Amendment appear to understand these laws' biased origins yet draw no broader implications from that fact.¹⁹² Others have sought to dismiss the relevance of past racism to the present dialogue.¹⁹³ In response, we argue that scholars must grapple with gun control's racist origins—origins that “uniquely matter” since they continue to burden constitutional rights.¹⁹⁴ Indeed, the Supreme Court's recent decision in *Ramos v. Louisiana* obliges them to do so.

In *Ramos*, the Court considered the validity of two state statutes—one from Oregon; the other from Louisiana—that permitted conviction by non-unanimous juries in felony trials.¹⁹⁵ While non-unanimity would cause a mistrial anywhere else, in these states, it could support a sentence of life without parole. In a majority opinion by Justice Gorsuch, the Court noted as an initial matter that both states' laws were “facially race-neutral.”¹⁹⁶ Nothing about the allowance of a 10-to-2 verdict inherently suggested invidious discrimination. And the reasons for these states' modern adherence to the non-unanimity rule seemed obscure.

Upon further reflection, though, the Court explained that the “*origins*” of those laws “are clear.”¹⁹⁷ “Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898,” where all the talk had concerned preserving “the supremacy of the white race.”¹⁹⁸ Its delegates were well-aware that “overt discrimination against African-American jurors [would] violat[e] the Fourteenth Amendment.”¹⁹⁹ So,

¹⁹² See Spitzer, *supra* note 22, at 78–79.

¹⁹³ See Frassetto, *supra* note 22 at 95–97 (arguing that, in Texas, it was pro-freedman, pro-civil-rights Radical Republicans who supported restrictions on the right to carry firearms).

¹⁹⁴ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020) (Sotomayor, J., concurring); see also Brief of Italo-American Jurists and Attorneys, as Amici Curiae Supporting Petitioners, *New York State Rifle & Pistol Association Inc. v. Corlett* (No. 20-843) (arguing that the Court in *Corlett* should consider New York's restrictive gun law in light of historical evidence reflecting the state's efforts to single out and disarm Italians).

¹⁹⁵ *Ramos*, 140 S. Ct. at 1394.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (emphasis added).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

instead, they adopted a facially neutral rule that permitted non-unanimous verdicts. But the real point was “to ensure that African-American juror service would be meaningless.”²⁰⁰ Even when a Black person managed to get on the jury, his vote could be overridden by his white peers. Oregon’s rule, too, could “be similarly traced to the rise of the Ku Klux Klan and efforts to dilute ‘the influence of racial, ethnic, and religious minorities on Oregon juries.’”²⁰¹ None of *Ramos*’s litigants even disputed those points, and courts in both states had “frankly acknowledged that race was a motivating factor in the adoption of their States’ respective nonunanimity rules.”²⁰²

So what? Previous parties, amici, and scholars had all urged the Court to treat certain other laws and precedents as “tainted” or “poisoned” for their infection with bias or bigotry.²⁰³ But the Court had demurred on those past occasions. Such “extralegal” concerns, as Chief Justice Rehnquist once called them, were “not the usual stuff of Supreme Court debate,” and considering them would be a “disservice to the Court’s traditional method of adjudication.”²⁰⁴

It was surprising, then, that the *Ramos* Court seemed to place such import on “the racist origins of Louisiana’s and Oregon’s laws.”²⁰⁵ And it did so despite these states arguably having “purged” the laws’ earlier taint through subsequent reenactments. Indeed, the majority explained that given the laws’ modern implications for a fundamental right, it could not leave “an uncomfortable past unexamined.”²⁰⁶ The majority’s tactic also engendered two concurrences that further endorsed its analytical move. Justice Kavanaugh was left wondering why the Court should sanction a law “that is thoroughly racist in its origins,”²⁰⁷ while Justice Sotomayor believed that “the racially biased origins of the Louisiana and Oregon laws uniquely matter here.”²⁰⁸

²⁰⁰ Id.

²⁰¹ Id.

²⁰² Id.

²⁰³ See, e.g., Charles L. Barzun, *Impeaching Precedent*, 80 U. Chi. L. Rev. 1625, 1626–30 (2013) (detailing such attempts).

²⁰⁴ Id. (quoting John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 280 (2001); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 68–69 (1996)).

²⁰⁵ *Ramos*, 140 S. Ct. at 1405.

²⁰⁶ Id. at 1401 n.44.

²⁰⁷ Id. at 1419 (Kavanaugh, J., concurring in part).

²⁰⁸ Id. at 1408 (Sotomayor, J., concurring in part).

Scholars noticed the import of *Ramos*'s novel approach soon after. "It is not often that the Supreme Court ratifies an entirely new form of judicial argument," noted Professor Charles Barzun.²⁰⁹ "But that may be what happened this past term."²¹⁰ The *Ramos* Court had elevated laws' genealogy from an anti-modality to a new and apparently "legitimate modality."²¹¹ Still, Professor Barzun struggled to explain precisely *why* the Court thought genealogy relevant. Though laws may be invalid if conceived with animus, Oregon's and Louisiana's later reenactments seemed to have purged it. And genealogical arguments may often be logically fallacious. Indeed, logicians call it the "genetic fallacy" to "assume[] that a statement, position, or idea must be flawed" simply because its *source* happens to be flawed.²¹²

We think, though, that *Ramos* was not flawed or fallacious or, as the dissent charged, dealing in "*ad hominem* rhetoric."²¹³ Rather, it told us something important about how future courts and scholars should approach historical analysis and, ultimately, originalism. As many scholars have persuasively argued, we can think of constitutional exegesis

²⁰⁹ Charles Barzun, *The Constitution and Genealogy, Balkinization* (July 6, 2020), <https://balkin.blogspot.com/2020/07/the-constitution-and-genealogy.html>. [<https://perma.cc/EH4M-B3TZ>].

²¹⁰ *Id.*

²¹¹ *Id.*; see also Barzun, *supra* note 203, at 1631 ("My claim, in short, is that the effort to historicize or impeach a past decision is a legitimate and potentially useful means of evaluating a decision's authority as a matter of precedent.").

²¹² Jacob E. Van Vleet, *Informal Logical Fallacies* 19 (2011).

²¹³ 140 S. Ct. at 1426 (Alito, J., dissenting). Justice Alito, joined by Chief Justice Roberts and Justice Kagan, argued that the tainted "origins of the Louisiana and Oregon rules have no bearing on the broad constitutional question that the Court decides." *Id.* But having "lost" in *Ramos*, Justice Alito switched gears two months later when the Court in *Espinoza* considered whether the Montana Supreme Court had violated the Free Exercise Clause when it applied the "no-aid provision" of the Montana Constitution to bar religious schools from benefiting from a state program that provided tuition assistance. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring). In his concurring opinion, Justice Alito argued that *Ramos* established that the Court may examine the motivation behind the passage of a statute or a state constitutional provision to smoke out illicit bigotry. Justice Alito, quoting *Ramos*, concluded that Montana's no-aid provision remained "[t]ethered" to its original "bias" against Catholics because the state had not "actually confront[ed] the provision's 'tawdry past in reenacting it.'" *Id.* at 2274 (quoting 140 S. Ct. at 1410) (Sotomayor, J., concurring in part). Combining the opinions of *Ramos* and of *Espinoza*, six Justices—all but Justices Kagan and Barrett and Chief Justice Roberts—have endorsed and applied the genealogical taint principle.

as having a pair of key stages: interpretation and then construction.²¹⁴ When we *interpret* a text, we seek to discover its communicative content—what the words meant at the time of their ratification.²¹⁵ When we then *construe* the text, we determine what *legal effect* we should give to that meaning.²¹⁶ The clearer the text, the smaller the “construction zone.” But sometimes constitutional provisions are “general, abstract, [or] vague,” so we must resort to other heuristics of meaning when applying them “to concrete constitutional cases.”²¹⁷

One of those heuristics of meaning, of course, is historical practice.²¹⁸ To discern how fundamental a right really is, we might look to how people in the past viewed the right—how they exercised it and which restrictions upon it they tolerated or endorsed. But *Ramos* gives us a critical caveat about how we should conduct this historical research. When assessing a past restriction’s probative weight on the true scope of a constitutional guarantee, we cannot simply ignore past actors’ illegitimate and ulterior motives in enacting such restrictions. Rather, illegitimate motives tell us that past actors restricted a right *not* necessarily because they considered it trivial, but because they thought their impermissible motive—for instance, preservation of white supremacy—the greater priority. So ignoring historical motives (and, perhaps even more important, historical enforcement patterns) might lead us to wrongly over-value certain historical evidence in a modern constitutional calculus. Translated to the controversy before the Court in *Ramos* itself, concluding that historical actors did not consider jury unanimity an important right because of their longstanding decision to permit *nonunanimity* would be a mistake. Rather, the impermissible motives behind that historical practice gutted those restrictions’ probative weight in assessing how broad or fundamental was the burdened right.

With that context in mind, understanding *Ramos*’s import for the Second Amendment becomes simple. When courts—and, later this term,

²¹⁴ Randy E. Barnett, Interpretation and Construction, 34 Harv. J.L. & Pub. Pol’y 65, 65–66 (2011); Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 455–56 (2013).

²¹⁵ Solum, *supra* note 214, at 457.

²¹⁶ *Id.*

²¹⁷ *Id.* at 458.

²¹⁸ We are primarily referring here to liquidation. See The Federalist No. 37, at 225 (James Madison) (Clinton Rossiter ed., 1961); see also Caleb Nelson, *Stare Decisis* and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1, 11–12 (2001); William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1 (2019).

the Supreme Court—assess the scope of the “bear” right, they may consider historical practice relevant in that assessment. But that does not involve simply looking at old laws written on a page. Judges instead must grapple with those laws’ historical motivations and enforcement patterns. And to the extent that such analysis reveals impermissible motives and disparate enforcement, judges must discount the probative weight of that evidence accordingly. In other words, *Ramos* tells us that it is illegitimate to conclude that the modern “bear” right is susceptible to copious restrictions because racist Southern authorities restricted Black citizens’ past exercise of that right. Such evidence may be powerfully probative of historical racism, but its probative weight regarding history’s true verdict on the scope of the Second Amendment should be considered slim. Otherwise, courts risk laundering past racist restrictions to validate modern burdens on constitutional rights.

CONCLUSION

On May 10, 1865, Frederick Douglass delivered an address in New York City that advocated for a constitutional amendment to make guarantees in the Bill of Rights directly applicable to the states.²¹⁹ Without one, he said, state legislatures could “take from [free Blacks] the right to keep and bear arms . . . [n]otwithstanding the provision in the Constitution of the United States.”²²⁰ As we now know, the nation responded by ratifying the Fourteenth Amendment. Ironically, New York today seeks to defend its “proper cause” requirement by invoking old laws of just the sort that Douglass decried. Its brief in opposition to certiorari in *NYSRPA II*, for instance, cited *Kachalsky* twenty-nine times and advanced multiple Southern gun-control statutes to argue that history supports continued restrictions on public carry.²²¹ Apparently, that historical evidence did not dissuade the Court from taking up the case. Nor, when it turns to the merits, should the Court reinvigorate tainted artifacts of a bygone era to burden constitutional rights in the modern one.

²¹⁹ “In What New Skin Will the Old Snake Come Forth?: An Address Delivered in New York, New York, on 10 May 10, 1865,” reprinted in 4 *The Frederick Douglass Papers* 79, 83–84 (John W. Blassingame & John R. McKivigan eds., 1991).

²²⁰ *Id.*

²²¹ Brief of Respondents at iii, v–vi, *N.Y. State Rifle & Pistol Ass’n v. Corlett*, 20-843 (2021), 2021 WL 723110 (citing *Kachalsky* and several Southern gun-control statutes).