Enforcement of Public Carry Restrictions: Texas as a Case Study

Brennan Gardner Rivas[*]

In ongoing conversations about public carry laws, many scholars make references to enforcement of public carry laws. These references tend to claim that such laws were enforced in a discriminatory way, or even not at all. This Article presents data-driven conclusions about the enforcement of the 1871 deadly weapon law of Texas, the state's primary public carry law which prohibited the open and concealed carrying of pistols, knives, and some other small weapons. The author collected this data from the extant criminal misdemeanor records of four sample counties, relying upon archival research rather than digital repositories to identify cases.

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I. LACK OF ARCHIVAL RESEARCH ON PUBLIC CARRY ENFORCEMENT HAS PRODUCED FALSE ASSUMPTIONS

Since *Heller* there has been substantial discussion of public carry laws in the United States, and in particular the nineteenth-century jurisprudence arising from the southern states. But there has not been

much talk of enforcement. In 1983, Raymond G. Kessler theorized that during times of political crises, firearm regulations "can be selectively enforced against those perceived to be a threat to government."[1] He rested his assertions on a 1979 article whose authors inferred that, since handgun permit laws display "prejudice" toward drug users, "former mental patients," and felons, "enforcement practices are likely to be worse."[2] Stephen P. Halbrook in 1989 speculated that Texas Democrats retained a public carry law enacted by their Republican enemies simply because "those in power could selectively enforce this act against political opponents or selected ethnic groups."[3] But it did not take long for writers to make the leap from theorizing about potentialities to pulling up supposed instances of such discriminatory enforcement. In 1990, a sociologist named Brendan F. J. Furnish claimed that the pages of the *New York Times* from 1911 to 1913 show that seventy percent of those arrested under the Sullivan Act were Italian.[4] Just a few years later, Clayton Cramer — in an article so riddled with falsehoods that it ought not be cited by a federal circuit judge — argued that the entire secret purpose behind postbellum, race-neutral public carry laws was the systematic and racially motivated disarming of African Americans.[5] Such claims have been repeated, republished, and assumed to be true.[6]

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[1] Raymond G. Kessler, *Gun Control and Political Power*, 5 LAW & POL'Y Q. 381, 381 (1983).

[2] DAVID T. HARDY & KENNETH L. CHOTINER, RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 209-11 (Don B. Kates, Jr. ed., 1979). Hardy and Chotiner cite as evidence for this assertion the racially disproportionate arrests in Massachusetts (statewide) and Chicago near the time of their writing. Recent scholarship from critical race studies calls into question this kind of facile analysis, which mistakes correlation for causation and underplays the extent of structural racism within the American justice system. *See infra* note 40.

[3] *See* 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, 662 (1989).

[4] Brendan F. J. Furnish, *The New Class and the California Handgun Initiative: Elitist Developed Law as Gun Control*, *in* THE GUN CULTURE AND ITS ENEMIES 133 (William R. Tonso ed., Second Amend. Found. 1990).

[5] Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17, 20-21 (1995).

[6] *See, e.g.*, Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity - The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995) [hereinafter *Never Intended to Be Applied to the White Population*] ("The model of gun control that emerged from the redeemed South is a model of distrust for the South's untrustworthy and unredeemed class, a class deemed both different and inferior, the class of Americans of African descent."); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991) [hereinafter *Afro-Americanist Reconsideration*] ("[T]he purpose of [twentieth century

Taking these works at face value, critical race theorists and ethnic studies scholars have marshalled the idea of selective enforcement against minorities into a growing historiography on the contours of racism and gun policy across American history — much of it predicated upon the false assumption that gun laws were enacted with racist ends in mind, and enforced in a racially discriminatory way as a matter of consistent-yet-unspoken policy by law enforcement officials.[7] The only substantive rebuttal to these arguments that I have seen so far (aside from my own research) has come from Patrick Charles, who found the anti-immigrant accusations surrounding the Sullivan Act's enforcement to be wildly inaccurate.[8]

There is another false assumption regarding the enforcement of public carry laws — incompatible with the one I just described — which holds that these statutes went largely unenforced. This is an amusing claim because the state appellate cases cited by *Heller* and addressed in *Young* came from somewhere; each one began with an arrest, and it stands to reason that for each case appealed there were far more that were not. Sadly, an over-reliance upon digitized newspaper collections, which only represent a small fraction of the publications that circulated in the nineteenth century, gives the impression that public carry laws were not enforced simply because few cases were reported in the news. In fact, the only place where a researcher might hope to find evidence of misdemeanor law enforcement is in county archival records — a place where it seems few people have looked.

If these common assumptions drive some researchers to examine and rebut them, new roadblocks emerge. In his dissent in *Young*, Judge O'Scannlain asserts that, even if these public carry laws were enforced,

gun control statutes in the South] . . . like that of the gun control statutes of the black codes, was to disarm blacks.").

[7] Brennan Gardner Rivas, *Strange Bedfellows: Racism and Gun Rights in American History and Current Scholarship*, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION: ESSAYS ON THE PLACE OF GUNS IN AMERICAN LAW AND SOCIETY (Joseph Blocher & Jake Charles eds., Oxford Univ. Press) (forthcoming 2022) (manuscript at 1-2) (on file with authors); Patrick J. Charles, *Racist History and the Second Amendment: A Critical Commentary*, 43 CARDOZO L. REV. (forthcoming Mar. 2022) (manuscript at 1-2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897310 [https://perma.cc/DCT4-XFM4].

[8] Where Furnish claimed 70% of defendant surnames listed in the pages of the *New York Times* were Italian, Charles found only 27-30%. Nearly a third (43 of 132) of the defendants had no name listed at all. Patrick J. Charles, *A Historian's Assessment of the Anti-immigrant Narrative in* NYSRPA v. Bruen, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Aug. 4, 2021) https://firearmslaw.duke.edu/2021/08/a-historians-assessment-of-the-anti-immigrant-narrative-in-nysrpa-v-bruen/ [https://perma.cc/N8GU-24MV].

they evaded constitutional scrutiny under the Second Amendment.[9] Beyond that, he argues, misdemeanors and sureties were inconsequential and akin to traffic violations in terms of their constitutional significance.[10] This line of argument would have us ignore enforcement history altogether as irrelevant to the constitutional issue at hand.

I will rebut these mutually incompatible claims of selective enforcement, non-enforcement, and enforcement irrelevancy, and discuss the results of my data-driven, archival exploration into the enforcement of the public carry laws of Texas.

The least compelling of these claims are the ones concerning irrelevancy which Judge O'Scannlain raised. To the first challenge, regarding constitutional scrutiny, of course this is an impossible request of nineteenth-century jurists whose education and professional consensus instructed them that the Second Amendment was irrelevant to police-based public carry laws enacted at the state level; we should not hold it against them that they did not foresee *Heller*, particularly when that decision claims to speak for a "consensus" from the past.[11] To Judge O'Scannlain's second point, that misdemeanors and sureties are constitutionally inconsequential, I will acquiesce that inferior courts today are consigned to traffic violations; but the kinds of criminal cases which they used to handle have been relocated to higher, constitutionally consequential courts. Rather than focus on the jurisdiction in which a crime is prosecuted, we should focus on the law in question. The fact that historic public carry laws are the subject of such great controversy before the court today only underscores their constitutional significance, misdemeanors though they may have been.

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[9] Young v. Hawaii, 992 F.3d 765, 857 (9th Cir. 2021) (en banc) (O'Scannlain, J., dissenting).

[10] *Id.* at 845 (O'Scannlain, J., dissenting).

[11] The *Duke* decision from Texas indeed engaged in constitutional scrutiny, even going so far as to explain quite clearly that the entire matter was "settled law" that the Bill of Rights was "intended to be limitations on the power of the government of the thirteen States, and not on the powers of the State governments," and "has been long regarded as the settled construction in the Supreme Court of the United States." State v. Duke, 42 Tex. 455, 457 (1875). The statute in question, one which I will talk in more detail about, is as close to a ban on public carry of pistols and knives as any state dared venture during the Gilded Age; in fact, it was so sweeping in its effect that I called it a ban in my own dissertation. But the court at that time saw it, not as a ban on weapons in public, but as "nothing more than a legitimate and highly proper regulation of their use." *Id.* at 459. Two decades later, in another case arising from this Texas law, the U.S. Supreme Court held that "it is well settled that the restrictions of these [Second and Fourth] amendments operate only upon the federal power, and have no reference whatever to proceedings in state courts." Miller v. Texas, 153 U.S. 535, 538 (1894).

Even more fundamental than the relevancy of enforcement history is the fact that it does indeed exist. Robert Leider has argued that the "Massachusetts Model" legislation involving sureties went unenforced, in large measure because digitized newspaper repositories do not carry many stories about the law's enforcement. While I agree with him that the Massachusetts Model was not technically a "ban," and that the drift away from common law led other states to pursue criminal statutes rather than sureties to keep the peace, the key phrase from his paper remains, "until someone does archival research on this issue."[12]

Another attempt, similarly without the aid of archival research, has been made by Justin Aimonetti and Christian Talley, who purport to prove that post-Civil War[13] concealed weapons laws were enacted with racist intent, and were consistently enforced in a discriminatory way against African Americans.[14] Their evidence contains zero archival sources and instead relies upon a small assemblage of Southern newspaper articles.[15] A large portion of these articles are reform-minded editorials calling for better enforcement of concealed weapon statutes, regardless of race. But Aimonetti and Talley misconstrue these voices of Southern progressivism and argue quite weakly that they show a lack of vigorous enforcement against whites. One revealing example comes from the pages of the *Savannah Morning News*, wherein the editor laments the common practice of carrying weapons and the inadequacy of prior legislation to curtail it; far from evidence of racial animus, the article clearly demonstrates that mainstream Americans (even those in

[12] Robert Leider, Constitutional Liquidation, Surety Laws, and the Right to Bear Arms 15 (Mar. 2021) (unpublished manuscript) (on file with George Mason University School of Law).

[13] This is a chronologically nebulous period for the authors as they decline to define it. The states they refer to enacted concealed weapons restrictions throughout the nineteenth century and early twentieth century, ranging from 1801 to 1917. *See Search the Repository*, DUKE CTR. FOR FIREARMS L., https://firearmslaw.duke.edu/repository/search-the-repository/ (last visited Feb. 1, 2022) [https://perma.cc/T6KY-CK5U].

[14] Justin Aimonetti & Christian Talley, *Race,* Ramos*, and the Second Amendment Standard of Review*, 107 VA. L. REV. ONLINE 193, 197 (2021).

[15] *Id.* The authors cite forty-one separate newspaper articles, from thirty-three newspapers. The plurality is from South Carolina papers — eighteen of the citations (44%) are drawn from seven of that state's newspapers. Each title (save one, which I could not find and believe to be a mistyped citation, *id.* at 216 n.172) are available through the Library of Congress: Chronicling America. Presumably, the authors looked no further than a keyword search of Chronicling America without looking to any other newspaper databases, let alone archival resources.

the South) supported public carry laws and lamented the unnecessary deaths that resulted from indiscriminate weapons-carrying.[16]

The Aimonetti and Talley article further claims that public carry laws were enacted for racist purposes, though they do not address any specific legislation. The closest their article comes is a newspaper report of debates in the South Carolina legislature surrounding a bill that would have amended the state's concealed weapon law in 1901. A state senator promoted mandatory licensing for concealed-carry as a way to dissuade Black citizens from carrying weapons; however, the man withdrew his own proposed amendment in favor of one "which he thought would suit better."[17] That amendment was proposed by a different state senator, "the effect of which is that no person shall carry a pistol, concealed or unconcealed, except on his own premises, the length of which is less than twenty inches and the weight of which is less than three pounds."[18] This amendment, which would have prohibited even the *open* carrying of pistols in South Carolina, was adopted, though the bill in question did not become law.[19] So much for evidence of "impermissible motives" for legislative enactments.[20]

But what about racially discriminatory enforcement of Southern public carry statutes? The authors make this claim, but it rests primarily upon reports that African Americans had been arrested for carrying

[16] The *Savannah Morning News* editor said, "No man who thinks very much of himself, cares to be going around with the butt of a pistol sticking out of his pocket," — a statement which calls into question the assumption that white Southerners engaged in near-constant weapon-carrying and considered it an appropriate behavior for men. *The Concealed Weapon Evil*, MORNING NEWS, Sept. 8, 1893, at 6. On manliness and weapon-carrying, see Brennan Gardner Rivas, The Deadly Weapon Laws of Texas: Regulating Guns, Knives, and Knuckles in the Lone Star State, 1836-1930, at 114-23 (May 2019) (Ph.D. dissertation, Texas Christian University) (on file with author) [hereinafter The Deadly Weapon Laws of Texas]. The editor's brief remark regarding armed Black Georgians was: "Almost every negro that one meets is armed. Some of them carry two pistols and a Winchester rifle." This statement should cause readers to ponder whether Black Southerners chose to arm themselves to spite the law, or to defend themselves from a hostile white majority whom they encountered in the public square. Speaking eloquently against all weapon-carrying, the editor concluded with this statement, worth quoting in full: "The very act of carrying these concealed weapons in a time of peace is an offense. The man that does it has murder in his heart. It has grown to be a very common thing where men get into a little dispute that could be settled very easily, as soon as their passion was over, for one or both to draw pistols and one or both get killed or seriously wounded. This is a free country, of course, but is it not possible that there is too much freedom in some things?" *The Concealed Weapon Evil*, *supra*, at 6.

[17] *The General Assembly*, YORKVILLE ENQUIRER, Feb. 16, 1901, at 2.

[18] *Id.*

[19] *Id.*

[20] Aimonetti & Talley, *supra* note 14, at 223.

concealed weapons, often amid a larger local riot or violent episode. The connections to enforcement more broadly are scant, and consist of a few passing references and one small city's list of "doings" by the Police Court for the years 1902 and 1904.[21] So much for evidence of "disparate enforcement" of public carry laws.[22]

II. TEXAS AS A CASE STUDY OF ARCHIVAL-BASED ENFORCEMENT HISTORY

Where the previous authors have theorized, conjectured, and attempted to present evidence of public carry law enforcement, I will now present data-driven conclusions drawn from archival records. I have put together a dataset of more than three thousand cases from four sample counties in Texas covering the years 1870 to 1950.

A. Statutory Context in Texas

Public carry restrictions in Texas included several statutory parts. The first was a time-place-manner ("TPM") restriction enacted in 1870 which prohibited a broad array of weapons, including long guns, at

[21] Emblematic of the authors' approach is a discussion of concealed-weapons arrests as a way for white Virginians to prevent feared uprisings by local African American residents. *See id.* at 215. This method has previously been used by Cottrol and Diamond, which also failed to draw any concrete connection between arrest of Black weapon-carriers and systematic law enforcement policy. *See* Cottrol & Diamond, *Afro-Americanist Reconsideration*, *supra* note 6, at 349-358. Isolated episodes to do not prove a consistent policy across time and place. More weight must be given to the two articles from the *Watchman and Southron* of Sumter, SC, which gave annual reports of proceedings of the Police Courts. The two articles cited by Aimonetti and Talley present figures for 1902 and 1904. The first of those reports included only three arrests for concealed weapons, two Black and one white, of a total of more than four hundred criminal misdemeanors. *See Doings of the Police Force for 1902*, WATCHMAN AND SOUTHRON (Sumter, SC), Feb. 25, 1903, at 2. The second year featured a much more stark racial disparity of thirty Black persons arrested for concealed-carry and only four white. This certainly shows us inconsistent enforcement patterns, and a tremendous racial disparity in that local area for the year 1904, but it decidedly does not present compelling evidence of consistent discriminatory enforcement across the long Progressive Era or across the entire South. These articles instead show us the extent to which local law enforcement as an entire enterprise became a tool for the oppression of Black Southerners. The *Watchman and Southron* editor even addressed racial disparities regarding the misdemeanors reported for 1904, saying "As usual the negroes are in the great majority, but an inspection of the summary will show that the percentage of convictions was much higher in the cases against white prisoners than in those where negroes were the defendants." *The Sinner's Record*, WATCHMAN AND SOUTHRON (Sumter, SC), Feb. 1, 1905, at 6.

[22] Aimonetti & Talley, *supra* note 14, at 223.

specific social gatherings; its penalty ranged from $50 to $500.[23] The second was what I have called in my own research the 1871 deadly weapon ban or deadly weapon law[24]; it has also been referred to as "The Six-Shooter Law" by Gov. Greg Abbot[25] or "the pistol law"[26] by other scholars and commentators. It was a sweeping prohibition against the open or concealed carrying of deadly weapons (all of which were small, not considered militia or hunting weapons, and deemed to be weapons of interpersonal conflict rather than arms that may be borne in proper defense or service). [27] There were exemptions, so it was not a total ban

[23] "Be it enacted by the Legislature of the State of Texas, That if any person shall go into any church or religious assembly, any school room or other place where persons are assembled for educational, literary or scientific purposes, or into a ball room, social party or other social gathering composed of ladies and gentlemen, or to any election precinct on the day or days of any election, where any portion of the people of this State are collected to vote at any election, or to any other place where people may be assembled to muster or perform any other public duty, or any other public assembly, and shall have about his person a bowie-knife, dirk or butcher-knife, or fire-arms, whether known as a six-shooter, gun or pistol of any kind, such person so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not less than fifty or more than five hundred dollars, at the discretion of the court or jury trying the same; provided, that nothing contained in this section shall apply to locations subject to Indian depredations; and provided further, that this act shall not apply to any person or persons whose duty it is to bear arms on such occasions in discharge of duties imposed by law." An Act Regulating the Right to Keep and Bear Arms, 12th Leg., 1st Called Sess., ch. XLVI, § 1, 1870 Tex. Gen. Laws 63.

[24] Brennan Gardner Rivas, *An Unequal Right to Bear Arms: State Weapons Laws and White Supremacy in Texas, 1836-1900*, 121 SW. HIST. Q. 284, 284-303 (2018); Rivas, The Deadly Weapon Laws of Texas, *supra* note 16, at 124.

[25] Brief for the Governor of Texas as Amicus Curiae in Support of Petitioners, New York State Rifle & Pistol Association, Inc. v. Bruen, No. 20-843 (U.S. July 20, 2021).

[26] Donald Curtis Brown, who wrote a dissertation on the subject in the 1980s, tended to refer to it as "the pistol law" in emulation of many newspaper editors of the day who used that phrase. The fact that pistols were only one of several weapons included under its purview has discouraged more recent scholars (myself included) from using this phrase as a primary identifier for the law in question. *See* Donald Curtis Brown, The Great Gun-toting Controversy, 1865-1910: The Old West Gun Culture and Public Shootings (1983) (Ph.D. dissertation, Tulane University) (on file with author).

[27] No amendments were made to this law between its enactment in 1871 and the completion of the 1879 penal code, but subsequent changes were made and are reflected in later penal code revisions. The first section stated, "That any person carrying on or about his person, saddle, or in his saddle bags, any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie knife, or any other kind of knife manufactured or sold for the purposes of offense or defense, unless he has reasonable grounds for fearing an unlawful attack on his person, and that such ground of attack shall be immediate and pressing; or unless having or carrying the same on or about his person for the lawful defense of the State, as a militiaman in actual service, or as a peace officer or policeman, shall be guilty of a misdemeanor, and, on conviction thereof shall, for the first offense, be punished by fine of not less than twenty-five nor more than one

— but it came fairly close.[28] That law, confusingly, superseded the 1870 TPM restriction with a similar one; therefore, the revised TPM law as well as the deadly weapon law both became absorbed in the state's penal code of 1879.[29] Texans also had statutes which prohibited the unlawful discharge of a firearm as well as the "rude display" of a pistol.[30] Judges treated the latter of these as a minor offense, and it was common for unlawful carry defendants to plead down to rude display as a lesser offense.[31] A fourth and more obscure law was another time-place-

hundred dollars, and shall forfeit to the county the weapon or weapons so found on or about his person; and for every subsequent offense may, in addition to such fine and forfeiture, be imprisoned in the county jail for a term not exceeding sixty days; and in every case of fine under this section the fines imposed and collected shall go into the treasury of the county in which they may have been imposed; provided that this section shall not be so construed as to prohibit any person from keeping or bearing arms on his or her own premises, or at his or her own place of business, nor to prohibit sheriffs or other revenue officers, and other civil officers, from keeping or bearing arms while engaged in the discharge of their official duties, nor to prohibit persons traveling in the State from keeping or carrying arms with their baggage; provided, further, that members of the Legislature shall not be included under the term 'civil officers' as used in this act." An Act to Regulate the Keeping and Bearing of Deadly Weapons, 12th Leg. Reg. Sess., ch. XXXIV, § 1, 1871 Tex. Gen. Laws 25. The third section of the act reads, "If any person shall go into any church or religious assembly, any school room, or other place where persons are assembled for amusement or for educational or scientific purposes, or into any circus, show, or public exhibition of any kind, or into a ball room, social party, or social gathering, or to any election precinct on the day or days of any election, where any portion of the people of this State are collected to vote at any election, or to any other place where people may be assembled to muster, or to perform any other public duty, (except as may be required or permitted by law,) or to any other public assembly, and shall have or carry about his person a pistol or other firearm, dirk, dagger, slung shot, sword cane, spear, brass-knuckles, bowie-knife, or any other kind of knife manufactured and sold for the purposes of offense and defense, unless an officer of the peace, he shall be guilty of a misdemeanor, and, on conviction thereof, shall, for the first offense, be punished by fine of not less than fifty, nor more than five hundred dollars, and shall forfeit to the county the weapon or weapons so found on his person; and for every subsequent offense may, in addition to such fine and forfeiture, be imprisoned in the county jail for a term not more than ninety days." *Id.* § 3.

[28] The law did not apply to a person's home or business, and there were exemptions for "peace officers" as well as travelers; lawmakers and jurists spent considerable time fleshing out who qualified under these exemptions, and how to allow those fearing an imminent attack to carry these weapons in public spaces. Also, the deadly weapon law did not apply to all guns or firearms but just pistols. The time-place-manner restrictions, however, applied to any "fire-arms . . . gun or pistol of any kind" and later "pistol or other firearm," as well as "any gun, pistol . . . ." *See supra* notes 23, 27; *see infra* notes 29, 32.

[29] *See* TEX. PENAL CODE ANN. § 9.318 (1879); *id.* § 9.320.

[30] TEX. PENAL CODE ANN. § 9.314 (1879); *id.* § 9.316.

[31] This is a fascinating trend, and the dataset shows a total of 211 cases, which is 11% of the 1,885 cases with known outcomes, reduced to rude display. The law treated

manner restriction which specifically and solely concerned carrying arms to a polling place. It also made its way into the penal code, but under the title and chapter involving elections rather than the one pertaining to deadly weapons.[32]

A brief aside which I would like to make here pertains to the time-place-manner restrictions which remained in place alongside the deadly weapon law. The *Young* dissent made the case that such restrictions do nothing more than demonstrate "that carry was presumptively lawful everywhere else."[33] Not so. In Texas, these separate TPM statutes provided opportunities for legal flexibility. What I mean by that is: the list of prohibited weapons was slightly different, and in the case of the broad 1870 TPM statute, included long guns which were untouched by the 1871 deadly weapon law. Furthermore, the two TPM statutes in Texas had much higher fine thresholds, meaning that they could more forcefully punish a violator and, *importantly*, be prosecuted in District court rather than Justice or County courts.[34] I want to reiterate that all three of these mechanisms remained within the state penal code through multiple revisions reaching across the late nineteenth and early twentieth centuries. Beyond that, in my own archival research I have seen each one be enforced.

B. Sample Counties

With 254 separate counties, a comprehensive survey of county-level misdemeanor records in Texas is an impossible task. I relied upon a strategic and historically informed sampling process to draw conclusions about the enforcement of public carry provisions. About 150 counties have compiled inventories of the surviving records. Only a fraction of these have been microfilmed, but some of them have been

the simple act of carrying as a much more serious offense than using it in a rude or menacing way. I tracked rude display cases within the sample counties, though there were far fewer of them than there were "unlawful carry" cases. In some ways rude display seems to have become a replacement charge for affrays that did not result in injuries, as well as unlawful weapon carriers who were willing to plead guilty to a lesser charge.

[32] "If any person, other than a peace officer, shall carry any gun, pistol, bowie knife, or other dangerous weapon, concealed or unconcealed, on any day of election, during the hours the polls are open, within the distance of one-half mile of any poll or voting place, he shall be punished as prescribed in article 161 of this Code." TEX. PENAL CODE ANN. § 6.163 (1879). The prescribed penalty from section 161 was a fine of $100 to $500 in addition to imprisonment in the county jail not exceeding one month. *Id.* § 161.

[33] Young v. Hawaii, 992 F.3d 765, 846 (9th Cir. 2021) (en banc) (O'Scannlain, J., dissenting).

[34] *See supra* notes 23, 27, 28, 30.

transferred to university libraries and archives for safekeeping. The majority of Texas county records, though, can only be seen by traveling to the small county seats and asking clerks for a chance to poke around their storage areas to look for them. I limited my sample to only those counties that had been inventoried and still held criminal misdemeanor records *other than* just case files (which are time-consuming to sort through as compared to scanning pages of a ledger).

I chose four sample counties spanning the more heavily populated portion of the state — east of the so-called "frontier line" which demarcated Comanche lands that were (prior to irrigation) inconducive to large-scale farming.[35] The surviving, accessible records vary for each county, so the type of information varies as well.[36]

Jefferson County is along the Gulf coast, near the Louisiana border. The seat, Beaumont, has long been a thriving coastal city bustling with economic activity. Jefferson County yielded 784 cases spanning the years 1874 to 1953; this is a fairly low number due in large measure to the fact that entire collections of records listed in the inventory were missing. The most useful records there were Criminal Index books from the early to mid-twentieth century, which included names, crimes, dates, and case numbers but did not reveal any information about the outcome of the case itself.

Parker County is along the old "frontier line" and remained a home of Comanche bands well into the 1860s. After the Comanches were pushed off the land, Anglo-white ranchers and farmers moved into the area. Parker County records were hit-and-miss, yielding 301 total cases from 1877 to 1920. There are several gaps in the chronological record, particularly for the period prior to the late 1890s.

McLennan County is about one hundred miles south of the Dallas-Fort Worth metro area and near the turn of the twentieth century it was a bustling, thriving market town. Cotton farming and slavery had long been present in this northern part of the "blackland prairie" but the area

[35] Historians of West Texas will surely be disappointed that I did not include a western county within my sample. My only response is that I hope to survey Presidio County and include it within my database. It is also worth noting that a very few cases (a total of three) came from two Liberty County Justice court criminal docket books. I reviewed these materials simply as a matter of convenience because they were close at hand, and two were found in a volume from the mid-1870s, making them rare and worth recording. But the Liberty County cases are far too few in number to represent an accurate view of law enforcement there. Where possible, I have deliberately tried to exclude them, though there are so few that they nonetheless have little bearing upon the overall totals.

[36] Sometimes, records that should be there are missing; other times, records are available but unusable, as happened to me in Jefferson County.

really grew on the back of the railroads that came through in the 1870s and 1880s. Waco became a hub featuring the kinds of transfer points and railway infrastructure that most cities lacked. I found 825 cases spanning 1871 to 1930. The records from McLennan District and County courts is extensive, and the Criminal Fee books from 1897 to 1930 provided insights into the average cost of prosecution and whether convicted violators had to work off their fines on the county farm.

The single best documented county, insofar as criminal misdemeanors are concerned, is Fayette County. This historic area was part of the original empresario grant given to Stephen F. Austin by the newly independent Mexican empire. Fayette County attracted many Bohemian and Czech immigrants, which made it fertile ground for the development of a Republican Party apparatus during Reconstruction. Fayette County farmers had plantations and slaves, but they were not mono-agricultural in favor of cotton and voted against secession in 1861. Fayette County records yielded 1,346 cases, 560 of which derived from Justice Court Docket books.

In total, I found 3,256 separate cases from these four counties. The final outcome of many of the cases is known, which means that the dataset can tell us not only who was being arrested, but what ended up happening to him or her within the justice system. In this Article, I will focus on three issues which the dataset support, the first being jurisdictional flexibility in enforcing the deadly weapon law.

C. Jurisdictional Flexibility and Changes

In the early and mid-1870s, these cases usually originated in District court via a grand jury indictment. This was a new law with a hefty fine (minimum $25) that addressed a cause of serious concern among Texan people, all of which encouraged prosecutors to proceed via indictment. Furthermore, the Texas constitution in force from 1869 to 1876 did not include a judicial role for County courts; the Republicans who authored the Constitution of 1869 believed the County court system to be intransigently racist in its dealings with freedmen and deliberately unfair in its dealings with white Republicans, so they vested judicial powers within the District Court system and the Justices of the Peace.[37]

[37] *See* TEX. CONST. art. V (1869). Compare the constitutional statements vesting judiciary power within court systems for the constitutions of 1866, 1869, and 1876. Unlike the 1866 and 1876 constitutions, the republican-authored document does not mandate the creation of county courts. When the legislature created county courts in 1870, it required that justices of the peace serve as members of the court and vested them with administrative powers "as were heretofore discharged by the county commissioners and County Courts of this State." *See* An Act to Organize the Courts of

Since JPs were not professional jurists, many misdemeanor charges were vetted through the indictment process before being transferred back to the inferior court for adjudication. After the Constitution of 1876 took effect, and particularly after the 1879 legal reforms set forth a new Code of Criminal Procedure, the cases typically began via information or complaint in Justice courts with appeals receiving a trial de novo in the resuscitated County courts. That being said, there were plenty of Fayette County cases in the County court records that do not have a corresponding match in the Justice court docket books; some docket books may be lost, or some cases may have indeed originated in County court, which shared original jurisdiction with Justice courts.[38] This pattern came to an abrupt halt in 1905, when the legislature raised the minimum fine to $100, placing cases beyond the jurisdiction of Justice courts and squarely within County courts. Prosecutions skyrocketed after 1905, indicating that local officials prioritized its enforcement when it became exceedingly profitable for the county — fines went to the road fund, and violators jailed for failure to pay typically had to work on the road crew or a county farm. A deep understanding of the state's larger legal and legislative context was crucial to my making sense of these jurisdictional changes — a word of advice I give to anyone interested in conducting a similar archival research project.

D. Conviction Rates

So far, we have seen evidence that people in Texas were being arrested for unlawfully carrying deadly weapons, but were they being convicted? Of the 3,256 cases, 1,885 left a record of the final adjudication. Among those, 1,684 resulted in guilty judgments or appeals (89% of those with known outcomes; 52% of the total); 200 resulted in not guilty judgments (11% of those with known outcomes; 6% of the total). There was one recorded mistrial, which accounts for a negligible percentage of both. There was also a total of 406 cases that were dismissed or had indictments quashed, which accounts for 12% of the total.[39] This is a

Justice of the Peace and County Courts, and to Define Their Jurisdiction and Duties, 12th Leg., 1st Called Sess., ch. LXV, § 32–38, 1870 Tex. Gen. Laws 87.

[38] There were 105 cases from justice court in Fayette County that were marked as transferred to county court. All but six of those stated a bail amount (usually $100, but occasionally only $50). By contrast, there are a total of 731 cases from the county court system.

[39] If we were to look at cases with known judgments, including those quashed or dismissed, the total number would be 2,291. Guilty and Appealed judgments would then account for 74%, Not Guilty judgments would account for 9%, and

high conviction rate, particularly in relation to average misdemeanor conviction rates today in Texas, which hover at around 73%.[40] And among the 62 known Black deadly weapon violators, the conviction rate was 87% among those adjudicated (13% acquitted), with 21% receiving dismissals. These numbers correspond, more or less, to the larger sample.[41] We can conclude from this data that public carry arrests were likely to result in convictions for both White and Black defendants.

E. Racially Discriminatory Enforcement

A third issue which I would like to address is racially discriminatory enforcement, and what the dataset can tell us on that score. Scholarship on Texas points toward counties with a substantial Black minority — most of which had sizeable cotton production either before or after the Civil War — as the ones most affected by lynching, electoral fraud, and vicious behavior toward Black citizens during the half-century following the Civil War and Reconstruction.[42] It stands to reason that the counties most likely to engage in *prima facie* racially discriminatory enforcement — the ones most likely to use public carry laws for the racist ends that some scholars have proposed[43] — are the ones with a White majority but substantial Black minority, and a history of cotton production. Fayette County fits this description quite well, and the cultural influence of its European immigrants in fostering and maintaining a Republican Party presence through the end of the 1880s

Quashed/Dismissed would account for 18%. Dismissals were common enough, however, that I decided to consider them within their own separate category rather than allow them to dilute statistics for those cases that actually went to an adjudication.

[40] STATE OF TEX.: JUD. BRANCH, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY 67 (2014), https://www.txcourts.gov/media/885306/Annual-Statistical-Report-FY-2014.pdf [https://perma.cc/X3J7-JZXR]. The numbers in question apply to Statutory County Courts, which "aid the constitutional county court with its judicial function." STATE OF TEX.: JUD. BRANCH, TEXAS COURTS: A DESCRIPTIVE SUMMARY 2 (2014), https://www.txcourts.gov/media/994672/Court-Overview.pdf [https://perma.cc/RB8Y-3YYW].

[41] For additional information regarding this sampling process, see Rivas, The Deadly Weapon Laws of Texas, *supra* note 16, at 164-95. For a full list of county records reviewed for the purposes of this dataset, see *infra* Bibliography.

[42] *See* WILLIAM D. CARRIGAN, THE MAKING OF A LYNCHING CULTURE: VIOLENCE AND VIGILANTISM IN CENTRAL TEXAS, 1836-1916, at 3 (Univ. Ill. Press 2004).

[43] Aimonetti & Talley, *supra* note 14, at 203-10, 214-18; Cottrol & Diamond, *Afro-Americanist Reconsideration*, *supra* note 6, at 318-19, 354-55, 361; Cottrol & Diamond, *Never Intended to Be Applied to the White Population*, *supra* note 6, at 1329, 1331-35; Cramer, *supra* note 5, at 20-21, 23-24; David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1418; Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R.L.J. 67, 67-85 (1991).

makes it a revealing case study. McLennan County, on the other hand, only briefly fell under the leadership of Republicans and has a long, well-documented history of severe racial violence across the long Progressive Era.

To assess the prevalence of racially biased enforcement patterns, I used statistical sampling to take a closer look at these two counties. I found compelling evidence that racially discriminatory enforcement of the deadly weapon law developed over time and emerged during the decade of the 1890s.[44] The sample consisted of 177 named defendants from the two counties, which is about 10% of the total number.[45] These names became a starting point for research within census and other genealogical records to determine the race, ethnicity, age, hometown, and occupation of each person. There were only seven names (3.9% of the sample) for which I could not ascertain race or ethnicity with reasonable certainty, and for this reason I declined to include them in these results. My findings show that from 1870 to about 1890, the race of public carry defendants reflected the larger demographics of the county in question, with Black defendants accounting for anywhere from 25–40% during those two decades when their share of the population ranged from 27–34%. Evidence from Fayette County is particularly compelling because I undertook an additional step to confirm this hypothesis; I investigated the racial background of *all* 82 of the county's defendants from the years 1870 to 1879 and found that they mirrored local demographics almost perfectly. In 1870, the Black population of Fayette County was 33% of the total, and during that decade, 32% of those arrested for unlawful carry were Black (see Fig. C).

[44] *Infra* Figures A and B.

[45] There were 2,171 total cases from McLennan and Fayette counties combined, but 1,778 individual violators (repeat offenders, transferred cases, and appeals) account for the difference. The sample included 102 violators from a total of 1,021 in Fayette County, and 75 from a total of 757 in McLennan County. This sample size yields of confidence interval of ±7 when using the worst-case-scenario of 50% accuracy, which is the standard for polling statistics. Since my figures are based upon the reading of straightforward census data rather than subjective poll questions, and I have disregarded defendants whose race could not be determined with reasonable certainty, it is fair to consider the accuracy of this sample at 95% or higher.

Fig. A

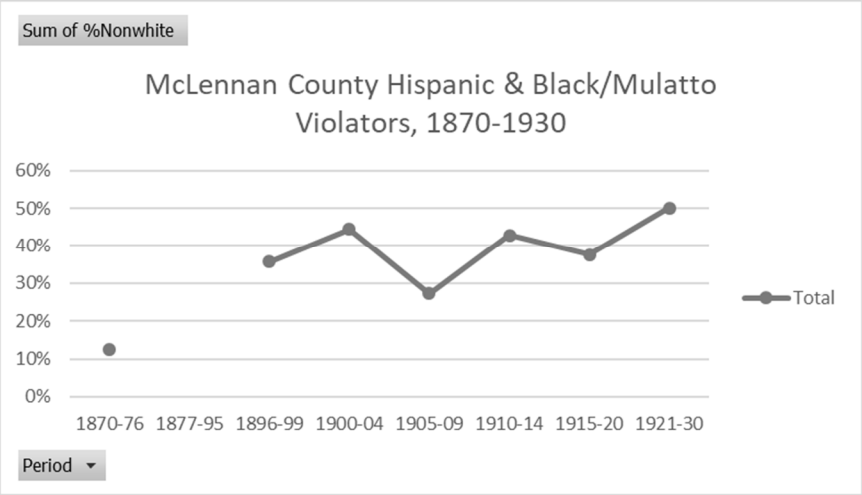

Sum of %Nonwhite
McLennan County Hispanic & Black/Mulatto Violators, 1870-1930
60%
50%
40%
30%
20%
10%
0%
1870-76
1877-95
1896-99
1900-04
1905-09
1910-14
1915-20
1921-30
Total
Period

Fig. B

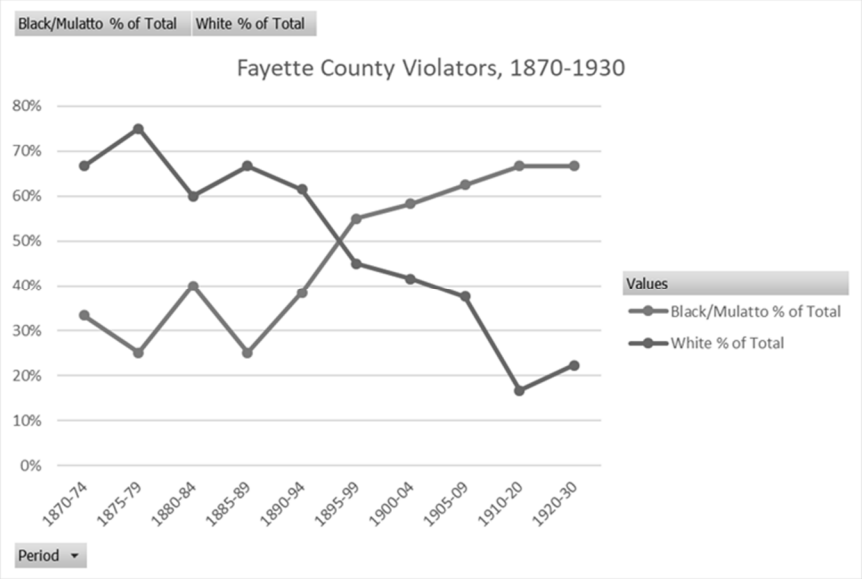
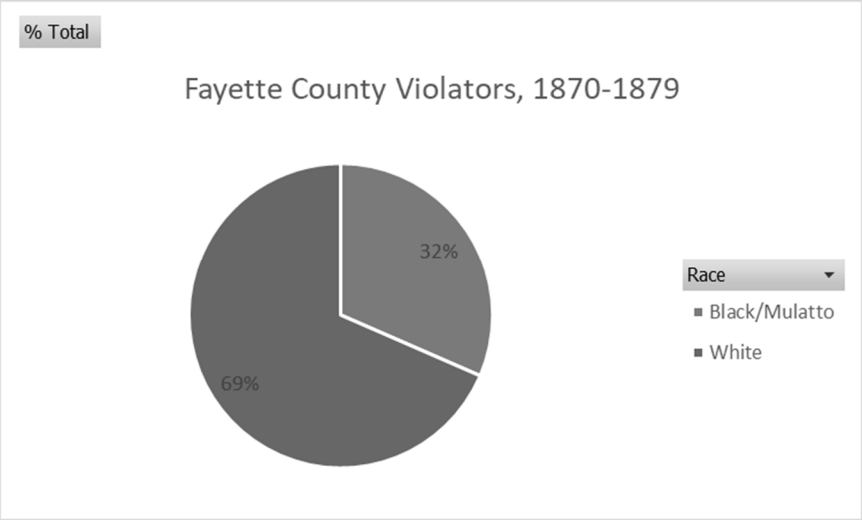

Black/Mulatto % of Total
White % of Total
Fayette County Violators, 1870-1930
80%
70%
60%
50%
40%
30%
20%
10%
0%
1870-74
1875-79
1880-84
1885-89
1890-94
1895-99
1900-04
1905-09
1910-20
1920-30
Values
Black/Mulatto % of Total
White % of Total
Period

Fig. C



The graphs of long-term enforcement within my sample show that racially biased enforcement of the deadly weapon law evolved over time and manifested itself during the 1890s. I believe this turning point is directly related to the collapse of Black voting rights in Texas during that decade, and the resulting erosion of Black political power locally. The best way to explain this phenomenon is by way of describing the economic and demographic growth that occurred in the market towns of Texas between 1870 and 1920. In both McLennan and Fayette counties, White people from elsewhere in Texas and the former Confederacy arrived by the thousands between 1870 and 1920.[46] They slowly upended the local balance of political power that had taken root following the enfranchisement of Black men in Texas in late-1860s. In these counties with substantial African American minorities (33% and 34%), Black men represented a crucial segment of the local voting population. Particularly in Fayette County, where immigrants from Central Europe engaged in less extreme forms of racism, county-level politics made room for Black voters and their political goals. When the state legislature convened every other year from 1875 to 1895, Fayette County's three- or four-member delegation almost always included a Republican, but the practice came to a swift stop amid the political turmoil of the 1890s. By that time, waves of newcomers meant that the White population outnumbered its Black counterpart to such an extent

[46] *Supra* Figures D and E.

that African Americans became irrelevant to the maintenance of local political power. When Black disfranchisement occurred in Texas, during the 1890s, whatever residual fairness was left in the administration of local justice evaporated; politics is about power, and a population robbed of its political voice can neither claim nor exercise it.

Fig. D

Fayette County Census Data, 1870-1920												
Year	*1870*		*1880*		*1890*		*1900*		*1910*		*1920*	
White	10,953	67%	19,167	69%	23,031	73%	26,148	72%	22,434	75%	23,201	77%
Negro	5,473	33%	8,763	31%	8,446	27%	10,394	28%	7,351	25%	6,755	23%

Fig. E

McLennan County Census Data, 1870-1920												
Year	*1870*		*1880*		*1890*		*1900*		*1910*		*1920*	
White	8,861	66%	19,276	72%	28,811	74%	45,345	76%	55,991	73%	65,280	79%
Negro	4,627	34%	7,643	28%	10,381	26%	14,405	24%	17,234	22%	17,575	21%

CONCLUSIONS

This local political history may seem insignificant in comparison to the great gun control debate that occupies the attention of the federal courts today — and indeed it is. If we are going to have a Second Amendment jurisprudence driven by history, then we need to prioritize the accuracy of that history; and to do that, we must venture into the proverbial weeds of historical context — almost universally driven by local imperatives, and therefore *complicated*. Context matters, from this political history of central Texas to the regional context in which it unfolded. For reasons which historians still discuss and debate today, the decade of the 1890s proved to be a momentous turning point in race relations across the American South. The number and severity of segregation laws increased, and all Southern states replaced or amended their constitutions to eliminate Black voting rights; the epidemic of heinous, ritualized race-killings hit its high point, as the writings of anti-lynching crusader Ida B. Wells-Barnett have demonstrated. Historians have long been aware of and intrigued by this seemingly inexplicable turning point. The eminent Southern historian C. Vann Woodward even went so far as to claim that post-emancipation race relations in the South did not really coalesce around segregation until that time.[47] His thesis has been disputed, but even his critics feel the need to explain why such dramatic changes took place *then*.[48] Was it a

[47] C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7 (Oxford Univ. Press 1955).

[48] *See, e.g.*, JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION (Oxford Univ. Press 1984) (discussing changing

reaction against Black activism, a response to perceived electoral corruption, or possibly a result of the U.S. Supreme Court abandoning the Reconstruction Amendments? No matter its origin, the swift and merciless reassertion of white supremacy was carried out through a local political process that White Democrats ultimately rigged to disempower Black voters and oppress Black communities. Interpreted within this larger regional context, the development of racially discriminatory enforcement in the 1890s is predictable, and it tells us far more about the failure of democracy in the American South than it does about public carry laws. Were we to look this closely at the enforcement of other misdemeanor crimes across the same time span, I believe we would see nearly identical results — during the closing years of the nineteenth century, discrimination emerged where it had been largely absent before or sharpened dramatically in places where it already existed. Indeed, the scholarship emerging from within critical race theory has demonstrated quite clearly the systemic failure of our nation's justice system to protect the civil rights of racial and ethnic minorities, particularly African Americans.[49]

Another persistent problem with historically driven jurisprudence is the "when" question. We have seen enforcement patterns change over time, influenced by the larger socio-political environment that necessarily shaped local policing and justice. Unlawful carry prosecutions moved from one jurisdiction to another, were treated by some officials as high-priority crimes while being set aside by others — a hallmark of the justice system as true today as it was then. Should we make legal judgments based on legislative intent? Or the initial application of the law? Or the racist practices that developed over time? Which "when" matters most? The fundamental shortcoming of history-in-law centers on this very issue of chronology, and how to accurately characterize a complex, convoluted story with the brevity needed to

perceptions of African Americans by Southern whites); Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875-1905*, 24 LAW & SOC. INQUIRY 377 (1999) (examining the advent of de jure segregation in the American South); Howard N. Rabinowitz, *More than the Woodward Thesis: Assessing* The Strange Career of Jim Crow, 75 J. AM. HIST. 842 (1988) (book review) (examining the origins and nature of segregation).

[49] *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (New Press 2010) (examining how the U.S. criminal justice system operates as system of racial control); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (Harvard Univ. Press 2016) (discussing the creation of the system of mass incarceration in the U.S.); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (Harvard Univ. Press 2010) (describing how America has characterized African Americans as criminal).

keep the judicial process moving. Sadly, 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. In the end, History as a jurisprudential lodestar poses as many problems as it resolves; it can show us how laws and customs came to be, but it cannot shine a light on where we are headed — we have to look to the future, not the past, to do that.

I will conclude with my own humble opinion, and my most significant takeaway from years spent studying the history of gun and weapon regulation. The nineteenth-century Americans whose jurisprudential mentality *Heller* claims to safeguard did not see the Second Amendment as a roadblock to sweeping state regulation of the weapons most likely to be used in the commission of crimes. These ambitious, risk-taking, forward-thinking Americans looked to their governments for bold and creative solutions to the new problems posed by life in an industrial age. They funded the construction of railways, bridges, and sanitation systems that we still use today, and in Texas they built and expanded commercial centers that still define exurban life in the Lone Star State. Yes, nineteenth-century Americans (and southern ones in particular) disagreed at times about the meaning and scope of the Second Amendment; and yes, they carefully phrased their statutes so as not to deny the right of self-defense during what they dubbed "a difficulty." But they did not see themselves as powerless to act, nor did they see the law or the constitution as frozen in time. If we want a history-focused jurisprudence, maybe we should listen to them a little more closely.

APPENDIX: BIBLIOGRAPHY OF ARCHIVAL SOURCES

County Records Consulted for Enforcement Dataset

Fayette County Records, LaGrange, Texas.
Office of the District Clerk of Fayette County.
District Court Minutes, vols. K-M (1867–1877).
Office of the County Clerk of Fayette County.
Judge's State Docket, vols. 1-6 (1872–1933).
Bar State Docket (1872–1879).
Bar Criminal Docket (1888–1894).
Office of the County Judge of Fayette County.
Justice Court Criminal Docket, Precinct 1 (1877–1880, 1883–1893, 1899–1901).
Justice Court Criminal Docket, Precinct 6 (1899–1902).
Justice Court Criminal Docket, Precinct 7 (1881–1890, 1893–1904).
Justice Court Criminal Docket, Precinct 8 (1890).
Justice Court Criminal Docket, Precinct Unlisted (1889–1897, 1893–1895, 1895–1897, 1897–1899).

Jefferson County Records, Beaumont, Texas.
Office of the County Clerk of Jefferson County.
County Court Criminal Minutes, vol. 1 (1897–1915).
Criminal Judgment Book (1910–1915).
County Court Criminal Index, (1914–1953).

Jefferson County Records, Sam Houston Regional Library and Research Center, Liberty, Texas.
Justice Court Criminal Docket, Precinct 6 (1908–1915).
Justice Court Civil and Criminal Docket, Precinct 1 (1874–1876).
Justice Court Criminal Docket, Examining Trials, Precinct 1 (1895–1902).
Justice Court Criminal Docket, Examining Trials, Precinct 1 (1921–1925).

Liberty County Records, Sam Houston Regional Library and Research Center, Liberty, Texas.
Justice Court Criminal Docket, Precinct 1 (1870–1875).
Justice Court Criminal Docket, Precinct 8 (1912).

McLennan County Records, McLennan County Archives, Waco, Texas.
Justice Court Criminal Docket, Precinct 1 (1901–1903).
Justice Court Criminal Docket, Precinct 3 (1894–1904).
Justice Court Criminal Docket, Precinct 5 (1896–1900).
County Court Criminal Fee Book, vols. K-W (1897–1930).

County Court Criminal Minutes, vols. A, H, L (1876–1881, 1896–1922).
County Court Criminal Case Files, Boxes 1-7 (1886–1887).
County Jail Register of Prisoners (1895–1900).
Texas, District Court Criminal Docket (1873–1874).
City of Waco Criminal District Court, Docket (1874–1876).

Parker County Records, University of Texas at Arlington Central Library, Special Collections, Arlington, Texas.
County Court Minutes, vols. 5-9 (1896–1937).
Justice Court Criminal Docket, Precinct 1, 9 vols. (1884–1923).