UC DAVIS LAW REVIEW ONLINE

VOL. 55 SEPTEMBER 2021

SYMPOSIUM ESSAY

The Right to Regulate Arms in the Era of the Fourteenth Amendment: The Emergence of Good Cause Permit Schemes in Post-Civil War America

Saul Cornell[*]

Under the framework developed in *District of Columbia v. Heller* and refined in *McDonald v. City of Chicago* the outcome of firearms litigation often hinges on demonstrating that there is a clear historical genealogy or analogue to modern gun laws. If a regulation is grounded in history it provides a strong foundation for upholding the challenged statutes and ordinances.[1] The Ninth Circuit took note of this fact when it highlighted the need for a detailed examination of the history of state statutes and local ordinances in *Young v. Hawaii*, describing this material as "the best evidence we have of the American understanding

 Paul and Diane Guenther Chair in American History, Fordham University.

[1] District of Columbia v. Heller, 554 U.S. 570, 591, 595 (2008); McDonald v. City of Chicago, 561 U.S. 742, 767-68 (2010).

of the interface between the right to keep and bear arms and the police power."[2]

Discussions of Founding era history and the English roots of Anglo-American gun regulation have dominated much of the existing scholarship and jurisprudence.[3] The role of Reconstruction-era law has figured less prominently in these debates, but this period is vital to understanding the history, text, and tradition model that *Heller* demands.[4] Indeed, in *McDonald v. City of Chicago*, Justice Alito refined and elaborated *Heller*'s history, text, and tradition model for evaluating the constitutionality of gun regulation.[5] Extending the focus of analysis

[2] Young v. Hawaii, 992 F.3d 765, 824 (9th Cir. 2021).

[3] Although there is widespread agreement that history, text, and tradition are important to *Heller*'s framework, there is less agreement about whether this approach precludes other standard modes of constitutional analysis entirely. *See* JOSEPH BLOCHER & DARRELL A. H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 100-17 (2018).

[4] On the expansion of regulation during Reconstruction, see PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY (2018); Saul Cornell & Justin Florence, *The Right to Bear Arms in the Era of the Fourteenth Amendment: Gun Rights or Gun Regulation*, 50 SANTA CLARA L. REV. 1043, 1068-69 (2010).

[5] *See McDonald*, 561 U.S. at 767-68. For Justice Kavanaugh's view on the model, see *Heller v. District of Columbia* (Heller II), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."). For Justice Gorsuch's view, see *Peruta v. California*, 137 S. Ct. 1995, 1998 (2017) (Mem.) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (noting positively that a Ninth Circuit panel decision "pointed to a wealth of cases and secondary sources from England, the founding era, the antebellum period, and Reconstruction"). On the likely increasing relevance of history given the recent Court appointees, see *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1540-41 (2020) (Alito, J., dissenting) (per curiam) (arguing that the fact that the City "point[ed] to no evidence of laws in force around the time of adoption of the Second Amendment that prevented gun owners from practicing outside city limits" was "sufficient to show that the New York City ordinance [was] unconstitutional") and Joseph S. Hartunian, *Gun Safety in the Age of Kavanaugh*, 117 MICH. L. REV. ONLINE 104, 115-16 (2019). Chief Justice Roberts also gestured toward a historical approach in the *Heller* oral argument: "[W]e are talking about lineal descendants of the arms but presumably there are lineal descendants of the restrictions as well." Transcript of Oral Argument at 77, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290). For Justice Barrett's view, see *Kanter v. Barr*, 919 F.3d 437, 451-52 (7th Cir. 2019) (Barrett, J., dissenting) ("There are competing ways of approaching the constitutionality of gun dispossession laws. Some maintain that there are certain groups of people — for example, violent felons — who fall entirely outside the Second Amendment's scope. . . Others maintain that all people have the right to keep and bear arms but that history and tradition support Congress's power to strip certain groups of that right. . . . These approaches will typically yield the same result; one uses history and tradition to identify the scope of the right, and the other uses that

beyond the Founding era, Alito took note of developments in American law up to and including Reconstruction. Building on *McDonald*'s analysis, the Seventh Circuit decision in *Ezell v. City of Chicago* explained the relevance of Reconstruction-era practices to *Heller*'s historical framework: "*McDonald* confirms that when state- or local-government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified."[6]

Despite these judicial pointers, scholarship on the history of firearms regulation during Reconstruction has lagged far behind studies of early American gun regulation.[7] This essay collects and analyzes evidence about Reconstruction-era firearms regulation and summarizes these findings.[8] Reconstruction ushered in one of the most intense periods of gun regulation in American history. The Republicans who framed and enacted the Fourteenth Amendment were eager to protect the Second Amendment rights of recently freed persons, including an individual right of self-defense. But Republicans were equally committed to enacting strong racially neutral gun regulations, aimed at reducing interpersonal violence and preserving the peace, a task vital to the success of Reconstruction.[9] Scores of new regulations were enacted and one of the main goals of these laws was to limit the public carry of weapons. These laws were not driven by racial animus, as some gun rights advocates have erroneously claimed, but sought to protect vulnerable populations in the South, including former slaves and Republicans eager to further the aims of Reconstruction.[10]

One area of regulation that has not received sufficient attention is municipal ordinances. During the Reconstruction Era, localities enacted some of the most sweeping laws in American history and pioneered new

same body of evidence to identify the scope of the legislature's power to take it away. In my view, the latter is the better way to approach the problem.").

[6] Ezell v. City of Chicago, 651 F.3d 684, 702 (7th Cir. 2011).

[7] *See supra* note 4.

[8] *See infra* Tables 1, 2.

[9] It is vital to distinguish between the racially motivated Black codes enacted by Confederate sympathizers and the racially neutral laws enacted by Republicans to protect free persons and Republicans from terrorist violence. See Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 611, 621-22 (2006).

[10] For the most recent example of the gun control is racist canard, see Justin Aimonetti & Christian Talley, Essay, *Race, Ramos, and the Second Amendment Standard of Review*, 107 VA. L. REV. ONLINE 193, 194 (2021).

approaches to gun regulation.[11] The most important and influential type of these new ordinances were good cause permit schemes. Indeed, by the end of Reconstruction, these discretionary good cause permitting schemes had not only proliferated in number but were in the process of becoming the dominant model of gun regulation in America. In states such as California, more than half the population lived under such schemes by the end of the nineteenth century.[12] Similarly, four of the nation's largest cities at the dawn of the new century, including New York, St. Louis, Buffalo and San Francisco, also embraced this form of gun regulation.[13]

Justice Alito's important insights in *McDonald* have not received enough attention in recent Second Amendment scholarship and jurisprudence. The changes in the language of state constitutional texts between the Founding era and the era of Reconstruction merits closer scrutiny.[14] Understanding this transformation requires analyzing the changing fears driving American constitutional thinking about the right to bear arms. For Reconstruction-era lawyers and judges schooled in common law modes of legal analysis, one of the most important interpretive tools was the mischief rule — the legal principle that the meaning of a legal text was shaped by an understanding of the state of the common law prior to its enactment and the mischief that the common law had failed to address and remediate.[15] By the era of

[11] For an important exception to this lack of attention to local laws, see generally Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013) (comparing urban and rural firearm municipal ordinances).

[12] *See infra* Table 3 and related text.

[13] An Act to Revise the Charter of the City of Buffalo, ch. 105, tit. 7, § 209, 1891 N.Y. Laws 129, 176-77 (Mar. 27, 1891); *Prohibiting the Carrying of Concealed Deadly Weapons, Sept. 17, 1880, in* GENERAL ORDERS OF THE BOARD OF SUPERVISORS PROVIDING REGULATIONS FOR THE GOVERNMENT OF THE CITY AND COUNTY OF SAN FRANCISCO 7-8 (1884); EVERETT W. PATTISON, THE REVISED ORDINANCE OF THE CITY OF ST. LOUIS, TOGETHER WITH THE CONSTITUTION OF THE UNITED STATES, AND OF THE STATE OF MISSOURI, THE CHARTER OF THE CITY; AND A DIGEST OF THE ACTS OF THE GENERAL ASSEMBLY, RELATING TO THE CITY 491-92 (1871); ELLIOTT F. SHEPARD & EBENEZER B. SHAFER, ORDINANCES OF THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, IN FORCE JANUARY 1, 1881, at 214-15 (1881). For population data, see *Table 13. Population of the 100 Largest Urban Places: 1900*, U.S. BUREAU OF THE CENSUS (June 15, 1998), https://www2.census.gov/library/working-papers/1998/demo/pop-twps0027/tab13.txt [https://perma.cc/TQ2K-3PMP].

[14] *See* McDonald v. City of Chicago, 561 U.S. 742, 767-68 (2010).

[15] The interpretation and application of the mischief rule raises a host of jurisprudential issues. *See* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 967 (2021). To reconstruct the original meaning of the law at the time of the Fourteenth Amendment, one must reconstruct how the rule was understood in the eighteenth century and in the era of Reconstruction. The mischief rule was articulated in Heydon's

Reconstruction, gun violence had emerged as a serious problem in American life and legislators responded to this development by enacting scores of new laws.

Founding era fears about the federal government's threat to state militias, Alito noted, had largely abated by the time of the Civil War. One of the most important consequences of this shift was the adoption of state arms bearing provisions that were more self-consciously individualistic.[16] What has not drawn much scholarly or judicial notice, though, is the profound change in the structure and language that accompanied the rise of a more individualistic formulation of the right to bear arms after the Civil War.

The inclusion of more individualistic language was only part of the change in the language of these texts. States also included provisions expressly affirming the right to regulate arms. In fact, state after state cast aside the eighteenth century's dominant formulation of arms-bearing, dropping references to the dangers of standing armies and the necessity of civilian control of the military. In place of these ancient fears of tyrannical Stuart monarchs and standing armies, a new fear permeated these texts: gun violence. To borrow a key concept from the common law: a new mischief had emerged, one that required a different remedy. The constitutional danger nineteenth century America faced, one that intensified after the Civil War, was not "lobster-back" redcoats facing off against minutemen, but interpersonal gun violence and the collective terrorist violence perpetuated by groups such as the Ku Klux Klan.[17] In response to these new threats to the peace and safety of the republic, a novel formulation of the right to bear arms emerged in state constitutional law — a new model that forged an indissoluble bond between the right to regulate arms and the right to bear arms.[18]

Powered by this new constitutional framework, uniting arms bearing and regulation into a single principle, states and localities took up the challenge of framing policies that both protected the right to bear arms

Case [1584] 76 Eng. Rep. 637, and elaborated on in 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 61 (1765). For the rule in post-Civil War constitutional thought, see JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION 206 (1882).

[16] Actually, a more self-consciously individualistic language to describe the right to bear arms, one expressly tied to self-defense, emerged during the Jacksonian era — much earlier than Alito credits. *See* SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 142-4 (2006).

[17] *See* RANDOLPH ROTH, AMERICAN HOMICIDE 350-54 (2009); ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 116-17 (2019).

[18] *See infra* notes 37–40.

and the public's right to enjoy the peace by enacting dozens of new laws regulating nearly every aspect of the right to keep and bear arms.[19] Laws regulating the sale of arms; prohibitions on possessing arms in churches, schools, and polling places; bans on concealed carry; general bans on public carry; and new discretionary permit schemes that limited the right of armed travel to situations in which citizens had a good cause to fear attack were among the most important laws adopted during this period.[20]

I. RECONSTRUCTION AND THE RIGHT TO BEAR ARMS

Although scholars have long recognized that Reconstruction, the period after the Civil War, ushered in profound changes in American law, the impacts of those changes on gun regulation and conceptions of the right to bear arms have not been subjected to rigorous historical analysis.[21] The Civil War had a profound impact on gun violence in America. The trauma of the war and the enormous increase in the production of guns necessary to supply two opposing armies intensified the problem posed by firearms violence and gave a new impetus to regulation.[22] A false historical narrative has warped much of the modern debate over the meaning of the right to keep and bear arms in the era of Fourteenth Amendment. According to this erroneous account, Reconstruction-era Republicans opposed gun regulation because it was inherently racist and aimed at disarming Blacks.[23] Confederate

[19] *See* Cornell & Florence, *supra* note 4, at 1069.

[20] *See infra* note 36.

[21] For discussions of the continuing problems with legal scholarship on the right to bear arms and its penchant for anachronistic claims, see generally Saul Cornell, "Half Cocked": The Persistence of Anachronism and Presentism in the Academic Debate Over the Second Amendment, 106 J. CRIM. L. & CRIMINOLOGY 203 (2016) and Martin S. Flaherty, *Can The Quill Be Mightier Than the Uzi?: History "Lite," "Law Office," and Worse Meets the Second Amendment*, 37 CARDOZO L. REV. 663 (2015).

[22] *See* ROTH, *supra* note 17.

[23] Several authors, including prominent gun rights activists, have argued that gun control was part of a racist agenda to strip freed persons of color of their rights, an erroneous conclusion that conflates the Black Codes with the Republican-enacted racially neutral gun regulations aimed at demilitarizing the South and pacifying the public sphere so African Americans could vote and organize to protect their rights. For a discussion of the vital importance of this distinction to evaluating Reconstruction-era laws, see discussion *infra* note 50. For a sampling of ideologically slanted scholarship on this topic, see generally STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998); 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, 1310, 1318 (1995) (The authors ignore laws

sympathizers in the Reconstruction South did attempt to use gun regulations in a racially targeted fashion, as part of the infamous Black Codes, hoping to facilitate the return of white rule. Although eager to dismantle these racist laws disarming Blacks, Republicans also used government power proactively to rebuild the militia system and pass a range of racially neutral gun control measures aimed at promoting public safety.[24] Rather than oppose an expansion of gun regulation, Reconstruction-era Republicans (including those responsible for framing and ratifying the Fourteenth Amendment) aimed to use racially neutral gun laws, including those designed to demilitarize the public sphere, to restore order and empower freed people to participate in civic life, most importantly elections.[25] Republicans were committed to a vision of government that would protect the rights of recently freed slaves and promote the ideal of a well-regulated society.[26]

Nothing better illustrates the linkage between gun regulation, the right to bear arms and the protection of free persons than General Daniel Sickles' General Orders.[27] In General Order No. 1 Sickles declared that "[t]he constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons, nor to authorize any person to enter with arms on the premises of another against his consent."[28] It is worth noting that

enacted by legislatures dominated by Republicans aimed at protecting Blacks in the Reconstruction South.); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17, 18 (1995).

[24] *See* Darrell A. H. Miller, *Peruta, The Home-Bound Second Amendment, and Fractal Originalism*, 127 HARV. L. REV. F. 238, 241 (2014); *see also* Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 205 (2005) (discussing Republican use of federal power to further their aims, including to enforce the Fourteenth Amendment).

[25] *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 51-53 (1996).

[26] *See generally* RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003) (discussing the origins of the Fourteenth Amendment).

[27] For a gun rights reading of Order No. 1 that ignores its strong support for racially neutral limits on public carry, see Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, *This Right Is Not Allowed by Governments that are Afraid of the People: The Public Meaning of the Second Amendment when the Fourteenth Amendment Was Ratified*, 17 GEO. MASON L. REV. 823, 854, 857 (2010). General Order No. 7 is not mentioned at all. For a similar one-sided reading of the evidence, see Cottrol & Diamond, *supra* note 23.

[28] 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION: POLITICAL, MILITARY, SOCIAL, RELIGIOUS, EDUCATIONAL & INDUSTRIAL 1865 TO THE PRESENT TIME 207-208, 211 (1906) (reprinting General Order No. 1 and General Order No. 7).

General No. 1 not only affirmed a right to bear arms, but reasserted the right to regulate arms, including bans on concealed carry and limits on the ability to travel armed on private property. Moreover, gun rights advocates ignore General Order No. 7 issued by Sickles several months later. Addressing the problem of promiscuous public carry, a practice that led to the disruption of civil society, Sickles issued another order prohibiting "[o]rganizations of white or colored persons bearing arms, or in-tend[ing] to be armed."[29] Order No. 7 prohibited drilling, parading, and patrolling with arms, limiting public carry to those enrolled in the military forces of the United States.[30] Sickles followed up with General Order No.10, a measure that banned all public carry and made concealed carry "an aggravation of the offense."[31]

Other laws aimed at limiting arms in polling places, schools, and other important public venues where people gathered were also enacted by Reconstruction era governments.[32] During the colonial period, some legislatures passed laws requiring settlers to bring arms to church, but during Reconstruction laws were passed banning firearms in churches, schools, and other public places in which people gathered in significant numbers.[33] The aim of these laws was to preserve the peace and enable civil society to function in the South. These were not restrictions on guns in sensitive places but were an effort to eliminate guns from public places essential for civic life to flourish. For example, one law from Texas prohibited guns in multiple public venues:

> If any person shall go into any church or religious assembly, any school-room or other place where persons are assembled for

[29] *See* Miller, *supra* note 24, at 241.

[30] EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION, (FROM APRIL 15, 1865, TO JULY 15, 1870) 204 (1875) https://quod.lib.umich.edu/m/moa/abz4761.0001.001/216?xc=1&g=moagrp&q1=General+Sickles&view=image&size=100 [https://perma.cc/M53U-STLW].

[31] *Id.*

[32] *See, e.g.*, 1890 Okla. Laws 495, art. 47, sec. 7 ("It shall be unlawful for any person, except a peace officer, to carry into any church or religious assembly, any school room or other place where persons are assembled for public worship, for amusement, or for educational or scientific purposes, or into any circus, show or public exhibition of any kind, or into any ball room, or to any social party or social gathering, or to any election, or to any place where intoxicating liquors are sold, or to any political convention, or to any other public assembly, any of the weapons designated in sections one and two of this article.").

[33] For a good illustration of the colonial policy, see AN ACT FOR THE BETTER SECURITY OF THE INHABITANTS BY OBLIGING THE MALE WHITE PERSONS TO CARRY FIRE ARMS TO PLACES OF PUBLIC WORSHIP (1770), *reprinted in* GEORGIA COLONIAL LAWS 471 (1932). For a good example of the restrictive approach taken during Reconstruction, see REVISED STATUTES OF THE STATE OF MISSOURI 224 (John A. Hockaday ed., 1879).

> educational, literary, or scientific purposes, or into a ball room, social party, or other social gathering, composed of ladies and gentleman, 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, 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.[34]

Many of the new constitutions adopted after the Civil War in Southern states, and the newly admitted Western states, reflected this approach to firearms regulation, entrenching it in the same provisions affirming the right to bear arms.[35] In keeping with the vision of law embodied in these new constitutional provisions, Republicans enacted dozens of new laws to reduce gun violence and promote public safety.[36]

The first state constitutions enacted after the American Revolution typically separated the right of the people to regulate their internal police from specific statements about the right to bear arms. Comparing the language of the Revolutionary era Pennsylvania Constitution 1776 and 1868 Texas Constitution side by side is instructive.[37] The Founding era formulation of the right to bear arms was distinct from the right of the people to regulate their internal police. The Reconstruction era formulation not only omits references to the dangers of standing armies and the need for civilian control of the military but merges the right to

---

[34] AN ACT REGULATING THE RIGHT TO KEEP AND BEAR ARMS (1871), *reprinted in* 2 A DIGEST OF THE LAWS OF TEXAS: CONTAINING LAWS IN FORCE, AND THE REPEALED LAWS ON WHICH RIGHTS REST FROM 1862 TO 1872, at 1322 (George Washington Paschal ed., Washington D.C., 1873).

[35] *See infra* Table 1.

[36] *See* Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 113-17 (2016); Brennan Gardner Rivas, *An Unequal Right to Bear Arms: State Weapons Laws and White Supremacy in Texas, 1836-1900*, 121 SW. HIST. Q. 284, 294 (2020).

[37] PA. CONST. of 1776 amends. III, XIII; TEX. CONST. of 1868, art. I, § 13.

regulate arms and the right to bear them into a single constitutional principle.[38] The Reconstruction-era constitutional solution cast aside the eighteenth-century language that was steeped in fears of standing armies and substituted in its place new language affirming the state's police power authority to regulate arms, particularly in public.

Pennsylvania Constitution (1776)	**Texas Constitution (1868)**
"That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same." "That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."[39]	"Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the Legislature may prescribe.[40]

The constitutional danger Americans faced during and after Reconstruction was unregulated firearms, particularly the danger posed by public carry. The debates in the Texas constitutional convention illustrate the centrality of this concern. The proliferation of weapons and the absence of regulation was a palpable fear in the convention that drafted the Texas Constitution — so much so that the convention passed a resolution prohibiting weapons in the convention hall.[41] One delegate reminded the convention's members that the constitutional

[38] *See, e.g.*, UTAH CONST. of 1896, art. I, § 6.

[39] PA. CONST. of 1776 amends. III, XIII.

[40] TEX. CONST. of 1868, art. I, § 13. For similarly expansive constitutional provisions enacted after the Civil War, see *infra* Table 1.

[41] 1 CONSTITUTIONAL CONVENTION, JOURNAL OF THE RECONSTRUCTION CONVENTION, WHICH MET AT AUSTIN, TEXAS, JUNE 1, 1868 (Austin, TX, Tracy, Siemering & Co. 1870) at 248 [hereinafter RECONSTRUCTION CONVENTION] ("The convention do order that no person shall hereafter be allowed in this hall, who carries belted on his person, revolvers or other offensive weapons.").

right to bear arms ought not be confused with the pernicious practice of habitually arming.[42] The right, he cautioned, ought not "be construed as giving any countenance to the evil practice of carrying private or concealed weapons about the person."[43]

Table One. Post-Civil War State Constitutional Arms Bearing Provisions about Regulation

Date	State	Provision
1868	Georgia	GA. CONST. of 1868, art. I, § 14: [T]he right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe by law the manner in which arms may be borne.
1868	W. Texas	W. TEX. CONST. of 1868, Art. I, § 13: Every person shall have the right to keep and bear arms, in the lawful defence of himself or the government, under such regulations as the Legislature may prescribe.
1869	Texas	TEX. CONST. of 1869, art. I § 13: Every person shall have the right to keep and bear arms, in the lawful defense of himself or the State, under such regulations as the Legislature may prescribe.
1870	Tennessee	TENN. CONST. of 1870, art. I, § 26: That the citizens of this State have a right to keep and to bear arms for their common defense. But the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.

[42] Modern gun rights advocates have erroneously argued that antebellum law established a constitutional right of permissive open carry. In fact, the cases cited for this proposition, including those cited by *Heller*, do not support such an expansive and unregulated right; rather, they support a notion of purposive carry, not permissive carry. On this confusion, see Saul A. Cornell, *The Police Power and the Authority to Regulate Firearms in Early America*, BRENNAN CTR. FOR JUST., June 2021, at 1, 8, https://www.brennancenter.org/sites/default/files/2021-06/Cornell_final.pdf [https://perma.cc/VG35-5FBX].

[43] RECONSTRUCTION CONVENTION, *supra* note 41, at 152.

1875	Missouri	MO. CONST. of 1875, art. II, § 17: That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.
1875	North Carolina	N.C. CONST. of 1875, art. I, § 24. A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and as standing armies in time of peace, are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power. Nothing herein contained shall justify the practice of carrying concealed weapon, or prevent the legislature from enacting penal statutes against said practice.
1876	Colorado	COLO. CONST. of 1876, art. II, § 13: That the right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.
1876	Texas	TEX. CONST. of 1876, art. I, § 23: Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power by law to regulate the wearing of arms with a view to prevent crime.
1877	Georgia	GA. CONST. of 1877, art. I, § 22: The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne.

1879	Louisiana	LA. CONST. of 1879, art. III: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed.
1885	Florida	FLA. CONST. of 1885, art. I, § 20: The right of the people to bear arms in defense of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne.
1889	Idaho	IDAHO CONST. of 1889, art. I, § 11: The people have the right to bear arms for their security and defense: but the legislature shall regulate the exercise of this right by law.
1889	Montana	MONT. CONST. of 1889, art. III, § 13: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.
1890	Mississippi	MISS. CONST. of 1890, art. III, § 12: The right of every citizen to keep and bear arms in defense of his home, person or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.
1891	Kentucky	KY. CONST. of 1891, § 1(7): The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.
1896	Utah	UTAH CONST. of 1896, art. I, § 6: The people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law.

The new focus on regulation was entirely consistent with the Fourteenth Amendment's emphasis on the protection of rights.[44] The author of Section One of the Fourteenth Amendment, John Bingham, reassured voters in Ohio that after the adoption of this Amendment, states would continue to bear the primary responsibility for "local administration and personal security."[45] As long as state and local laws were racially neutral and favored no person over any other, the people themselves, acting through their representatives, were free to enact whatever reasonable measures were necessary to promote public safety and secure the common good.[46]

The formulation of the right to bear arms adopted in post-Civil War state constitutions drew on antebellum jurisprudence and constitutional theory's robust view of state police power, including the right to regulate firearms. These post-war constitutional texts explicitly recognized broad legislative authority to regulate the right to bear arms. It would be difficult to understate the significance of this change: across the nation, state legislatures took advantage of the new formulation of the right to bear arms included in state constitutions and enacted a staggering range of new laws to regulate arms, especially public carry. Indeed, the number of laws enacted skyrocketed, as did the number of states passing such laws. [47] States fulfilled their role as laboratories of democracy by implementing a range of regulations aimed at curbing the problem of gun violence: limiting the sale of firearms, taxing particular types of weapons perceived to pose threats to public safety, imposing limits on the access of minors to weapons, and restricting the public places one might carry arms.[48] Texas banned "[a]ny 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 purpose 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."[49] The law aimed to preserve the peace and prevent the

[44] *See* Cornell & Florence, *supra* note 4, at 1056-58.

[45] *Id.* at 1058 (quoting John Bingham's Sept. 2, 1867, speech to the voters of Ohio).

[46] For a discussion of how the courts wrestled with the meaning of the Fourteenth Amendment, see WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 148-51 (1998).

[47] See *infra* Tables 2 & 3 for examples. On the expansion of regulation after the Civil War, see Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS. 55, 59-61 (2017).

[48] *Id.*

[49] An Act to Regulate the Keeping and Bearing of Deadly Weapons, Apr. 12, 1871, *reprinted in* 2 A DIGEST OF THE LAWS OF TEXAS: CONTAINING THE LAWS IN FORCE, AND

intimidation of free persons, the exact opposite of the claims of gun rights advocates who have insisted that gun control during Reconstruction was tainted by an insidious racist agenda.[50]

In the post-war period the number of laws limiting public carry increased dramatically , a trend that continued into the first decades of the twentieth century. There was broad agreement among courts and constitutional commentators that laws banning concealed weapons posed no constitutional issues. Some states went further and enacted more sweeping limits on open carry.[51] Rather than oppose limits on public carry, the dominant paradigm for firearms regulation in the era of the Fourteenth Amendment supported robust regulation of public carry, provided the laws were racially neutral and contained appropriate exceptions for specified good cause needs for self-defense.[52]

II. STATE REGULATION OF PUBLIC CARRY IN THE ERA OF THE FOURTEENTH AMENDMENT: A BRIEF OVERVIEW

Table 2. Examples of State Firearms Laws Passed Between 1865 and 1900 Impacting Public Carry

State	Year	Category	Source	Statutory Text
Texas	1866	Carry on the lands of others	Act of Nov. 6, 1866, ch. 92, § 1, 1866 Tex. Gen. Laws 90.	That it shall not be lawful for any person or persons to carry fire-arms on the enclosed premises or plantation of any citizen, without the consent of the owner or proprietor, other than in the lawful discharge of a civil or military duty, and any person or persons so offending shall be fined . . . or imprison[ed] . . . or both . . . .

THE REPEALED LAWS ON WHICH RIGHTS REST FROM 1864 TO 1872, at 1322 (George Washington Paschal, ed., Washington, D.C., 1873).

[50] Gun rights advocates have simply ignored the most recent scholarship on gun control and race relations during Reconstruction, including the rich new literature on gun regulation, enforcement, and Reconstruction in Texas. For more, see the discussion in Frassetto, *supra* note 36, at 102-04, and Rivas, *supra* note 36, at 287.

[51] For a good illustrations of state concealed carry statutes, see Act of Mar. 22, 1871, ch. 1888, § 1-2, 5, 1871 Ky. Acts 89, 89-90; Act of May 3, 1893, ch. 1180, § 1, 1893 R.I. Pub. Laws 231, 231-32.

[52] For an illustrative set of examples, see Table 2.

Indiana	1875	Brandishing	Act of Mar. 13, 1875, ch. 17, § 1, 1875 Ind. Acts 62.	[I]f any person shall draw or threaten to use any pistol, dirk, knife, slung-shot, or any other deadly or dangerous weapon upon any other person, he shall be deemed guilty of a misdemeanor . . . Provided, That the provisions of this act shall not apply to persons drawing or threatening to use such dangerous or deadly weapons in defense of his person or property, or in defense of those entitled to his protection by law.
Mississippi	1878	Prohibitions on Persons Deemed Irresponsible	Act of Feb. 28, 1878, ch. 46, § 4, 1878 Miss. Laws 175, 176.	[A]ny student of any university, college or school, who shall carry concealed, in whole or in part, any [pistol or other concealable deadly weapon], or any teacher, instructor, or professor who shall, knowingly, suffer or permit any such weapon to be carried by any student or pupil, shall be deemed guilty of a misdemeanor . . . .
Missouri	1879	Sensitive Places (courts, church, schools, colleges)	Act of Apr. 30, 1879, § 1, 1879 Mo. Laws 90, 90.	Hereafter it shall be unlawful for any person in this State, except he be a sheriff or other officer, in the discharge of official duty, to discharge or fire off any gun, pistol or fire-arms of any description in the immediate vicinity of any court house, church or building used for school or college purposes.

Arkansas	1881	Prohibitions on Pistols, (exception for military weapons)	Act of Apr. 1, 1881, no. 96, § 3, 1881 Ark. Acts 191, 192.	Any person who shall sell, barter or exchange, or otherwise dispose of, or in any manner furnish to any person any person [sic] . . . any pistol, of any kind whatever, except such as are used in the army or navy of the United States, and known as the navy pistol, or any kind of cartridge, for any pistol, or any person who shall keep any such arms or cartridges for sale, shall be guilty of a misdemeanor.
Nevada	1881	Penalty for carry while intoxicated	Act of Jan. 28, 1881, ch. 7, § 1, 1881 Nev. Stat. 19, 19-20.	Any person in this State, whether under the influence of liquor or otherwise, who shall, except in necessary self-defense, maliciously, wantonly or negligently discharge or cause to be discharged any pistol, gun or any other kind of firearm, in or upon any public street or thoroughfare, or in any theater, hall, store, hotel, saloon or any other place of public resort, shall be deemed guilty of a misdemeanor. . . .
Vermont	1884	Prohibitions on Certain Types of Weapons (spring loaded traps)	Act of Nov. 25, 1884, no. 76, § 1, 1884 Vt. Pub. Acts 74, 74-75.	A person who sets a spring gun trap, or a trap whose operation is to discharge a gun or firearm at an animal or person stepping into such trap, shall be fined . . . and shall be further liable to a person suffering damage to his own person or to his domestic animals by such traps, in a civil action, for twice the amount of such damage.
Maryland	1890	Sensitive Times (Sabbath)	Act of Apr. 3, 1890, ch. 273, § 1, 1890 Md. Laws 297, 297.	No person whatsoever shall hunt with dog or gun on the Lord's day, commonly called "Sunday," nor shall profane the Lord's day by gunning, hunting, fowling, or by shooting or exploding any gun, pistol or firearm of any kind, or by any other unlawful recreation or pastime. . . .

Florida	1899	Sensitive Places (Trains)	Act of May 29, 1899, ch. 4701, § 1, 1899 Fla. Laws 93, 93.	That it shall be unlawful for any person to discharge any gun, pistol, or other fire-arm, except in self defense, while on any passenger train in this State; or to recklessly handle any fire-arm or other weapon in the presence of any other person or persons on any train carrying passengers in this State.
Indiana	1875	Sell, barter, or give a pistol to a minor	Act of Feb. 27, 1875, ch. 40, § 1, 1875 Ind. Acts 59, 59	That it shall be unlawful for any person to sell, barter, or give to any other person, under the age of twenty-one years, any pistol, dirk, or bowie-knife, slung-shot, knucks, or other deadly weapon that can be worn, or carried, concealed upon or about the person, or to sell, barter, or give to any person, under the age of twenty-one years, any cartridges manufactured and designed for use in a pistol.

Federal territories enacted a variety of limits on armed travel in public, which suggests that the new, more robust vision for regulation was not limited to state and municipal law. [53] New Mexico adopted a broad prohibition on public carry: "[I]t shall be unlawful for any person to carry deadly weapons, either concealed or otherwise, on or about their persons within any of the settlements of this Territory . . . ."[54] This provision was not unique. Idaho adopted a similar law, prohibiting "any person . . . to carry, exhibit or flourish any . . . pistol, gun or other

[53] Territories had considerable latitude to enact laws consistent with their police power authority, but unlike states or localities, they were obligated to abide by the Second Amendment, even prior to the adoption of the Fourteenth Amendment. On the limits imposed by the Constitution on governments created in the territories, see JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1319 (1833) ("What shall be the form of government established in the territories depends exclusively upon the discretion of congress. Having a right to erect a territorial government, they may confer on it such powers, legislative, judicial, and executive, as they may deem best. They may confer upon it general legislative powers, subject only to the laws and constitution of the United States.") Thus, territorial laws would have had to be consistent with Second Amendment irrespective of any interpretation of the Fourteenth Amendment and the issue of incorporation.

[54] Act of Jan. 29, 1869, ch. 32, § 1-2, 1869 N.M. Laws 72, 72-73.

deadly weapons, within the limits or confines of any city, town or village or in any public assembly of Idaho Territory."[55]

The broad latitude legislatures and municipalities exercised over firearms regulation was widely acknowledged by the major constitutional commentators of the period as well. John Norton Pomeroy, one of the era's most distinguished constitutional authorities, observed that the right to keep and bear arms posed no barrier to government authority to regulate or limit persons from "carry[ing] dangerous or concealed weapons."[56] Pomeroy's observation is borne out by the legislation on public carry presented below in Table 3.[57]

III. LOCAL REGULATION AND THE RISE OF PERMIT SCHEMES IN THE ERA OF THE FOURTEENTH AMENDMENT

Gun regulation in the era of the Fourteenth Amendment was not limited to state-level interventions; there was also an enormous growth in the number of local ordinances. Developments at the local level have drawn relatively little scholarly or judicial notice but this was one of the areas in which government was most active.[58] A local ordinance adopted by Huntsville, Missouri offers a glimpse of the sweeping scope of such regulations.[59] It contained multiple provisions, including:

- A ban on concealed carry in public;
- A ban on public carry in public places where people assembled for religious, "educational, literary, or social purposes";
- A ban on carry in courthouses;
- A ban on carry into a "public assemblage of persons met for any lawful purpose" except militia-related activities;

---

[55] Act of Feb. 4, 1889, § 1, 1888 Idaho Laws 23, 23; *see also* Act of Jan. 11, 1865, § 1, 1864 Mont. Laws 355 (preventing the carrying of concealed deadly weapons in the cities and towns of the territory); Act of Dec. 2, 1875, ch. 52, § 1, 1876 Wyo. Sess. Laws 352. ("That hereafter it shall be unlawful for any resident of any city, town or village, or for any one not a resident of any city, town or village, in said Territory, but a sojourner therein, to bear upon his person, concealed or openly, any firearm or other deadly weapon, within the limits of any city, town or village.").

[56] JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES: ESPECIALLY DESIGNED FOR STUDENTS, GENERAL AND PROFESSIONAL 152-53 (1868).

[57] *See infra* Table 3.

[58] The most notable exception to this lack of attention to the importance of local regulation in American firearms law is Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013).

[59] Huntsville, Mo., Rev. Ordinance in Relation to Carrying Deadly Weapons (July 17, 1894).

- A ban on open public carry and public display of a weapon in a rude or threatening manner;
- A ban on carry while intoxicated;
- An exception for travelers passing through town.

Finally, the ordinance also included an affirmative defense exception for good cause, i.e., a specific threat to "home, person or property."[60]

The most common types of local regulations were bans on concealed carry. Evanston, Illinois's ordinance was typical: "It shall be unlawful for any person within the limits of the city of Evanston to carry or wear under his clothes or concealed about his person, any pistol, colt or slung shot."[61] Residents in the ten most populous cities in America at the end of the nineteenth century all lived under some form of restrictive public carry regime: permit schemes, complete bans on concealed carry, or some type of total ban with a specified threat and self-defense exception.[62] In some parts of the country a majority of the population were living under a model of gun regulation that limited public carry. The case of California is instructive in this regard since most of its inhabitants were subject to one of these types of limits on public carry.[63] Table 3 lists the municipalities in the state that enacted permit laws after the Civil War.

Table 3. Municipalities with Permit Schemes in Post-Civil War California[64]

Location	Year Permit ordinance enacted	Population in 1900
Sacramento	1876	17,897
Napa	1880	16,451
San Francisco	1880	342,782
Santa Barbara	1881	18,934

[60] *Id.*

[61] Evanston, Ill., Rev. Ordinances, ch. 29, § 531 (1893).

[62] Copies of these ordinances may be found in the appendix to Brief for Patrick J. Charles as Amicus Curiae Supporting Neither Party app. at 2-11, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. docketed Dec. 23, 2020) 2021 WL 3145961. Population statistics may be found in Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990*, (U.S. Census Bureau, Working Paper No. POP-WP027.

[63] *See* sources cited *supra* note 62.

[64] *Id.*

Alameda	1882	180,197
St. Helena	1884	1,582
Fresno	1885	37,862
Lompoc	1888	972
Marysville	1889	3,497
Oakland	1890	66,960
Monterey	1892	19,380

Within a decade of the end of Reconstruction about half the population of the state of California was living under good cause discretionary permit schemes such as those listed in Table Three. The list of municipalities adopting such regulations included tiny towns such as Lompoc, and the state's largest city, San Francisco.[65] Gun violence in California in this period was a complex problem, but the range of municipalities adopting good cause permit schemes, large heterogenous urban areas and smaller towns, suggest that these policies enjoyed broad popular support and were understood at the time to be consistent with California's constitution.[66]

Good cause permitting schemes were not the only type of restrictions adopted to deal with the problem of gun violence in post-Civil War California. Other localities, most notably Los Angeles and San Jose, adopted more restrictive laws limiting the ability to carry arms in public. The law enacted by Los Angeles was sweeping in scope, prohibiting public carry "concealed or otherwise."

> [N]o persons, except peace officers, and persons actually traveling, and immediately passing through Los Angeles city, shall wear or carry any dirk, pistol, sword in a cane, slung-shot, or other dangerous or deadly weapon, concealed or otherwise, within the corporate limits of said city, under a penalty of not more than one hundred dollars fine, and imprisonment at the discretion of the Mayor, not to exceed ten days. It is hereby

[65] Brief for Patrick J. Charles as Amicus Curiae Supporting Neither Party app., *supra* note 62, at 2-11.

[66] On the problem of gun violence in California during this period, see CLARE V. MCKENNA, RACE AND HOMICIDE IN NINETEENTH-CENTURY CALIFORNIA 11-12, 103 (2007). Race was certainly an important factor in many places in California, but the range of communities enacting limits on public carry of some kind, permit laws, bans on concealed weapons, or broader bans, militates against imputing nefarious racial motives to all the legislation enacted to reduce gun violence. Moreover, racial minorities were often the victims of homicides and assaults in these communities and had a vested interest in reducing the levels of gun violence.

> made the duty of each police officer of this city, when any stranger shall come within said corporate limits wearing or carrying weapons, to, as soon as possible, give them information and warning of this ordinance; and in case they refuse or decline to obey such warning by depositing their weapons in a place of safety, to complain of them immediately.[67]

If one adds together the population figures for the jurisdictions in California with either a good cause permit scheme in place or a more restrictive ban on public carry, such as the one in place in Los Angeles, the numbers demonstrate that the majority of Californians were living under a legal regime that curtailed the right to travel armed in public within populace areas. In short, the example of California offers strong evidence that some type of limit on armed travel in populated areas had become an accepted feature of American law by the end of the nineteenth century. Indeed, limits on the public carry of dangerous weapons are one of the most enduring features of American law, operating continuously in some form from the colonial era through Reconstruction and up until the rise of modern gun control laws in the twentieth century.[68]

The early history of good cause permit schemes has not figured prominently in post-*Heller* scholarship and jurisprudence because local ordinances have been difficult to identify and collect. But, starting with Reconstruction good cause permit ordinances emerged as the ascendent model in firearms regulation. By the end of the nineteenth century this approach to firearms regulation had become the dominant paradigm in America and had largely supplanted the common law inspired surety-based models of enforcing the peace that predominated before the Civil War.[69] The older surety model reflected the realities of life in early

---

[67] William M. Caswell, *Ordinances of the City of Los Angeles*, *§ 36*, *in* REVISED CHARTER AND COMPILED ORDINANCES AND RESOLUTIONS OF THE CITY OF LOS ANGELES 85 (1878).

[68] An Act for the Punishing of Criminal Offenders, 1694 Mass. Laws 12, no. 6 ("Further it is Enacted by the authority aforesaid, That every Justice of the Peace in the County where the Offence is committed , may cause to be staid and arrested all Affrayers, Rioters, Disturbers, or Breakers of the Peace, and such as shall ride or go armed Offensively before any of their Majesties Justices, or other Their Officers or Ministers doing their Office or elsewhere."). On New York's 1911 Sullivan law, see BLOCHER & MILLER, *supra* note 3, at 42.

[69] This community-based model of policing originated in England and continued in America until the rise of modern police forces in the nineteenth century. Any justice of the peace could detain, disarm, and if necessary, bind an individual to the peace by imposing a surety, a peace bond. Under the common law in America the conservation of the peace remained central to the legal system. As conservators of the peace, justices

modern England and colonial America. This approach to preserving the peace was well-suited to a pre-industrial society in which members of the local gentry elite could count on the mechanisms of deference and a web of patron-client relationships to help them maintain social order.[70] As America modernized, urbanized, and became a more diverse and highly mobile society over the course of the nineteenth century, these traditional mechanisms of law enforcement, including sureties, were slowly replaced by a criminal justice system that did not rely on informal mechanisms to maintain order. In a society in which the bonds of community had weakened, binding an individual to the peace was no longer an effective means to preserve social order.[71] Professional police forces, courts, and administrative agencies were better suited to maintaining order and peace in the new urban world of nineteenth-century America where people living in close proximity were less likely to be knit together in the bonds of community.[72] Thus, by end of the nineteenth century, permit schemes that took advantage of these new institutions and the tools provided by professional police forces had largely replaced the traditional common law mechanisms of sureties, or

of the peace, sheriffs, and constables maintained their broad common law authority. Additionally, any member of the community who felt threatened could have a justice of the peace impose a surety, a peace or good behavior bond, as a measure to conserve the peace. On sureties in England, see STEVE HINDLE, THE STATE AND SOCIAL CHANGE IN EARLY MODERN ENGLAND, 1550-1640, at 100 (2000). For an informative study of the transfer of English criminal justice to the colonies, see generally, Alfred L. Brophy, *"For the Preservation of the King's Peace and Justice": Community and English Law in Sussex County, Pennsylvania, 1682–1696*, 40 AM. J. LEGAL HIST. 167 (1996). Gun rights advocates have erroneously argued that peace bonds required an individual to come forward to start this process, but this claim ignores the role of the justice of the peace as conservators of the peace. *See* David B. Kopel and George A. Mocsary, *Errors of Omission: Words Missing from the Ninth Circuit's* Young v. Hawaii, U. ILL. L. REV. ONLINE 172, 184 (2021). This error has been repeated by other gun rights advocates. *See also* Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms* 13 (March 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697761 [https://perma.cc/RV6P-RS88]. Leider's flawed analysis of gun regulation rests on anachronistic interpretations of the historical evidence and ignores the relevant scholarship in the history of criminal law, the result is a presentist and distorted account of the enforcement of prohibitions on armed travel in pre-Civil War Massachusetts. For a general account of the history of criminal law in this period, see ELIZABETH DALE, CRIMINAL JUSTICE IN THE UNITED STATES, 1789-1939 (2011). On the norms governing antebellum Massachusetts, see Mary E. Vogel, *The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860* 33 L. & SOC'Y REV. 161, 163 (1999).

[70] *See* McPherson, *supra* note 30.

[71] *See* ERIC H. MONKKONEN, AMERICA BECOMES URBAN: THE DEVELOPMENT OF U.S. CITIES & TOWNS, 1780-1980, at 98-108 (1988).

[72] *Id.*

peace bonds, as the dominant method for dealing with the dangers posed by gun violence.[73]

IV. LIMITS ON ARMED TRAVEL IN PUBLIC DURING THE ERA OF THE FOURTEENTH AMENDMENT: HISTORY, TEXT, AND TRADITION AND THE GOOD CAUSE PERMIT MODEL

A comprehensive and scholarly review of the nation's laws on public carry published in the last decade of the nineteenth century noted that bans on concealed weapons and more general prohibitions on armed carry were permissible, provided they included a good cause exception for specified threats.[74] John Forrest Dillon's overview of American firearms law and the constitutional right to keep and bear arms endorsed this view. Drawing on recent cases, including *Andrews v. State*, he concluded, "[E]very good citizen is bound to yield his preference as to the means [of self-defense] to be used, to the demands of the public good."[75] Dillon acknowledged that the police power was not without limit in this area. Contrary to the claims of modern gun rights advocates, Dillon did not believe that there was a fundamental right to carry arms in public openly. Nor did he believe that the right to bear arms trumped state and municipal police power authority to regulate such behavior, taking it entirely out of the hand of the people's representatives. He did, however, recognize that American law acknowledged the continuing validity of affirmative defenses for necessity in cases of specified threats and reasonable self-defense.[76] Dillon concluded that as far as the right to carry went, states might regulate this practice and prohibit it entirely as long as the common law self-defense exception was recognized. "Every state," Dillon wrote, "has power to regulate the bearing of arms in such manner as it may see fit, or to restrain it altogether."[77] In those cases in which a state sought the more stringent form of regulation, Dillon argued that the common law would offer those who needed to travel armed an affirmative defense. Dillon's survey of American law was not the only commentary to come to this conclusion. Another comprehensive overview of American law published in the last decade of the nineteenth century reached the same judgment. The survey of American law and public carry was published

[73] *See supra* notes 17–19 and accompanying text.

[74] *See* John Forrest Dillon, *The Right to Keep and Bear Arms for Public and Private Defense*, 1 CENT. L.J. 295, 296 (1874).

[75] Andrews v. State, 50 Tenn. 165, 188 (1871).

[76] Dillon, *supra* note 74, at 296.

[77] *Id.*

in *The American and English Encyclopedia of Law*, an influential and popular legal reference work that became a fixture on bookshelves in law offices across the nation. It noted that "[t]he statutes of some of the States have made it an offence to carry weapons concealed about the body, while others prohibit the simple carrying of weapons, whether they are concealed or not. Such statutes have been held not to conflict with the constitutional right of the people of the United States to keep and bear arms."[78]

Although there has been considerable discussion of the implications of *Heller's* understanding of the right to keep and bear arms, *McDonald*'s focus on constitutional change, especially the changes wrought by Reconstruction, have not received nearly as much attention. Yet, *McDonald* makes Reconstruction's history vital to understanding the scope of permissible regulation today.[79] Read together these two landmark decisions make clear that when state and local regulation are at issue it is the era of the Fourteenth Amendment that is the most important time-period for understanding what is presumptively lawful under *Heller's* framework. Until now, this crucial period of firearms regulation has been largely neglected by post-*Heller* scholarship. This history is critical to fashioning a post-*Heller* firearms jurisprudence consistent with *McDonald*. Then, as now, states and localities function as America's laboratories of democracy, experimenting with different forms of regulation. This function is hardwired into our federal system. Unfortunately, this rich and diverse part of our legal history has been largely invisible in post-*Heller* scholarship and jurisprudence. Scholars and courts need to reckon with this history more fully before evaluating the constitutionality of gun laws. Rather than acting as a high-water mark for gun rights, Reconstruction ushered in a period of expansive regulation. Courts, legislators, and commentators during this period recognized that the robust power to regulate firearms, particularly in public, was not only constitutional, but essential to preserve ordered liberty. The key innovation in this period, a development that became the dominant model of firearms regulation in America, good cause permit schemes continue to function as an important part of efforts to address the problem of gun violence. These ordinances were first enacted by municipalities but were soon emulated by states. In short, this model is deeply rooted in history, text, and tradition. As such, these

[78] 3 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 408 (John Houston Merrill ed., 1887). This influential reference work was considered to be an essential part of a basic reference library for lawyers. *See American and English Encyclopedia of Law, Vol. 29*, 42 CENT. L.J. 397, 400 (1896) (book review).

[79] *See* sources cited *supra* note 5.

laws are indisputably presumptively lawful under *Heller*'s framework. Modern judges attempting to construct a post-*Heller* firearms jurisprudence that is sensitive to history, text, and tradition need to recognize that discretionary good cause permit schemes are firmly rooted in America's long history of gun regulation. If originalist judges wish to remain true to *Heller*'s model such laws are undeniably constitutional.