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The Law and Politics of Firearms Regulation in Reconstruction Texas

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THE LAW AND POLITICS OF FIREARMS
REGULATION IN RECONSTRUCTION
TEXAS

by Mark Anthony Frassetto*

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I. INTRODUCTION

The current state of scholarship on Second Amendment history paints post-Civil War firearms regulations as racist efforts by Southern states to prevent blacks from defending themselves against racial violence.¹ This reading distorts the historical record by ignoring the actors responsible for numerous gun laws across the former

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1. See, e.g., 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 (1989) (discussing directly on the subject of this Article, but portraying the events described in a very anti-Republican manner); 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). Also, see Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL’Y 17 (1995), which is especially inaccurate historically on this topic.

Confederacy. This Article is, in part, an effort to respond to such accounts by presenting the first detailed analysis of the post-war legislative response to widespread firearm violence in Texas, as well as the judicial interpretations of that legislation.² More fundamentally, this Article provides an in-depth account of the political views of the Republican Unionists, who followed their ratification of the Fourteenth Amendment with strict regulation on publicly carrying firearms to protect freedmen from racial violence.

Given the Supreme Court's instruction in *District of Columbia v. Heller* that the historical understanding should inform how the right to keep and bear arms is understood today,³ the views of those who wrote the Fourteenth Amendment (through which the Second Amendment applies to the states) are plainly relevant.⁴ As this Article's account of Texas history makes clear, the Republican Unionists who ratified the Fourteenth Amendment held a narrow view of the right to carry firearms in public, and believed public carry could be broadly regulated. By contrast, it was the Southern Democrats—who had fought relentlessly against the Fourteenth Amendment after losing the Civil War—who advocated an expansive view of the right to carry guns in public, a view which gun rights proponents continue to espouse today.

Part II of this Article explains that Texas, like most Southern states, suffered widespread violence against freedmen and their Republican supporters during the Reconstruction period.⁵ But unlike in many

2. Several major provisions of the laws discussed in this Article were repealed by the Texas state legislature during the 2015 legislative session. See Tex. H.B. 910, 84th Leg., R.S. (2015) (repealing S.B. 11, 84th Leg., R.S. (2015)). Everytown for Gun Safety opposed these changes.

3. See *District of Columbia v. Heller*, 554 U.S. 570, 626–28 (2008).

4. See *McDonald v. City of Chicago*, 561 U.S. 742, 771–80 (2010); Akhil Reed Amar, *The Second Amendment as a Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 889–90 (2001); Clayton E. Cramer et al., *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 (2010).

5. In this Article, the terms “Republican” or “Radical Republican” will be used to identify Unionists who generally supported black civil rights, the policies of Reconstruction, and the administration of Edmund J. Davis. “Democrat” will be used to refer to secessionists who opposed Reconstruction, black civil rights, and the administration of Edmund J. Davis. The political divisions in Reconstruction Texas were not nearly this clear cut, but a more detailed taxonomy would go beyond the level of detail necessary for this Article. Reconstruction refers to the period of Federal and Republican control in Texas from 1865–1874 and nationally from 1863–1877. Reconstruction is generally divided into two periods. The first, Presidential Reconstruction, during which the rebel states were treated indulgently by the federal government and the Southern pre-war political order generally remained in place, took place from 1865 to early 1867. The second period, known as Congressional Reconstruction, began when the Radical Republican majorities elected in 1866 took office. The Radical Republican Congress passed the Reconstruction Acts, which placed the rebel states under military control and excluded former Confederates from politics. During Congressional Reconstruction, control was eventually passed from federal military gover-

states, Republican Unionists in Texas confronted racist reactionaries' violence with strong legislative and executive action. On the heels of the Fourteenth Amendment—which Republicans drafted and ratified—Republicans in Texas enacted a law prohibiting the carrying of firearms under most circumstances.

Part III of this Article recounts the diverging outcomes of two legal challenges to Texas's broad restrictions on public carry, in which the Texas Supreme Court evaluated both federal and state constitutional attacks on the law. The first challenge, in 1872, was considered by a high court made up of Republicans and Unionists, who decisively upheld the law under both the Second Amendment and its analogue in the Texas Constitution. By 1874, when the Court heard the second challenge, its membership had completely changed. That Court—made up entirely of Democrats, four-fifths of whom were former Confederate officers—took a much broader view of the right to bear arms. However, even this Democrat-controlled Court concluded that the law did not infringe upon the right to bear arms.

The Republican Unionists may have lost political and judicial control in Texas, but their legacy lives on through the Fourteenth Amendment. As such, their philosophy on the role of government, the Constitution, and self-defense—including their narrow view of the right to carry arms in public—is a crucial part of the history of the Second Amendment. Justice Scalia's instructions in *Heller* to look to history in interpreting the Second Amendment means an accurate portrayal of historical gun regulations is of crucial importance. This Article is intended as an initial step in that direction.

II. TEXAS'S RECONSTRUCTION-ERA RESTRICTIONS ON PUBLIC CARRY IN HISTORICAL CONTEXT

A. *The Uniquely High Levels of Violence in Texas*

Texas was a uniquely violent place, both before and after the Civil War. While violence in every Confederate state far exceeded violence in the North, Texas's levels of violence stood out even among the Confederate states.⁶ At the time of annexation in 1845, the homicide rate in lawless South Texas was a staggering 100 per 100,000 and a likely 50 per 100,000 in the slaveholding portion of East Texas.⁷ As a reference

nors to Republican-controlled state governments, most of which included blacks. Reconstruction ended at different times in each state when control returned to conservative white Democrats known as "redeemers." See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 (1988).

6. See, e.g., HORACE V. REDFIELD, HOMICIDE, NORTH AND SOUTH: BEING A COMPARATIVE VIEW OF CRIME AGAINST THE PERSON IN SEVERAL PARTS OF THE UNITED STATES 11, 68 (Ohio State Univ. Press 2000) (1880).

7. RANDOLPH ROTH, AMERICAN HOMICIDE 234 (2009). Roth attributes this extremely high murder rate to the weak governance provided by Mexico and instability and conflict caused by the transition from Mexico, to the Republic of Texas, to the

point, the 2013 U.S. murder rate was 4.5 per 100,000.⁸ Visitors to Texas before the Civil War often commented on the high levels of violence and how well-armed many Texans were. Frederick Law Olmsted, the famed landscape architect, wrote after touring Texas in the 1850s:

The street affrays are numerous and characteristic. I have seen, for a year or more, a San Antonio weekly [newspaper], and hardly a number fails to have its fight or its murder. More often than otherwise, the parties meet upon the plaza by chance, and each, on catching sight of his enemy, draws a revolver, and fires away. . . . [I]t is, not seldom, the passers-by who suffer. Sometimes it is a young man at a quiet dinner in a restaurant, who receives a ball in the head; sometimes an old negro woman, returning from market, who gets winged.⁹

Violence continued in Texas during the War, especially against Unionists. In 1862, forty-two suspected Union sympathizers were lynched in Gainesville, while in 1863, German-American Unionists were massacred while attempting to flee to Mexico.¹⁰

A report commissioned by the 1868–69 Constitutional Convention (the “Convention Report”) found that violence further increased in the period after the Civil War ended in 1865. Homicides had increased from a reported total of 98 in 1865 to 347 in 1867.¹¹ While the investigators admitted these numbers “came far short of representing the actual number,” as they included full reports from only thirty of Texas’s 127 counties, they showed the trend of increasing violence in Texas, much of it political.¹² Even with the Convention Report’s under-inclusive numbers, the murder rate in Texas during the period from 1860 to 1868 was forty-five times that in New York.¹³ Texas led

United States. This was especially true in South Texas where it is estimated at least 200 people were murdered by bandits between 1836 and 1845.

8. *Uniform Crime Reports: Murder*, FED. BUREAU OF INVESTIGATION, <http://1.usa.gov/1YNrV3N> [<https://perma.cc/8WFL-AYU2>] (last visited July 12, 2016).

9. FREDERICK LAW OLNSTED, *A JOURNEY THROUGH TEXAS: OR, A SADDLE-TRIP ON THE SOUTHWESTERN FRONTIER* 158 (Univ. of Tex. Press 1978) (1857); see also BARRY A. CROUCH & DONALY E. BRICE, *THE GOVERNOR’S HOUNDS: THE TEXAS STATE POLICE, 1870–1873* 10 (2011) (describing a Texan’s conversation with northern journalist Albert D. Richardson in which the Texan told Richardson, “if you want to obtain distinction in this country, kill somebody.”).

10. *Great Hanging at Gainesville, Tex.* ST. HIST. ASS’N, <http://bit.ly/1W53ai6> [<https://perma.cc/M2UZ-GPTC>] (last visited July 12, 2016); CARL H. MONEYHON, ED-MUND J. DAVIS OF TEXAS: CIVIL WAR GENERAL, REPUBLICAN LEADER, RECON-STRUCTION GOVERNOR 48 (2010).

11. Ann Patton Baenziger, *The Texas State Police During Reconstruction: A Reex-amination*, 72 SW. HIST. Q. 470, 471 (1969).

12. CROUCH & BRICE, *supra* note 9, at 20.

13. *Id.*; see also TEX. CONSTITUTIONAL CONVENTION (1868–1869), JOURNAL OF THE RECONSTRUCTION CONVENTION: WHICH MET AT AUSTIN, TEXAS 501 (Tracy, Siemering & Co. 1870) (New York state, despite having a population five times the size of Texas, only suffered a total of forty-seven murders in 1867—300 less than the number of murders in Texas during the same year).

the nation in murders throughout the post-War period. In 1870, Texas had at least 323 murders, a staggering 195 more than the next-most-deadly state.¹⁴ The Convention Report authors wrote they doubted “such a record of blood can be exhibited in any Christian or civilized State in the world in a time of peace.”¹⁵

MINIMUM HOMICIDE RATES IN RECONSTRUCTION TEXAS¹⁶

Year	1865	1866	1867	1868	1869	1870
Total Population	711,397	732,833	754,270	775,706	797,143	818,579
White Population	492,796	507,176	521,557	535,938	550,319	564,700
Black Population	218,193	225,249	232,306	239,362	246,416	253,700
Reported Murders	98	170	347	319	N/A	323
White Victims	47	75	173	182	N/A	N/A
Black Victims	51	95	174	137	N/A	N/A
Overall Murder Rate (per 100,000)	13.776	23.198	46.005	41.124 (70.498)	49.6 ¹⁷	39.45 ¹⁸
White Rate (per 100,000)	9.537	14.788	33.17	33.216 (58.213)	N/A	N/A
Black Rate (per 100,000)	23.374	42.176	74.901	57.235 (98.118)	N/A	N/A

Texas was especially resistant to emancipation and Reconstruction, resulting in staggering levels of violence against blacks and Unionists. Presidential Reconstruction-era governor James Throckmorton even proposed a system of gradual emancipation be implemented, in clear

14. Baenziger, *supra* note 11, at 473.

15. CROUCH & BRICE, *supra* note 9, at 20.

16. These rates are calculated using Reconstruction Journal Records for the homicide numbers and 1860 and 1870 census information for the population numbers. The Convention Report records are clearly and admittedly under-inclusive, so these numbers provide only a minimum homicide rate during the period. The actual homicide rate may have been significantly higher—possibly double or triple the calculated rate. Populations are calculated by dividing the difference between the 1860 and 1870 census evenly and allocating across the ten years. Homicide Rates for 1868 were calculated using both the raw numbers, which included up to the end of July, and numbers adjusted for the remaining five months.

17. This rate is calculated using Freedmen’s Bureau Records for 46 counties during the first quarter of 1869, adjusting for the population of those counties. It is impossible to determine whether these counties are representative of the state as a whole, and intuitively more anarchic counties seem less likely to accurately report their records. It is also impossible to determine whether the murder rate was subdued by relatively cold weather in the early part of the year. This data also does not account for the more tumultuous period surrounding the election at the end of 1869. The Author would like to again thank Robert Dykstra for locating these records and calculating the 1869 homicide rate.

18. This number was calculated based on statistics released by the Federal Census Bureau, and published in the Daily State Journal (Austin) in August 31, 1871. See Baenziger, *supra* note 11, at 473 n.13. See also ROTH, *supra* note 7, at 569 n.123 (estimating a homicide rate of 268 per 100,000 in South and West Texas).

violation of both the Emancipation Proclamation and Thirteenth Amendment.¹⁹ Provisional military governor Andrew J. Hamilton in a letter to President Johnson described reports of "shooting and hanging of Negroes by the half dozens at a time, for the crime of leaving their former Masters."²⁰ General W.E. Strong described freedmen being treated "unmercifully, and shot down like wild beasts, without any provocation"²¹ And fifth military district Commander Major General Joseph J. Reynolds reported "murder of negroes is so common as to render it impossible to keep an accurate account of them."²² The Convention Report showed that between 1865 and 1867, for every white person murdered by a black person, thirty-seven black people were murdered by whites.²³ Many of the 460 murders of whites during that time period were also attacks on white Republicans by Democrats.²⁴

Given the frequency of attacks on blacks and Republicans, the investigation and prosecution of these crimes left much to be desired. Abner Doubleday, a Civil War General stationed in Texas after the War, reported that not a single white man had been convicted of murder in Texas since it achieved independence from Mexico.²⁵ This was obviously an exaggeration, but the reality was only slightly less extreme. Of the approximately 1,000 homicides reported in Texas between 1865 and 1869, there were only 279 indictments, five convictions, and one execution (a freedman).²⁶ That meant only one of every 200 murderers was actually punished for his crime. The Convention Report stated bluntly why these numbers were so low: "It is our solemn conviction that the courts, especially juries, as a rule, will not convict ex-rebels for offenses committed against Union men and freedmen"²⁷ Even when a conviction was secured, justice was often still out of reach. In one case, a white man who had attacked and nearly beat to death a freedman was arrested by a Freedman's Bureau agent, turned over to civil authorities, and convicted; the punishment was a fine of one cent.²⁸ In 1870, a reported 702 murderers and 413 attempted murderers were on the loose in Texas.²⁹ Crime, especially directed toward blacks and Unionists, was out of control.

19. MONEYHON, *supra* note 10, at 77.

20. CROUCH & BRICE, *supra* note 9, at 11-12.

21. *Id.* at 12.

22. *Id.* at 21.

23. TEX. CONSTITUTIONAL CONVENTION (1868-1869), *supra* note 13, at 194.

24. *Id.* at 195.

25. CROUCH & BRICE, *supra* note 9, at 15.

26. Baenziger, *supra* note 11, at 473. These numbers were not broken down by race, so it is possible Doubleday's statement about murder prosecutions was accurate during the post-War period.

27. TEX. CONSTITUTIONAL CONVENTION (1868-1869), *supra* note 13, at 199.

28. *Id.*

29. Baenziger, *supra* note 11, at 473.

B. *The Radical Republican Administration of Edmund Davis*

In 1869, Radical Republican Edmund Davis was elected Governor of Texas. Davis's administration would be defined by its effort to restore order in Texas in the face of Democratic opposition. As part of this effort, Davis would establish an integrated statewide police force, a state-funded public education system, and, most notably for this Article, a statewide ban on carrying firearms in public. Ultimately, in the face of widespread opposition, most of the efforts of Davis and his Radical Republican party were doomed. However, Davis's statewide ban on public carry remained in place for more than a century. The actions of his administration, especially regarding public carry of firearms, provide insights into the Radical Republicans' philosophy on guns, self-defense, and the role of government.

1. Edmund Davis's Rise to Governor

Prior to the Civil War, Davis served as a judge in South Texas and was a close political ally of Texas Revolution hero and Unionist, Sam Houston.³⁰ Davis opposed secession, and attempted to run for a position as a delegate to the secession convention in order to oppose leaving the Union.³¹ After secession, Davis refused to swear a loyalty oath to the Confederacy and was removed from his judgeship.³² Davis fled Texas and served as an officer in the Union army, rising to the rank of Brigadier General by the end of the War.³³

After the War, Davis was elected as a delegate to the 1866 Texas Constitutional Convention as a Unionist who supported the proposals of military governor Andrew J. Hamilton.³⁴ During Presidential Reconstruction, Davis and the Unionists were in the distinct minority in the convention, which refused to ratify the Thirteenth and Fourteenth Amendments and essentially restored control to the secessionists who controlled the state during the War. At the convention, Davis was limited to procedural maneuvers to stall particularly egregious provisions and to introducing doomed provisions in protest. Notably, Davis proposed universal male suffrage for blacks, a position well out front of his party at the time.³⁵ In 1868, as a result of the Republican controlled Congress seizing control of Reconstruction policy, a new Con-

30. Carl H. Moneyhon, *Edmund Jackson Davis*, TEX. ST. HIST. ASS'N, <http://bit.ly/1XT3kLm> [<https://perma.cc/E4JK-8TV8>] (last visited July 24, 2016).

31. *Id.*

32. MONEYHON, *supra* note 10, at 40–41. Sam Houston was also removed as governor for refusing to swear loyalty to the Confederacy, an action akin to removing George Washington from office. Thomas H. Kreneck *Samuel Houston*, TEX. ST. HIST. ASS'N, <http://bit.ly/1UnCfMQ> [<https://perma.cc/R2JB-66LW>] (last visited July 24, 2016).

33. MONEYHON, *supra* note 10, at 59–72.

34. *Id.* at 79–80.

35. *Id.* at 82–83. Davis may have meant suffrage for blacks meeting educational or literacy thresholds.

stitutional Convention was called and Davis was selected as a compromise candidate between conservatives and Radical Republicans for convention president.³⁶ During the conference, Davis assumed leadership of the Radical Republicans. His able management of an extremely contentious conference propelled him to statewide prominence.³⁷

In 1869 the federal government sought to return control of Texas to an elected state government. An election—in which former Confederate soldiers were generally prohibited from voting for the new government—was held to fill the state government created by the 1868 Constitutional Convention.³⁸ Davis was elected Governor of Texas by less than 800 votes in an election marred by violence against blacks seeking access to the polls.³⁹ This violence and intimidation was especially severe in Falls County, where white plantation owners marched their black employees to the polls, handed them a ballot of Davis's opponent, and watched as it was dropped into the ballot box. Blacks attempting to vote for Davis had their lives threatened and ballots ripped from their hands.⁴⁰ In Milam and Navarro counties, voting was discontinued after federal and local officials were attacked and mobs of whites stormed the polls in order to prevent blacks from voting.⁴¹ After the election, racial violence continued in both counties, with blacks pistol-whipped in front of the courthouse in Navarro County in retribution for Davis's election.⁴²

2. The Davis Administration: 1870–1872

In the midst of this chaos and widespread resistance, Davis began his term as governor. In his inaugural message, Davis called the legislature's attention to the "consideration of measures to establish law and order throughout the State, and the punishment or repression of crime."⁴³ Davis proposed several policies to reduce crime in Texas, including reorganizing the state militia, which had been disbanded under military rule; establishing a state police force; creating an impartial court system; and establishing free, state-funded, public schools (which Davis identified as a long-term crime prevention measure).⁴⁴

36. *Id.* at 114–15. At the time, the primary dispute between the two factions was over the *ab initio* issue, which was whether the legislative and judicial acts of the secessionist governments should have continued validity.

37. *Id.* at 122. The convention collapsed without finalizing a state constitution.

38. See generally Dale Baum, *Chicanery and Intimidation in the 1869 Texas Gubernatorial Race*, 97 SW. HIST. Q. 36 (1993).

39. *Id.* at 36.

40. *Id.* at 49.

41. *Id.* at 38–39 (stating that the discontinued voting in Milam and Navarro counties almost certainly did not swing the election results).

42. *Id.* at 40.

43. H.J. of Tex., 12th Leg., 1st C.S. 14 (1870) (inaugural address of Governor Edmund J. Davis).

44. *Id.* at 18–21.

The state legislature adopted all of these policies in one form or another.⁴⁵ As a first step, Davis created a racially integrated state police force to “follow up and arrest offenders” where the “authorities are too weak to enforce respect [for the law] or indisposed to do so.”⁴⁶ The creation of the force drew sharp opposition from both Democrats and conservative Republicans, who claimed that creating the state police was an inappropriate transfer of power from local governments to the Governor. State Senator and former slave Matthew Gaines cut to the true heart of the opposition, stating it was not the result of fear over executive power, but rather opposition to the “idea of gentleman of my color being armed and riding around after desperadoes.”⁴⁷

The resistance, however, was insufficient to stop the establishment of Davis’s force, which was granted powers not given to local law enforcement, including the authority to cross county lines and act independently of local law officers.⁴⁸ The chief of the state police was also granted power to command all local law enforcement when necessary to suppress crime and arrest offenders.⁴⁹ The force, which split approximately sixty percent white and forty percent black, was diverse to a level surpassing many modern police departments, including among its officers whites, freedmen, Tejanos, and Asians, as well as both former Union and Confederate soldiers.⁵⁰ This racial diversity was enough for Texas Democrats to dub the state police (when being polite) a “Negro Militia.”⁵¹

During Davis’s inaugural address, he also called for the prohibition on carrying handguns in public. Davis stated:

I would, in this respect of prevention of crimes, call your attention to the provisions of section thirteen of the Bill of Rights, on the

45. Act approved June 24, 1870, 12th Leg., C.S., ch. 10, 1870 Tex. Gen. Laws 11, 11, *reprinted in* 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 185, 185 (1898); Act approved July 1, 1870, 12th Leg., C.S., ch. 13, 1870 Tex. Gen. Laws 19, 19, *reprinted in* 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 193, 193 (1898); Act approved July 2, 12th Leg., C.S., ch. 14, 1870 Tex. Gen. Laws 21, 21, *reprinted in* 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 195, 195 (1898); Act approved Aug. 13, 1870, 12th Leg., C.S., ch. 68, 1870 Tex. Gen. Laws 113, 113, *reprinted in* 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 287, 287 (1898). The school system adopted by the Davis administration provided equal funding for all students in the state, in contrast with the system in effect in Texas 100 years later and controversially upheld by the Supreme Court in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

46. Baenziger, *supra* note 11, at 473.

47. *Id.* at 474.

48. Act approved July 1, 1870, 12th Leg., C.S., ch. 13, § 8, 1870 Tex. Gen. Laws 19, 20, *reprinted in* 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 193, 194 (1898).

49. Act approved July 1, 1870, 12th Leg., C.S., ch. 13, § 5, 1870 Tex. Gen. Laws 19, 19, *reprinted in* 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 193, 193 (1898).

50. See CROUCH & BRICE, *supra* note 9, app.; Baenziger, *supra* note 11, at 475. Crouch and Brice dispute the forty percent cited by Baenziger, and originally used as a criticism of the state police force, but do not dispute that the state police were integrated to a degree unprecedented at the time.

51. Baenziger, *supra* note 11, at 475.

subject of bearing arms. The Legislature is there given a control over the privilege of the citizen, in this respect, which was not in the old constitution. There is no doubt that to the universal habit of carrying arms is largely to be attributed the frequency of homicides in this State. I recommend that this privilege be placed under such restrictions as may seem to your wisdom best calculated to prevent the abuse of it. Other than in a few of the frontier counties there is no good reason why deadly weapons should be permitted to be carried on the person.⁵²

That summer, the state legislature partially fulfilled Governor Davis's request by passing a law forbidding the carrying of any "bowie-knife, dirk or butcher-knife, or fire-arms, whether known as a six shooter, gun or pistol of any kind," at a variety of locations:

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 . . . or to any other place where people may be assembled to muster or to perform any other public duty, or any other public assembly.⁵³

The fine for violating the new law was a whopping \$50 to \$500 (the modern equivalent of \$1,000 to \$10,000).⁵⁴

While the prohibition on carrying firearms at public gatherings provided an important tool for the state police to maintain order, it proved insufficient to prevent and deter crime.⁵⁵ In a letter to the 1871 session of the state legislature, Governor Davis stated the law was "a very partial remedy" and went on to say "instances of personal violence occur almost daily" and "are within the experience of everybody."⁵⁶ Davis stated that a total prohibition on carrying arms rather than the limited prohibition enacted in the previous session would be "a great preventative of violence and bloodshed" and "essential to the complete suppression of lawlessness."⁵⁷ Confusion about the proper enforcement of the 1870 Law also contributed to one of the more serious crises faced by the Davis administration.

52. H.J. of Tex., 12th Leg., 1st C.S. 19 (1870). Handguns accounted for around two-thirds of the murders in Texas during the period, which is an aberrationally high percentage for the time. See ROTH, *supra* note 7, at 356.

53. Act approved Aug. 12, 1870, 12th Leg., C.S., ch. 46, 1870 Tex. Gen. Laws 63, 63, reprinted in 6 H.P.N. Gammel, *The Laws of Texas 1822-1897*, at 237, 237 (Gammel Book Co. 1898); CROUCH & BRICE, *supra* note 9, at 26.

54. Calculated using inflation calculator at <http://www.westegg.com/inflation/>, which is based on consumer price index statistics going back to 1800 (last visited July 12, 2016).

55. CROUCH & BRICE, *supra* note 9, at 61 (discussing the arrest of Joseph Elliott for wearing arms in a public assembly during efforts to stop the notorious West Gang).

56. H.J. of Tex., 12th Leg., R.S. 57 (1871).

57. *Id.*

During the summer of 1870, Madison County was wracked by violence against freedmen. Tensions reached their peak on July 21, 1870, when a band of disguised men staged a jailbreak on the Madison County jail, releasing two murderers. In response, State Police Private John H. Patrick, a Republican with ambitions for higher office, assembled a group of black militia and began confiscating guns from any person carrying them, under color of the 1870 Act.⁵⁸ Patrick's confiscation order, along with the fact that blacks were enforcing laws against whites, led to widespread public outrage. A local deputy sheriff formed a posse with the ostensible purpose of arresting Patrick, but an actual intent to foment violence against politically active blacks and Republicans, based on the claim that blacks had joined Patrick's militia unit with the intention of murdering whites.⁵⁹ The posse sought Patrick at his home, but he was in Austin where a disciplinary hearing had been convened to look into his actions. The group instead killed two militia leaders.⁶⁰ In response to this incident and other chaos in the county—including militia members being killed, shot, and attacked, and freedmen being whipped by whites—Governor Davis ordered forty state police and three-hundred state guards into Madison County to restore order. Many of his opponents viewed these actions as tyrannical, and the event damaged the reputation of the state police and the Davis administration statewide.

In response to concerns about the effectiveness of the 1870 Act, and likely partially as a result of the confusion in Madison County, the Texas Legislature drafted a bill in 1871 that prohibited the carrying of any "pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife . . . [without] reasonable grounds for fearing an unlawful attack on his person"⁶¹ The bill punished first offenses with confiscation of the weapon and a fine between \$25 and \$100 (approximately \$500–\$2,000 with inflation)⁶² and up to sixty days in prison for a second offense.⁶³ The law's exception allowing publicly carrying a firearm when in fear of unlawful attack was further narrowed by requiring the defendant to show that the

58. CROUCH & BRICE, *supra* note 9, at 39–40 (Patrick would be fired in December 1870). Confusion does not seem to have been limited to Patrick. In one instance a district court judge, F.P. Wood, ordered anyone who carried a gun in town, not just those at public assemblies, to be arrested. *Id.* at 62.

59. *Id.* at 40.

60. *Id.*

61. Act approved Apr. 12, 1871, 12th Leg., R.S., ch. 34, § 1, 1871 Tex. Gen. Laws 25, 25, reprinted in 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 927, 927 (1898).

62. Calculated using inflation calculator at <http://www.westegg.com/inflation/>, which is based on consumer price index statistics going back to 1800 (last visited July 12, 2016).

63. Act approved Apr. 12, 1871, 12th Leg., R.S., ch. 34, § 1, 1871 Tex. Gen. Laws 25, 25, reprinted in 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 927, 927 (1898).

danger was “immediate and pressing,” and “of such a nature as to alarm a person of ordinary courage,” that “the weapon was borne openly and not concealed beneath the clothing,” and that the claimed danger did not have “origin in a difficulty first commenced by the accused.”⁶⁴ This clarified that the exception did not apply when a person had carried a firearm due to a generalized fear of crime, but rather only when a specific threat existed. The penalties for the 1870 Act were also amended to provide for confiscation of the weapon and imprisonment for up to 90 days for subsequent offenses.⁶⁵ The law granted the governor the power to exempt counties from the carry prohibition if they were dubbed a frontier county “liable to incursions of hostile Indians.”⁶⁶ The law also included exceptions for people carrying weapons on their own property or in their place of business, members of the militia in active service, law enforcement officers, and the transportation of arms in the baggage of travelers.⁶⁷

The bill titled “An Act to Regulate the Keeping and Bearing of Deadly Weapons,” was introduced by Republican Representative Frederick Grothaus on January 24, 1871.⁶⁸ The bill passed out of the Judiciary Committee 5–3, receiving primarily Republican support.⁶⁹ On March 9, 1871, the House passed the bill by a margin of 60–12, with all twelve black representatives voting in favor of the bill.⁷⁰ On March 29, 1871, the Senate passed the bill by a 20–4 margin with support of both of the State’s black Senators.⁷¹ In both chambers opposition to the law consisted primarily of Democrats, and conservative

64. Act approved Apr. 12, 1871, 12th Leg., R.S., ch. 34, § 2, 1871 Tex. Gen. Laws 25, 25, *reprinted in* 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 927, 927 (1898).

65. Act approved Apr. 12, 1871, 12th Leg., R.S., ch. 34, § 3, 1871 Tex. Gen. Laws 25, 25–26, *reprinted in* 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 927, 927–28 (1898).

66. Act approved Apr. 12, 1871, 12th Leg., R.S., ch. 34, § 4, 1871 Tex. Gen. Laws 25, 26, *reprinted in* 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 927, 928 (1898).

67. Act approved Apr. 12, 1871, 12th Leg., R.S., ch. 34, § 1, 1871 Tex. Gen. Laws 25, 25, *reprinted in* 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 927, 927 (1898).

68. H.J. of Tex., 12th Leg., R.S. 95 (1871); Britney Jeffery, *Frederick Edward Grothaus*, TEX. ST. HIST. ASS’N, <http://bit.ly/1Llq64O> [<https://perma.cc/HY5L-X6JD>] (last visited July 24, 2016).

69. H.J. of Tex., 12th Leg., R.S. 443–44 (1871) (Judiciary Committee Report dated February 28, 1871).

70. The black representatives who supported the measure were Richard Allen, D.W. Burley, Silas Cotton, Goldstein Dupree, Jeremiah J. Hamilton, Mitchell Kendall, David Medlock, John Mitchell, Henry Moore, Sheppard Mullens, Benjamin Franklin Williams, and Richard Williams. *See* H.J. of Tex., 12th Leg., R.S. 523–32 (1871).

71. G.T. Ruby and freedman Matthew Gaines were the two black senators who supported the Amendment. *See* S.J. of Tex., 12th Leg., R.S. 538 (1871).

Republicans, who had served in the Confederate Army.⁷² Governor Davis signed the bill on April 12, 1871.⁷³

The new prohibition on public carry was widely enforced across the State, especially by the state police.⁷⁴ Line police officers consistently sent their superiors reports of arresting those carrying weapons.⁷⁵ Local law enforcement also participated in arresting those carrying weapons illegally.⁷⁶ In fact, Governor Davis declared martial law in Limestone County, in part because of the aftermath of a shootout between police and a man they were trying to arrest for carrying a pistol.⁷⁷ Davis specifically mentioned the citizens' failure to obey the law against carrying pistols and other weapons as a reason for the declaration.⁷⁸

While state and local law enforcement worked to carry out the ban, many citizens resisted. Some tried to circumvent the law by posing as state or local law enforcement that were exempted from the public carry restrictions. It was difficult to know who was lying, but in at least one case an imposter who was discovered carrying a revolver was ar-

72. Members of the House voting nay: Abbot (Democrat, Confederate Officer); English (Unknown Party, Confederate Officer); M.A. Gaston (Democrat); Hawkins (Conservative); F. Kyle (Democrat, Confederate Officer); J.W. Lane (Democrat); Jas. A. Miller (Democrat); W.C. Pierson (Radical/Democrat) (There is some dispute as to the political affiliation of W.C. Pierson he is listed as a Radical Republican in the Texas State Almanac from 1870, but his obituary states he was one of the few Democrats who served in the Texas House of Representatives during Reconstruction); Robb (Democrat, Confederate Officer); E. Ross (Democrat); Self (Unknown); G.H. Slaughter (Radical Republican). Members of the Senate voting nay: Bowers (Conservative, Confederate Officer); Cole (Democrat); Dillard (Democrat, Confederate Officer); Pickett (Conservative). See H.J. of Tex., 12th Leg., R.S. 523-32 (1871); S.J. of Tex., 12th Leg., R.S. 538 (1871); TEXAS ALMANAC (1870) (for party affiliation information); *The Handbook of Texas*, TEX. ST. HIST. ASS'N, <https://tshaonline.org/handbook> (for biographical information) (last visited July 12, 2016).

73. Act approved Apr. 12, 1871, 12th Leg., R.S., ch. 34, § 3, 1871 Tex. Gen. Laws 25, 25-26, reprinted in 6 H.P.N. Gammel, *The Laws of Texas 1822-1897*, at 927, 927-28 (1898).

74. See generally *State v. Clayton*, 43 Tex. 410 (1875); *State v. Duke*, 42 Tex. 455 (1874); *Young v. State*, 42 Tex. 462 (1874); *Smith v. State*, 42 Tex. 464 (1874); *Titus v. State*, 42 Tex. 578 (1874); *Waddell v. State*, 37 Tex. 354 (1873); *Baird v. State*, 38 Tex. 599 (1873); *English v. State*, 35 Tex. 473 (1872); *Jenkins v. State*, 36 Tex. 638 (1872); *McNeill v. State*, 14 S.W. 393 (Tex. Ct. App. 1890); *Wilson v. State*, 10 S.W. 749 (Tex. Ct. App. 1889); *Cathey v. State*, 5 S.W. 137 (Tex. Ct. App. 1887); *Roberson v. State*, 228 S.W. 236 (Tex. Crim. App. 1921); *George v. State*, 234 S.W. 87 (Tex. Crim. App. 1921); *Mayfield v. State*, 170 S.W. 308 (Tex. Crim. App. 1914); *Harris v. State*, 126 S.W. 890 (Tex. Crim. App. 1910); *Davidson v. State*, 45 S.W. 488 (Tex. Crim. App. 1898); *Sexton v. State*, 45 S.W. 920 (Tex. Crim. App. 1898); *Ex parte Jones*, 41 S.W. 626 (Tex. Crim. App. 1897).

75. CROUCH & BRICE, *supra* note 9, at 122.

76. *An Acting Officer Murdered*, DAILY HERALD (Dallas, Tex.), July 15, 1871, at 4; WEEKLY DEMOCRATIC STATESMAN (Austin, Tex.) Sept. 21, 1871, at 4.

77. *A Negro Outrage at Springfield*, WEEKLY DEMOCRATIC STATESMAN (Austin, Tex.), Oct. 5, 1871, at 3.

78. CROUCH & BRICE, *supra* note 9, at 108.

rested and fined.⁷⁹ Similarly, a few state police officers who were terminated for misconduct continued to fraudulently act as officers and on occasion were arrested for illegally carrying firearms.⁸⁰ Some efforts to enforce the law turned violent, including the Lampasas Massacre of 1873, the deadliest single incident in the brief existence of the state police. Four state police officers were murdered by members of a local cattle-rustling gang when they attempted to arrest a gang member who was violating the public carry ban.⁸¹ Despite this resistance, law enforcement efforts to enforce the public carry prohibition continued.

3. The Davis Administration: 1873–1874

During the elections of 1872, a coalition of Democrats and conservative Republicans campaigned against Davis's policies and the Democrats retook control of the state legislature by an overwhelming margin. In Davis's 1873 address to the now extremely hostile Democratic-controlled House of Representatives, he stated the prohibition on public carry "had a most happy effect," and to further push for its enforcement, Davis "offered a standing reward for the arrest and conviction of violators of it."⁸² The fate of Davis's law enforcement efforts was, however, in large measure, linked to the fate of the state police. In 1873, when the Democrats retook the House of Representatives and Senate, they immediately defunded and then disbanded Davis's police force.

Governor Davis vetoed the legislature's initial bill disbanding the state police, questioning the wisdom of dissolving the force at a time when lawlessness was "still rampant in parts of the state" and praising the bravery and efficacy of the state police. He offered to work with the legislature to prevent any future incidents of abuse of power, but the fate of the police was sealed on April 22, 1873, when the House of Representatives passed the repeal over Davis's veto in a 58–7 vote.⁸³ Between 1870 and 1872 the state police had made more than 6,000 arrests, effectively suppressed the Ku Klux Klan, and provided freedmen real protection against racial violence.⁸⁴ Democrats cheered the disbandment of the police as a great victory over Radical Republican oppression. In Georgetown and Waco, jubilant crowds stormed the jails and set free many of the prisoners arrested by the state police.⁸⁵ The abolishment of the state police threw sole responsibility for law

79. *Id.* at 120.

80. *Id.* at 124. In contrast to the strict enforcement of the prohibition on public carry, the state police opposed efforts by local Democratic law enforcement to disarm freedmen of their militia and special police weapons. *Id.* at 141.

81. *Id.* at 150–56.

82. H.J. of Tex., 13th Leg., R.S. 33–34 (1873).

83. Baenziger, *supra* note 11, at 488.

84. FONER, *supra* note 5, at 440.

85. Baenziger, *supra* note 11, at 488.

enforcement back into the hands of the local sheriffs and deputies who had failed so miserably to check crime prior to the police's creation. An Adjutant General's report at the end of the year reported "the 'arms law' [concerning personal weapons] except in the more populous counties, is being entirely disregarded"⁸⁶

In December 1873, Davis lost his reelection bid for governor in an overwhelming defeat as former Confederate supporters were again allowed to vote and Texas saw a massive influx of immigrants from other southern states.⁸⁷ But shortly afterwards, the Texas Supreme Court invalidated the election because it had been conducted under an election statute passed by the Democratically-controlled state legislature in violation of the Texas Constitution of 1869.⁸⁸ In what was often derisively called "the semicolon case," the Court was tasked with interpreting Article 3, Section 6 of the Texas Constitution of 1869, which read "All elections for State, District and County officers shall be held at the county seats of the several counties, until otherwise provided by law; and the polls shall be opened for four days, from 8 o'clock A. M. until 4 o'clock P. M. of each day."⁸⁹ The Court held that the provision allowed the legislature to change the location of elections but not the times.⁹⁰ Because the election law had limited elections to a single day rather than the four days required by the 1869 Constitution, the Court tossed out the results of the entire election.⁹¹

Davis was faced with the unenviable choice of either ignoring a decision of the state Supreme Court (every member of which he had appointed) or refusing to recognize a governor and state legislature elected by a 2–1 margin. Davis knew that retaining the governorship was not feasible, but he also knew that the legal legitimacy of a state government elected through an election that had been invalidated by

86. *Id.* at 489.

87. FONER, *supra* note 5, at 549.

88. *See generally Ex parte Rodriguez*, 39 Tex. 705 (1873). Davis had signed the election law. *Id.* at 706.

89. Lance A. Cooper, "A Slobbering Lame Thing"? *The Semicolon Case Reconsidered*, 101 Sw. Hist. Q. 320, 323 (1998).

90. The *Rodriguez* decision, and the Davis administration generally, have been vilified in Texas history since Democrats regained full control in 1874. *See generally* T.R. FEHRENBACH, *LONE STAR: A HISTORY OF TEXAS AND THE TEXANS* (1968). One textbook used in a state-mandated government course at Texas colleges described the "injustice, oppression, and extravagance" of the Davis administration and the twelfth legislature as "undoubtedly, the worst in the history of the state." WILBOURN E. BENTON, *TEXAS POLITICS: CONSTRAINTS AND OPPORTUNITIES* (5th ed. 1984). However, the Court's reading of the state constitution seems reasonable, although bold in the context the decision was made. Cooper, *supra* note 89, at 339.

91. *See Ex parte Rodriguez*, 39 Tex. at 773–74. Similarly, another dispute existed surrounding the term of the governor because of inconsistent provisions in the State constitution as to the length of the Governor's term and the inauguration of a new governor. *See generally* Carl H. Moneyhon, *Edmund J. Davis in the Coke-Davis Election Dispute of 1874: A Reassessment of Character*, 100 Sw. Hist. Q. 130 (1996).

the state Supreme Court would be dubious.⁹² Davis sought a statement of recognition from President Grant for the new legislature before it sat, but President Grant only gave a vague statement that it would be “prudent” and “right” to “yield to the will of the people.”⁹³ Shortly afterwards, the newly elected legislature assembled and sought the recognition of Davis, who refused to grant it without some sort of recognition from the President or Congress. The legislature responded by inaugurating Richard Coke as governor. Davis refused to leave office without federal recognition for the new government, and believed his term ran an additional three months. He posted militia to guard the executive offices from a Democratic takeover.⁹⁴ The Democrats responded by placing their own militia to guard the legislative chamber. To avoid conflict, Davis agreed to send his militia forces away. Shortly afterwards, Davis agreed to vacate the governor’s mansion under protest.⁹⁵ Davis leaving office marked the end of the Reconstruction period in Texas.

III. LEGAL CHALLENGES AND INTERPRETATION OF THE 1871 PROHIBITION ON PUBLIC CARRY

In the three years following enactment of the 1871 prohibition on public carry, two major legal challenges reached the Texas Supreme Court. The first was heard by a Court made up entirely of Davis appointees sympathetic to Reconstruction—the same Court that later invalidated the election of the Democratic legislature.⁹⁶ This “Semicolon Court” was held in such disrepute among Democratic “redeemers” that its opinions were only considered quasi-precedential among judges and attorneys in post-Reconstruction Texas.⁹⁷ The second challenge came in 1874, after the Democratic legislature, furious at the Court’s ruling against the validity of its election, removed the entire bench from office and appointed a new Democratic slate of judges.⁹⁸

92. *Id.* at 133–34.

93. *Id.* at 143.

94. *Id.* at 146.

95. *Id.* at 149.

96. There was one change in the Court membership between the *English* decision and the *Semicolon* case. See Hans W. Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and “Redemption” (1866–1882)*, 40 ST. MARY’S L.J. 17, 78, 116 (2008).

97. *Id.* at 92. I use “Semicolon Court” here as shorthand for the Court appointed by Governor Davis. The designation has traditionally been used derisively, especially by Southern scholars critical of Reconstruction. Use of the designation here is for clarity only and is in no way intended to be critical of the Court. Similarly the use of the term “redeemers” is used only to be consistent with historical discussion of the period and in no way to imply the reassertion of conservative white control was a positive development.

98. *Semicolon Court*, TEX. ST. HIST. ASS’N, <http://bit.ly/1KQlYzG> [<https://perma.cc/5ADF-TNJS>] (last visited July 24, 2016).

These two cases created a kind of natural experiment that isolated the contemporaneous legal views on firearms rights of Republican Unionists and Democratic redeemers. Ultimately, both Courts ruled that the general prohibition on carrying firearms in public was constitutional, but they relied on radically different reasoning in doing so. The distinctions in their legal reasoning embody the difference in the jurisprudential approach to the right to bear arms of the Southern Democrats whose rebellion resulted in the passage of the Fourteenth Amendment and the Republican Unionists who supported and passed the Amendment.

A. *The Texas State Constitution and Arms Bearing*

The Texas Constitution has contained a Second Amendment analogue since the first Constitution of the Republic of Texas which read: "Every citizen shall have the right to bear arms in defense of himself and the Republic. The military shall at all times and in all cases be subordinate to the civil power."⁹⁹ In 1845, in the first Texas State Constitution, the two provisions of the 1836 Constitution were separated and the Second Amendment analogue was tweaked to read: "Every Citizen shall have the right to keep and bear arms, in the lawful defence of himself and the State."¹⁰⁰ This language remained consistent in both the 1861 Confederate State Constitution and the 1866 Presidential Reconstruction Constitution.¹⁰¹

After the takeover of Congress by Radical Republicans and the passage of the First Reconstruction Act, a new Texas Constitutional Convention was called in 1868. One of the major concerns facing the delegates was the growing lawlessness in Texas, especially that targeting freed slaves and Republicans.¹⁰² In his opening message to the convention, then Governor Elisha Pease stated, "crime was never more prevalent in Texas [than now]."¹⁰³ Many delegates also likely had in mind the attempted lynching of sitting Supreme Court Justice Colbert Caldwell and the organization of the Ku Klux Klan in Texas, which had recently killed several blacks in a march through a freedmen's community.¹⁰⁴ In this lawless period, the delegates narrowed the scope of the firearms right to say: "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."¹⁰⁵ This constitution was ratified in 1869, and its provision on the right to

99. REPUB. TEX. CONST. of 1836, Declaration of Rights, § 14.

100. TEX. CONST. of 1845, art. I, § 13.

101. TEX. CONST. of 1861, art. I, § 13; TEX. CONST. of 1866, art. I, § 13.

102. MONEYHON, *supra* note 10, at 48.

103. *Id.* at 116.

104. *Id.* at 117.

105. TEX. CONST. of 1869, art. I, § 13.

keep and bear arms was in force when both legal challenges to the public carry law were heard.¹⁰⁶

B. *The Texas Supreme Court, 1867–1874*

During the Reconstruction period, the Texas Supreme Court underwent unprecedented upheaval. As a result of changes in federal policy and state politics between 1866 and 1874, Texas went through four different Supreme Courts.¹⁰⁷ During Presidential Reconstruction, in the immediate aftermath of the Civil War, Texas Democrats adopted a Constitution meant to change as little as possible without bringing federal retribution. Under the terms of that constitution, a slate of five Democratic Justices were elected, four of whom had served as officers in the Confederate army.¹⁰⁸ With the advent of Congressional Reconstruction, the federally appointed military governor of Texas appointed a new Court more sympathetic to the Union.¹⁰⁹ This Court sat until the ratification of the Republican-drafted Constitution of 1869 and the inauguration of Edmund J. Davis as governor in 1870.

In 1870, Davis filled the now three-member state Supreme Court, forming the so-called Semicolon Court. The Court's first three justices were Lemuel Evans, Wesley Ogden, and Moses B. Walker, all of whom had unionist sentiments and close ties to the North.¹¹⁰ Evans was a Tennessee-born conservative Republican who was forced to flee Texas during the Civil War after opposing secession, ending up in Washington D.C.¹¹¹ Ogden was born in New York and practiced law in Ohio and New York before moving to Texas in 1849. Ogden was also forced to flee Texas after opposing secession, but returned after the War, serving in several judicial positions prior to being appointed to the Court.¹¹² Walker was the only member of the Court who could fairly be called a carpetbagger.¹¹³ Prior to the War, Walker was a Yale-educated Ohio attorney and failed politician who rose to the rank of brevet brigadier general during the War. Walker remained in the mili-

106. *Constitution of 1869*, TEX. ST. HIST. ASS'N, <http://bit.ly/1IVwcsy> [<https://perma.cc/Z8AQ-NAMP>] (last visited July 24, 2016).

107. Baade, *supra* note 96, at 18.

108. *Id.* at 36–37.

109. *Id.* at 50.

110. In 1873, Justice Evans was replaced with pre-War unionist John David McAdoo. Upon secession, McAdoo chose Texas over the Union and served in the Confederate military—ultimately rising to the rank of Brigadier General. *See John David McAdoo*, TEX. ST. HIST. ASS'N, <http://bit.ly/1OiKF3D> [<https://perma.cc/924J-SP2N>] (last visited July 24, 2016).

111. Baade, *supra* note 96, at 79–80.

112. *Id.* at 81.

113. Carpetbagger is a derogatory term for a person who moved from the North to the South during reconstruction to take advantage of political opportunities, here the term is intended to be merely descriptive. FONER, *supra* note 5, at 295 n.28.

tary after the War and was assigned to Texas, where he was appointed to the military Supreme Court.¹¹⁴

The 1873 election that unseated Davis also included a referendum on a state constitutional amendment to disband the State Supreme Court and replace it with a new Court made up of five Justices.¹¹⁵ The newly elected Governor Coke appointed three justices who had previously served on the Confederate Texas Supreme Court and one justice who had served on the Court when Democrats controlled it during Presidential Reconstruction. Two of the Justices had been representatives at the Texas Secession convention. Thomas J. Devine, one of the associate justices appointed by Governor Coke, had the distinction of being one of only three people tried for treason after the Civil War.¹¹⁶ The Fortieth edition of the Texas Reports pointedly acknowledged the transition to the “Redeemer” Court saying: “[w]ith this volume we pass to another era in the judicial history of Texas. Those who have before construed the laws of this [s]tate, and who have assisted in the effort to preserve constitutional freedom for its citizens, again constitute its court of last resort.”¹¹⁷

C. *The Semicolon Court Cases*

The Semicolon Court’s major case concerning firearms, *English v. State*, arose out of three prosecutions under the 1871 Texas public carry law. English had been convicted for carrying an unloaded “out of repair” pistol while intoxicated, and a second appellant was convicted of carrying a butcher knife at a religious assembly.¹¹⁸ The appellants challenged both the 1871 general prohibition on carrying firearms in public as well as the specific restriction on carrying in enumerated public places first enacted in 1870. He and his co-defendants brought challenges, under both the federal Second Amendment and Article 1, Section 13 of the Texas Constitution of 1869.¹¹⁹

114. *Moses B. Walker*, TEX. ST. HIST. ASS’N, <http://bit.ly/1NcaN2f> [<https://perma.cc/D4P3-B2KT>] (last visited July 24, 2016).

115. Although the Semicolon Court invalidated the election, the Democrats convened the legislature anyway, passing the Amendment by the required two-thirds vote in each chamber. Baade, *supra* note 96, at 121.

116. *Id.* at 123.

117. *Id.* at 124 (citing Alex W. Terrell & Alex S. Walker, *Preface* to 40 Tex., at v, v (1882)).

118. *English v. State*, 35 Tex. 473, 473–74, 480 (1872). No evidence of the circumstances of third prosecution is available, but the Supreme Court reversed the judgment in that appellant’s case, which presumably means that that court’s ruling was in conflict with the *English* decision. A request to the Texas State Archives—which houses Texas Supreme Court records for this period—for records related to the *English* and *Duke* cases resulted in an archivist informing the Author that the Court records for both cases had been lost at some time prior to 1944 when cases were indexed.

119. *Id.* at 474, 478.

Justice Walker wrote the opinion for a unanimous Court. The opinion first looked to whether the federal Second Amendment prevented Texas from prohibiting the carrying of firearms. Interestingly, the Court found that unlike other rights enumerated in the Bill of Rights, the Second Amendment, standing alone, applied equally to both state and local governments.¹²⁰ This interpretation relied exclusively on the work of New York legal commenter Joel Prentiss Bishop, with the opinion quoting two entire paragraphs from Bishop's treatise on Criminal Law.¹²¹ Relying on Bishop, Walker adopted a militia-based view of the Second Amendment, finding that the only weapons protected were those used during service in the militia because "such only are properly known by the name of 'arms,' and such only are adapted to promote 'the security of a free State.'"¹²²

Justice Walker's opinion further stated that under the Second Amendment "'bear' arms refers merely to the military way of using them, not to their use in bravado and affray."¹²³ Walker—who was quite familiar with firearms, having served as a Colonel for the Ohio volunteers during the Civil War, and having been shot three times during the battle of Chickamauga—decisively found that the law did not violate the Second Amendment, stating:

No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the Constitution of the United States, as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the Legislature to punish and prohibit.¹²⁴

The Court then went on to uphold the law under the Second Amendment, saying: "The act referred to makes all necessary exceptions, and points out the place, the time and the manner in which certain deadly weapons may be carried as means of self-defense, and these exceptional cases, in our judgment, fully cover the wants of society."¹²⁵

Next, the Court turned to consider the case under Article 1, Section 13 of the Texas State Constitution of 1869. The Court decided that the

120. *Id.* at 475 (citing JOEL PRENTISS BISHOP, *Carrying Weapons*, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 493 (1873)).

121. *See generally* BISHOP, *supra* note 120. Notably, Bishop believed the Second Amendment applied to the states by its own terms rather than through either the due-process or privileges and immunities clauses of the Fourteenth Amendment.

122. *English*, 35 Tex. at 475; BISHOP, *supra* note 120, at 497.

123. *English*, 35 Tex. at 473, 475.

124. *Id.* at 476.

125. *Id.* at 477. Walker also made an interesting distinction between the right protected by the Second Amendment, and a pre-existing right to self-defense, stating: "There is no abridgement of the personal rights, such as may be regarded as inherent and inalienable to man, nor do we think his political rights are in the least infringed by any part of this law." *Id.*

term “arms” as used in the Texas State Constitution had the same meaning as in the Second Amendment and was limited to militia weapons.¹²⁶ It went on to state that the provision of section 13—making the right subordinate to the regulations prescribed by the state legislature—clearly allowed for the prohibition on publicly carrying firearms except in limited circumstances. Walker’s opinion then clarified that even in the absence of the provision allowing regulation, the prohibition on public carry would be valid.¹²⁷

Justice Walker next discussed how Texas’s law was consistent with the laws enacted in other states. He observed that:

This law is not peculiar to our own State, nor is the necessity which justified the enactment (whatever may be said of us to the contrary) peculiar to Texas. It is safe to say that almost, if not every one of the States of this Union have a similar law upon their statute books, and, indeed, so far as we have been able to examine them, they are more rigorous than the act under consideration.¹²⁸

While Walker did not cite the specific statutes he mentioned, he most likely referred to a series of laws primarily enacted in the North, which generally prohibited carrying a firearm or other dangerous weapon without reasonable cause to fear an attack on oneself or one’s family. The laws of Maine, Massachusetts, Michigan, Minnesota, Oregon, Pennsylvania, Virginia, West Virginia, and Wisconsin all included such statutes.¹²⁹

Justice Walker’s opinion then shifted from legal analysis to a discussion of the relationship between individuals, their community, and government, stating in reference to the 1871 Act that:

It will doubtless work a great improvement in the moral and social condition of men, when every man shall come fully to understand that, in the great social compact under and by which States and communities are bound and held together, each individual has compromised the right to avenge his own wrongs, and must look to the State for redress. We must not go back to the state of barbarism in which each claims the right to administer the law in his own case; that law being simply the domination of the strong and the violent over the weak and submissive.

. . .

126. *Id.* at 478.

127. *Id.* at 478–79 (“But we do not intend to be understood as admitting for one moment, that the abuses prohibited are in any way protected either under the State or Federal Constitution.”).

128. *Id.* at 479.

129. See generally Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121, 130–32 (2015). See also 1841 Me. Laws 709, ch. 169, § 16; 1836 Mass. Acts 750, § 16; 1846 Mich. Pub. Acts 690, ch. 162, § 16; 1851 Minn. Laws 526, ch. 112, § 18; 1853 Or. Laws 218, ch. 16, § 17; 1861 Pa. Laws 248, 250, § 6; 1847 Va. Acts 127, ch. 14, § 15; 1870 W. Va. Acts 702, ch. 153, § 8; 1838 Wis. Sess. Laws 381, § 16.

The powers of government are intended to operate upon the civil conduct of the citizen; and whenever his conduct becomes such as to offend against public morals or public decency, it comes within the range of legislative authority.¹³⁰

On this point, the Court quoted John Stuart Mill's *On Liberty*:

"It is one of the undisputed functions of the government, to take precautions against crime before it has been committed, as well as to detect and punish it afterwards. The right inherent in society, to ward off crimes against itself by antecedent precautions, suggests the obvious limitations to the maxim, 'that purely self-regarding misconduct cannot properly be meddled with in the way of prevention or punishment.'"¹³¹

Walker's opinion rejected the challenge to the portion of the law that prohibited carrying weapons at public assemblies even more vehemently. Justice Walker wrote for the Court that: "We confess it appears to us little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance, into a church, a lecture room, a ball room, or any other place where ladies and gentlemen are congregated together."¹³² The Court upheld the public assembly provision just as it had the general public carry prohibition.

The Semicolon Court had a few other opportunities to interpret the 1871 Act. In *Jenkins v. State*, the Court, again in a decision by Justice Walker, upheld the sufficiency of an indictment for carrying firearms. The Court found that the government was not required to plead that the defendant did not fall into the exceptions in the act; rather it was the defense's burden to prove the defendant fell within one of the laws exceptions.¹³³

In *Waddell v. State*, the Court contrasted the right to keep arms for self-defense in the home, which it had recognized as protected in *English*, with carrying arms in public, which could be strictly regulated. In *Waddell*, it reversed a defendant's conviction for carrying a firearm when the defendant purchased two pistols, proceeded to several other stores in town seeking ammunition to fit his gun, and then travelled to his home fifteen miles out of town. The Court found the conduct within the statute's exception for keeping or bearing arms on one's own premises or on a journey, stating:

130. *English*, 35 Tex. at 477-78.

131. *Id.* at 478 (The reporter has the Court citing to pages 56 and 57 of John Stuart Mill's *On Liberty*, but the actual quotes appear between pages 172 and 175).

132. *Id.* at 478.

133. *Jenkins v. State*, 36 Tex. 638 (1872) (The headnotes for *Jenkins* describe the offense as "carrying concealed weapons" while the actual statute prohibits carrying weapons generally).

he had a perfect right to purchase the arms, and for the purpose of obtaining ammunition to suit them, he had a right to take them with him, to any place where such ammunition was sold; and then he had a perfect right to take them to his home for any lawful purpose he may have intended to serve with them, such as guarding his house against thieves and robbers, defending himself and family against murderers or assassins.¹³⁴

The Court then reaffirmed the validity of the law stating, “[W]e find nothing in the act which, rightly construed, takes away any right or abridges any reasonable and lawful privilege of the citizen.”¹³⁵ The Court then advised prosecutors and lower courts against bringing similar cases, saying,

if wrong constructions are placed upon this act, and absurd and vexatious prosecutions for acts not within the denunciation of the law are tolerated and entertained by the courts, the law itself must become unpopular, even odious, to a free people, and the Legislature will be driven by public indignation and protest to repeal the law.¹³⁶

In contrast to *Waddell*, in *Baird v. State*, the Court upheld the conviction of a defendant who carried a handgun while hog hunting.¹³⁷ The defendant claimed his carrying was legal under the “place of business” exception because he hunted hogs in the forest every winter, which he claimed made it his regular business. The Court was unwilling to grant the exception such a broad interpretation, noting that if “place of business” included anywhere a person could conduct business, “every man could very plausibly set up the right to keep and bear arms on every occasion, for he could always claim to be at his own business”¹³⁸ The Court limited place of business to a particular location dedicated exclusively to a person’s business. The Court also rejected a challenge that the prosecution had failed to show that the person was not on his own property at the time of the crime, saying whether a person owned the property where he was arrested for carrying is within the defendant’s own knowledge and power of proof.¹³⁹ However, the Court again cautioned against overly zealous application of the law, saying:

134. *Waddell v. State*, 37 Tex. 354, 356 (1873). This is similar to language in the 1871 Tennessee case. See also *Andrews v. State*, 50 Tenn. 165, 178–79 (1871) (“The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.”).

135. *Waddell*, 37 Tex. at 355.

136. *Id.*

137. *Baird v. State*, 38 Tex. 599 (1873).

138. *Id.* at 601.

139. *Id.* at 602.

The constitutionality of that act being admitted, its beneficial effects upon society have been quite fully demonstrated and placed almost beyond question. But while it is generally conceded that the execution of that law, in the spirit, and for the purposes intended by the law-making power, would greatly conduce to the peace and quiet of the citizens of the State, yet it must also be admitted that any attempt to prostitute that law from the purposes for which it was enacted into an instrument of oppression to annoy and harass any peaceful and law-abiding citizen, would greatly tend to bring that law into disfavor, and create and stimulate a demand for its repeal. It is therefore but just and reasonable that this law, as well as all others, should be executed in the spirit intended, for the good of the citizens generally, and not as a snare to entrap the unwary who intend no wrong, and believe they are exercising only their legitimate or inalienable rights.¹⁴⁰

Possibly in response to these concerns, after laying down the rule that Baird's conduct violated the law, the Court reversed the conviction on a technical issue.¹⁴¹

D. *The 'Redeemer' Court Cases*

When the Redeemer Democrats took over the governorship, they reconstituted the Supreme Court and appointed Democratic judges to replace the Semicolon Court.¹⁴² While the Democrats repealed most of the Davis administration's legislative accomplishments, they left in place the prohibition on public carry, although enforcement was sporadic.¹⁴³ The newly constituted Court heard several challenges to the 1871 Firearms Act during its first year and issued a series of three opinions interpreting the Act. Notably, while all three decisions reversed the defendant's conviction for carrying firearms, even the "Redeemer" Court concluded that the public carry prohibition was constitutional.

The first and most important case was *State v. Duke*, an appeal by the state after the district court had found an indictment under the 1871 law deficient on constitutional grounds.¹⁴⁴ The "Redeemer" Court upheld the law as the Semicolon Court had, although with very

140. *Id.* at 600–01. The Court seems to have wanted to avoid creating an excuse for the now Democratically controlled state legislature to repeal the public carry law.

141. *Id.* at 603.

142. Baade, *supra* note 96, at 121.

143. *See, e.g.*, The Weekly Democratic Statesman (Austin, Tex.) Mar. 26, 1874 at 3; *Row on Sunday*, The Waco Daily Examiner (Waco, Tex.) June 9, 1874 at 3; The Dallas Daily Herald (Dallas, Tex.) Nov. 13, 1874 at 4; *Judge Burford's Court*, The Dallas Daily Herald (Dallas, Tex.) at 4; *Mayor's Court*, The Dallas Daily Herald (Dallas, Tex.) June 17, 1875 at 4; *Bold Resistance – The Difficulties of Enforcing Laws*, The Dallas Weekly Herald, July 17, 1875 at 3; The Dallas prosecutions occurred under a Dallas City Ordinance with identical language to Texas's statewide law, *see Ordinances of the City of Dallas*, Dallas Herald (Dallas, Tex.) June 15, 1872 at 1.

144. *State v. Duke*, 42 Tex. 455 (1874).

different reasoning.¹⁴⁵ The first difference arose out of the applicability of the Second Amendment. The “Redeemer” Court found the Second Amendment did not apply to the states, citing *Barron v. Baltimore* and the *Slaughter-House Cases*.¹⁴⁶ While this decision was fully supported by law, and anticipated the next year’s decision of the United States Supreme Court in *United States v. Cruikshank*, 92 U.S. 542 (1875), it is also consistent with the Democratic desire to minimize the role of the federal government and the reach of federal constitutional law within the state.

The Court then considered the statute under Article 1, Section 13 of the Texas Constitution of 1869. The Court disagreed with the Semicolon Court’s militia-based reading of Section 13, noting that the Texas right excluded the Second Amendment’s recitation of the well-regulated militia language, and instead stated:

The arms which every person is secured the right to keep and bear (in the defense of himself or the State, subject to legislative regulation), must be such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for defense of the State. If this does not include the double-barreled shot-gun, the huntsman’s rifle, and such pistols at least as are not adapted to being carried concealed, then the only arms which the great mass of the people of the State have, are not under constitutional protection.¹⁴⁷

The Court then stated:

Regarding, then, some kinds of pistols as within the meaning of the word, we are of the opinion that the Act in question is nothing more than a legitimate and highly proper regulation of their use. . . . It undertakes to regulate the place where, and the circumstances under which, a pistol may be carried; and in doing so, it appears to have respected the right to carry a pistol openly when needed for self-defense or in the public service, and the right to have one at the home or place of business.¹⁴⁸

However, the Court then went on to uphold the lower court’s dismissal of the indictment on the grounds that the state failed to plead that the exceptions in the Act did not apply to the defendant’s con-

145. *Id.* at 457.

146. *Id.* at 457–58 (citing *Barron v. Baltimore*, 32 U.S. 243 (1833) and *Slaughter-House Cases*, 83 U.S. 36 (1873)). The *Slaughter-House Cases* were decided after the *English* decision, but *English* did not rely on the Fourteenth Amendment for the applicability of the Second Amendment to the States.

147. *Id.* at 458–59. Notably, by making this distinction *Duke* does seem to interpret the Second Amendment as a militia based rather than individual right.

148. *Id.* at 459 (reversing the conviction because the prosecution had failed to assert that the defendant did not fall into the statutory exceptions).

duct. In doing so, the Court overturned the Semicolon Court's *Jenkins* decision which had come to the opposite conclusion.¹⁴⁹

The Semicolon and "Redeemer" Courts also disagreed about the scope of citizens' self-defense rights. The Semicolon Court was adamant that citizens in a society relinquish the power to settle scores, and instead rely on the state to keep the peace. The "Redeemer" Court spoke of no such limitations. Rather, the Court essentially permitted citizens to decide the appropriate level of self-defense by upholding a right to keep "commonly kept" arms "appropriate for 'open and manly use in self-defense.'"¹⁵⁰ The Court went so far as to name several "commonly kept" arms protected by the state constitution, including pistols and double-barreled shotguns.¹⁵¹

In a pair of cases decided the same day as *Duke*, the "Redeemer" Court interpreted the exceptions to the public-carry ban, overturning convictions in both cases. In *Young v. State*, the Court reversed a conviction for carrying a pistol because the trial court judge had refused to let in evidence regarding threats made against the defendant.¹⁵² The defendant claimed he only carried a pistol because he had previously been attacked, and his attacker after being restrained had yelled, "If I didn't kill you this time, damn you, I will do it yet."¹⁵³ The trial judge, in an extremely narrow reading of the exception, found as a matter of law that this statement was inadequate because the attacker was not physically present at the time defendant was arrested with the gun.¹⁵⁴ The Court disagreed, finding that the issue was a mixed matter of both fact and law that should have gone to a jury. The Court noted: "[i]t is easy to imagine circumstances under which the danger might be most imminent, though the person from whom it was threatened was not immediately present."¹⁵⁵

149. *Id.* at 461. See generally *Jenkins v. State*, 26 Tex. 638 (1872); see also *State v. Clayton*, 43 Tex. 410 (1875) (finding the indictment valid, which read defendant "unlawfully carr[ied] on and about his person a certain pistol, he then and there having no reasonable grounds for fearing an unlawful attack on his person, nor was he then and there either a militiaman in actual service, or a peace officer, or a policeman, nor was he then and there on his own premises or at his own place of business." This was sufficient to plead the exceptions).

150. *Duke*, 42 Tex. at 458. For a discussion of the culture of honor and violence prevalent in the South, see BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS & BEHAVIOR IN THE OLD SOUTH* (Oxford Univ. Press 1983).

151. *Duke*, 42 Tex. at 458-59.

152. *Young v. State*, 42 Tex. 462 (1874).

153. *Id.* at 463.

154. *Id.* at 463-64.

155. *Id.* at 464; see also *Bailey v. Commonwealth*, 74 Ky. 688, 692-93 (1876) (interpreting similar language to allow carry when a specific threat exists even if that threat is not actually present); *Chatteaux v. State*, 52 Ala. 388, 390 (1875) (continuing to carry a pistol concealed after passing through a dangerous area does not meet the exception for good reason to apprehend an attack).

In the second decision interpreting the law's exceptions, the Court reversed a conviction for carrying a pistol on two grounds.¹⁵⁶ First, the indictment did not state that the defendant lacked reasonable grounds to fear an unlawful attack.¹⁵⁷ Second, the defendant was traveling sixteen miles to a nearby town, a journey he expected to last two or three days.¹⁵⁸ The Court found this was sufficient to bring the defendant within the exception for travelers.¹⁵⁹ While these decisions seem reasonable, they do appear to be part of a pattern of finding technical flaws in indictments and prosecutions in order to avoid subjecting defendants to punishment under the 1871 Act.

However, the "Redeemer" Court did not overturn every firearms conviction that came before it.¹⁶⁰ In *Titus v. State*, the Court upheld a conviction for carrying a pistol while hunting. The Court made clear that the statute did not include an exception for hunting and that the use of pistols in hunting is neither "necessary or proper."¹⁶¹ While the Semicolon Court's *Baird* decision was clearly on point, the Court did not cite it as precedent, but rather only stated that *Baird* "is a case similar to the present."¹⁶²

IV. CONCLUSION

As the foregoing makes clear, at the time of the ratification of the Fourteenth Amendment, restrictions on publicly carrying firearms were not viewed by Texas Republicans as violative of any right. Rather, in 1870 and 1871, faced with a horrifying rate of violence, Texas's Republican state legislature did not feel constrained in taking action to protect the people of Texas. This resulted in a general prohibition on carrying firearms that was aggressively enforced by a newly created state police force. This restriction was consistent with the Republican view that individuals surrendered their personal right to avenge grievances by entrusting government to maintain societal order.

Contrary to the historical accounts presented by many scholars, these laws were obviously not enacted based on racial animus. Then, as now, gun violence weighed most heavily on the black commu-

156. *Smith v. State*, 42 Tex. 464 (1874).

157. *Id.* at 465.

158. *Id.*

159. *Id.* at 466.

160. At the time, every criminal defendant was entitled to an appeal as of right to the State Supreme Court. This proved burdensome to the Supreme Court, which resulted in the creation of the Texas Court of Criminal Appeals. Baade, *supra* note 96, at 126.

161. *Titus v. State*, 42 Tex. 578, 579 (1874).

162. *Id.* at 579. The Semicolon Court cases were held in such ill repute in "redeemed" Texas that attorneys practicing in Texas avoided citing them as precedent.

nity.¹⁶³ But, unlike the present day inaction of Congress and many state legislatures, in the face of aberrational homicide rates, the government of Texas under Governor Edmund Davis took action. This action was taken with the full support of the black community who it was intended to protect.¹⁶⁴ The law was also enforced in a racially neutral manner during the Davis administration.¹⁶⁵ The Texas state police was a fully integrated police force closely aligned with the Republican governor and fully committed to protecting freedmen from violence perpetrated by whites.

When interpreting the rights protected by the Fourteenth Amendment, scholars should look to the legal views of those who supported the enactment and ratification of the Fourteenth Amendment rather than those who fought to abscond from the constitutional system, and in the case of Texas Democrats, specifically rejected ratification of the Fourteenth Amendment.¹⁶⁶ The Republican-appointed Supreme Court did not struggle to uphold the prohibition on carrying firearms. Justice Walker, a former Union general, found the law consistent with the laws of the rest of the nation and self-evidently valid and beneficial. In contrast, the law was viewed with suspicion when it came before the “redeemed” Supreme Court, which expressed sympathy for a right to “manly self-defense.” These differing views are representative of the differing Republican and Democratic views about gun rights, self-defense, and the role of government. The Republican view was enshrined in the Fourteenth Amendment after the North’s victory in the Civil War. This view should be the guide in interpreting the scope of the Second Amendment now.

163. See generally Nate Silver, *Black Americans Are Killed at 12 Times the Rate of People in Other Developed Countries*, FIVE THIRTY EIGHT (June 18, 2015, 5:33 PM), <http://53eig.ht/1RdE3VR> [<https://perma.cc/Q4XS-KA3C>].

164. See *supra* notes 71–72.

165. This Article does not speak to the enforcement of the laws in the post-Reconstruction period. While press accounts from the post-Reconstruction period seem to indicate that the law continued to be enforced against both the white and black population, it is virtually certain that blacks would have been treated unfairly.

166. Texas Democrats also rejected ratification of the Thirteenth Amendment. *Constitutional Convention of 1866*, TEX. ST. HIST. ASS’N, <http://bit.ly/1ZYBA6d> [<https://perma.cc/T5AQ-95M3>] (last visited July 24, 2016).