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No. 08-1521

IN THE
Supreme Court of the United States

OTIS McDONALD, ET AL.,
Petitioners,

v.

CITY OF CHICAGO, ET AL.,
Respondents.

**On Writ of Certiorari to the United States Court
of Appeals for the Seventh Circuit**

**BRIEF OF THIRTY-FOUR PROFESSIONAL
HISTORIANS AND LEGAL HISTORIANS AS
AMICI CURIAE IN SUPPORT OF
RESPONDENTS**

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**BRIEF OF THIRTY-FOUR PROFESSIONAL
HISTORIANS AND LEGAL HISTORIANS
AS *AMICI CURIAE* IN SUPPORT OF
RESPONDENTS**

Professional historians and legal historians respectfully submit this brief as *amici curiae* in support of Respondents.¹

INTEREST OF *AMICI CURIAE*

Amici are professional historians and legal historians who have taught courses and published scholarship on the Second Amendment, Reconstruction Amendments, federalism, and legal and constitutional history. We file this brief in support of Respondents. *Amici* do not directly address the doctrinal question of whether the Fourteenth Amendment incorporated a right to bear arms against the states. Rather, based on our study as historians, we explain that, in the period surrounding ratification of the Fourteenth Amendment, states had broad authority to enact non-discriminatory gun-safety regulations and regulate arms in like manner as the ordinances challenged in this case.

Amici's names are set forth in the "List of *Amici Curiae*" following the Conclusion.

¹ Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this brief are on file with the Clerk.

SUMMARY OF ARGUMENT

The historical record shows that states and municipalities have long enjoyed authority to enact reasonable non-discriminatory gun safety regulations, including bans on the possession of particularly dangerous classes of weapons. Although this type of regulation—enacted through the exercise of traditional police powers—preceded adoption of the Fourteenth Amendment, it continued unabated and even increased in the aftermath of that new constitutional provision. Neither state constitution drafters, nor state legislatures, nor state courts, nor legal treatise writers understood the Fourteenth Amendment to limit state authority to enact such reasonable non-discriminatory regulations.

During the Reconstruction period, many states adopted constitutional right-to-bear-arms provisions that explicitly contemplated and authorized gun safety regulations. For example, the Texas Constitution of 1868 was one of several to make “the right to keep and bear arms” expressly subject to “such regulations as the legislature may prescribe.” These express provisions would have made little sense if those states believed that the Fourteenth Amendment barred such forms of regulation in any event.

State legislatures also heavily regulated firearms during the Reconstruction period. As firearms became smaller and more dangerous in the nineteenth century, many states either regulated or forbade the carrying or use of portable weapons, including pistols. To take just two of the many examples we describe in this brief, Tennessee outlawed any carrying of “any ... belt or pocket pistol, revolver, or any kind

of pistol, except the army or navy pistol,” and Wyoming barred anyone from “bear[ing] upon his person, concealed or openly, any fire-arm or other deadly weapon, within the limits of any city, town or village.” (Excerpts from these laws are reprinted in the Appendix.)

Courts repeatedly upheld these types of restrictions against constitutional attack. For example, the Tennessee Supreme Court observed that the right to bear arms could “be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good,” and the Arkansas Supreme Court upheld that state’s regulations as a lawful “exercise of the police power of the State without any infringement of the constitutional right” to bear arms. Influential treatises and articles reaffirmed the permissibility of reasonable safety regulations.

The historical examples from the Reconstruction era identified by petitioners and their *amici* do indicate one important change created by the Fourteenth Amendment. In its aftermath, states could no longer enact gun laws that discriminated against classes of *people* (and, in particular, against African-Americans). But petitioners and their *amici* do not cite—and we as professional historians have not found—examples from the Reconstruction era in which states were prohibited from enacting reasonable non-discriminatory safety regulations, including regulations banning classes of dangerous weapons.

It would therefore be contrary to early practice under the Fourteenth Amendment to block states and cities from enacting reasonable gun regulations,

including bans on specific types of dangerous weapons, such as the laws at issue in this case. As state constitution drafters, courts, legislatures, and commentators alike have agreed, our constitutional framework gives states and local governments the authority they need to balance the public safety interests impacted by the possession and use of dangerous weapons such as handguns. The regulations at issue in this case are consistent with our nation's historical regulation of dangerous weapons.

ARGUMENT

IT WAS WIDELY UNDERSTOOD DURING THE RECONSTRUCTION PERIOD THAT STATES WERE AUTHORIZED TO EXERCISE THEIR TRADITIONAL POLICE POWERS TO REGULATE FIREARMS, INCLUDING BY BANNING PARTICULARLY DANGEROUS WEAPONS.

A. States Possessed Plenary Authority During The Antebellum Period To Regulate Arms In Order To Protect The Public Safety.

States and municipalities have always had primary responsibility to enact regulations protecting public safety in our constitutional system. Exercising these “police powers,” states and municipalities extensively regulated firearms during the antebellum period, including by banning types of particularly dangerous weapons. Courts almost universally upheld regulations that stopped short of disarming the citizenry altogether.

1. *States Had Broad Authority To Exercise Police Power To Promote Public Safety.*

Since the Founding, states and municipalities have possessed broad power to enact safety regulations protecting the public. In the early nineteenth century, this came to be known as the “police power”—“the inherent and plenary power of a State ... to prescribe regulations to preserve and promote the public safety, health and morals, and to prohibit all things hurtful to the comfort and welfare of society.” Lewis Hochheimer, *The Police Power*, 44 Cent. L.J. 158, 158 (1897).

The range and reach of police powers are extensive.² As this Court recently recognized, “the structure and limitations of federalism ... allow the States ‘great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.’” *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Medtronic, Inc v. Lohr*, 518 U.S. 470, 575 (1996)). Indeed, nineteenth-century jurists often proclaimed the difficulty of establishing *any* fixed constitutional limitation on state police powers to enact regulations when necessary for the protection of public health, morals, welfare, or especially, safety—even when these regula-

² See, e.g., Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw: The Evolution of American Law, 1830-1860* (2d ed. 1967); William J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (1996); Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 Cal. L. Rev. 217 (1984).

tions shaped or restricted the rights, interests, liberties, and property of its citizens.

Rather than viewing constitutional rights as final trump cards over local self-governing authority, the early American conception of police power instead held that rights were generally subject to the kinds of regulations and restrictions that protected the ordered liberty of all in a well-regulated society. As Massachusetts Chief Justice Lemuel Shaw described the police power, “Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.” *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85 (1851).

As a consequence, ordinary police regulations were rarely challenged on constitutional grounds in antebellum American courts. When such regulations were challenged, courts regularly upheld the exercise of police power. *See, e.g., Thorpe v. Rutland & Burlington R.R.*, 27 Vt. 140, 149-50 (1854) (surveying an array of early American police power cases and describing its breadth). In later assessing the scope of police powers, Justice William O. Douglas concluded: “We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless.” *Berman v. Parker*, 348 U.S. 26, 32 (1954).

2. *States and Municipalities
Regularly Invoked Their
Police Power To Regulate
Or Ban Arms In The Name
Of Public Safety.*

The “promotion of safety of persons and property is unquestionably at the core of the State’s police power.” *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). In order to promote the safety of persons and property, “colonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used guns.” Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 162 (2007).

States exercised their police powers to regulate arms in many ways. In one early form of regulation, several states regulated the storage of gunpowder in order to protect against fires, in some instances effectively banning the possession of loaded weapons in the home.³ As Chief Justice Marshall observed,

³ See, e.g., Act of June 26, 1792, ch. X, 1792 Mass. Acts 208; Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627; Act of Dec. 6, 1783, ch. 1059, 11 Pa. Stat. 209; see *District of Columbia v. Heller*, 128 S. Ct. 2783, 2819 (2008) (stating that the Massachusetts law would have been construed to permit self-defense and, “[i]n any case, we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city”); *id.* at 2849 (Breyer, J., dissenting) (describing various laws regulating gunpowder). Antebellum courts repeatedly upheld such regulations. See, e.g., *Foote v. Fire Dep’t of New York*, 5 Hill 99, 101 (N.Y. Sup. Ct. 1843) (“The statute is a mere police regulation—an act to prevent a nuisance to the city.”); *Williams v. City Council of Augusta*, 4 Ga. 509, 512 (1848).

“The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States.” *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827). He explained that “The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power” *Id.* at 444.

Shortly thereafter, other states, including Ohio, Tennessee, and Virginia, enacted laws regulating the discharge of guns, particularly in potentially crowded public places like the town square.⁴ Since the Founding, then, states and local governments have regulated arms when necessary to protect citizens from such then-existing threats to public safety as fires and accidental shootings.

In the early part of the nineteenth century, the states were confronted with an additional problem concerning firearms. In the years since the colonial era, weapons had grown smaller and cheaper, and the practice of traveling with concealed weapons, such as handguns and knives, had become both common and dangerous. See Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 138-41 (2006). Perceiving a threat to their citizens’ safety, many state legislatures responded to this new danger by enacting laws prohibiting the carrying of concealed

⁴ See, e.g., Act of Feb. 17, 1831 § 6, reprinted in 3 Statutes of Ohio and the Northwestern Territory 1740 (Salmon P. Chase ed., 1835); Act of Dec. 3, 1825, ch. CCXCII, § 3, 1825 Tenn. Priv. Acts 306; Act of Nov. 16, 1821, ch. LXLIII, §§ 1-2, 1821 Tenn. Pub. Acts 78-79; Act of Jan. 30, 1847, ch. 79, 1846-47 Va. Acts 67; Act of Feb. 4, 1806, ch. XCIV, 1805-06 Va. Acts 51.

weapons. Kentucky passed the first of these in 1813, prohibiting the wearing of a “pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon,” with a narrow exception for “when traveling on a journey.” An Act to Prevent Persons in this Commonwealth from Wearing Concealed Arms, Except in Certain Cases (1813), *reprinted in* Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic* 143-44 (1999). Louisiana passed a similar ban the same year. Other states soon followed suit.⁵

Several states went further in response to this new threat, deciding not only to outlaw the carrying of concealed weapons, but to proscribe entire classes of concealable weapons, which by their nature posed threats to public safety. In 1837, for example, Alabama imposed a tax on the sale or giving of Bowie Knives or Arkansas Tooth-picks. See An Act To Suppress the Use of Bowie Knives (1837), *reprinted in* Cramer, *supra*, at 146. The following year, Tennessee altogether banned the wearing, sale, or giving of the same weapons. See Act of Jan. 27, 1838, ch. CXXXVII, 1837-1838 Tenn. Pub. Acts 200, *reprinted in* Cramer, *supra*, at 148-49; *see also* Cornell, *supra*, at 142 (describing the Alabama and Tennessee statutes as “more robust” than earlier statutes by “effectively moving from regulation to prohibition of certain classes of weapons”).⁶

⁵ See statutes from Alabama, Virginia, Arkansas, and Indiana, *reprinted in* Cramer, *supra*, at 145-52, and from Ohio, Act of Mar. 18, 1859, 1859 Ohio Laws 56.

⁶ Edged weapons were standard equipment for the militia, *see, e.g.*, Mass. Session Laws (Nov. 29, 1775), at 17, and so would be protected against federal regulation by the Second

In the years that followed, state courts repeatedly upheld these statutes against constitutional attack, even when the pertinent state constitution explicitly protected the right to bear arms. *See, e.g., Day v. State*, 37 Tenn. 496, 499 (1857); *Aymette v. State*, 21 Tenn. 154, 159-61 (1840) (right to keep weapons is unqualified, but right to bear arms for purposes other than the common defense can be regulated); *State v. Buzzard*, 4 Ark. 18, 21 (1842); *State v. Chandler*, 5 La. Ann. 489, 489-90 (1850) (upholding a ban on concealed weapons that was “absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons”); *State v. Jumel*, 13 La. Ann. 399, 400 (1858) (upholding a concealed-weapons law because it only banned a “*particular mode* of bearing arms which is found dangerous to the peace of society”); *State v. Reid*, 1 Ala. 612, 616-17 (1840) (holding that it was permissible for the state to regulate weapons “merely to promote personal security” by prohibiting the wearing of weapons “in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others”). Courts thus recognized that states and localities had authority to exercise their police powers to regulate weapons deemed particularly dangerous.

Against this backdrop, the major outlier is *Bliss v. Commonwealth*, 12 Ky. 90, 91, 93 (1822), in which the Kentucky Supreme Court declared Kentucky’s concealed-weapons ban in conflict with its Constitu-

Amendment, *see Heller*, 128 S. Ct. at 2816. Until the era of the Colt, edged weapons were more lethal and reliable than handguns.

tion. As commentators in the era of the Fourteenth Amendment recognized, *Bliss* is properly understood as the exception, not the rule, in judicial decisions involving challenges to gun-safety regulations. See Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 125, at 75-76 (1868). And, indeed, it was so anomalous that the legislature responded by amending the state constitution to allow a concealed-weapons ban. See Ky. Const. of 1850, art. XIII, § 25.

By contrast, the vast majority of state and local laws regulating or outlawing dangerous arms were upheld as paradigmatic examples of the exercise of police power. “The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Every thing prejudicial to the health or morals of a city may be removed.” *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. (5 How.) 504, 589-91 (1847) (McLean, J., dissenting).⁷ This power, Justice McLean explained, is “essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he be assailed by an assassin, or ap-

⁷ Justice McLean’s conception of dangerous weapons as a “nuisance” invokes the common law notion that judicial regulation of certain types of property to protect the public safety was appropriate even without affirmative legislative action. This understanding was the forerunner of the modern statutory police power. See Ernst Freund, *Standards of American Legislation* 66 (1917) (“[T]he law of nuisance is the common law of the police power, striking at all gross violations of health, safety, order, and morals.”); Novak, *supra*, at 60-66 (describing gunpowder as an example of something governed by the common law of nuisance).

proached by poison.” Thus, for example, in light of the “explosive nature of gunpowder, a city may exclude it” as an “act[] of self-preservation.” For “[i]ndividuals in the enjoyment of their own rights must be careful not to injure the rights of others.” *Id.*

It was therefore generally recognized in the period before adoption of the Fourteenth Amendment that state legislatures could react to threats to the public safety through reasonable regulation of the right to bear arms, including outlawing certain classes of particularly dangerous weapons.

B. The Fourteenth Amendment Did Not Reduce States’ Robust Authority To Enact Non-Discriminatory Regulations Of Arms Or Outlaw Specific Classes Of Weapons.

The passage of the Fourteenth Amendment did not reduce states’ broad authority to regulate possession of arms. On the contrary, state constitutions, regulations, and judicial decisions of the period following adoption of the Fourteenth Amendment demonstrate that states continued to enjoy broad authority to balance the right to bear arms against requirements of public safety. In striking that balance, states were authorized to regulate (and even ban) dangerous weapons, including handguns.

Consistent with an across-the-board expansion in the number and scope of state police-power regulations in the post-Civil War era,⁸ state restrictions on

⁸ There is a scholarly consensus extending from the Reconstruction-era itself to today concerning the general explosion in police-power health and safety regulations in the period *follow-*

dangerous weapons expanded after adoption of the Fourteenth Amendment. This history provides grounding to the Seventh Circuit's observation that "it is difficult to argue that legislative evaluation of which weapons are appropriate for use in self-defense has been out of the people's hands since 1868." Pet. App. 8a. To the extent that the Fourteenth Amendment protects any individual right to bear arms, that right was widely understood—both before and after the Reconstruction Amendments—to permit states the authority to enact significant non-discriminatory safety regulations of dangerous weapons, including handguns.

1. *Many Post-Fourteenth-Amendment State Constitutions Authorized Legislatures To Enact Reasonable Safety Regulations Of Weapons.*

The Reconstruction era brought a burst of constitution-writing at the state level, and a majority of the state constitutions adopted at the time of or after passage of the Fourteenth Amendment protected some right to bear arms. But, as detailed below, the majority of the new constitutions that included right-to-bear-arms provisions—fifteen of twenty-four—*also* expressly limited those rights by authoriz-

ing the adoption of the Fourteenth Amendment. See, e.g., William J. Novak, "Legal Origins of the Modern American State" in Austin Sarat et al., *Looking Back at Law's Century* 249-83 (2002); B.J. Ramage, *Social Progress and the Police Power of a State*, 36 Am. L. Rev. 684 (1902); Ernst Freund, *The Police Power, Public Policy and Constitutional Rights* (1904). As described in this section, the increased regulation of firearms during the period accords with that trend.

ing legislative regulation.⁹ It is quite unlikely that these states believed they were violating the federal Constitution in allowing for such regulation. To the extent that the states believed they were bound by the Second Amendment, they did not understand that Amendment to *prevent* precisely the kind of reasonable safety regulation permitted by their own constitutions.

Three new state constitutions subjected the right to general legislative limitation. In 1868, Texas's Republican-dominated constitutional convention drafted a provision subjecting "the right to keep and bear arms" to "such regulations as the legislature may prescribe." Tex. Const. of 1869, art. I, § 13. Over the next several decades, Idaho and Utah enacted similar provisions, with Idaho providing that "the Legislature shall regulate the exercise of this right by law" and Utah providing that "nothing herein shall prevent the legislature from defining the lawful use of arms." Idaho Const. of 1889, art. I, § 11; Utah Const. of 1896, art. I, § 6.

Other state constitutional provisions—such as one Texas enacted in 1876—specifically granted the legislature the somewhat narrower "power, by law, to regulate the wearing of arms, with a view to prevent crime." Tex. Const. of 1876, art. I, § 23. Tennessee enacted a provision substantially identical to Texas's. See Tenn. Const. of 1870, art. I, § 26. Georgia and Florida granted even broader power to their

⁹ Several new state constitutions declined to protect arms rights. See Cal. Const. of 1879; Ill. Const. of 1870; Neb. Const. of 1875; N.Y. Const. of 1894; N.D. Const. of 1889; Va. Const. of 1870; W. Va. Const. of 1872.

legislatures, allowing for regulation of the manner of bearing arms without tying the power to the prevention of crime.¹⁰ See Fla. Const. of 1885, art. I, § 20; Ga. Const. of 1868, art. I, § 14; Ga. Const. of 1877, art. I, § 22. Seven other states expressly authorized regulation of firearms by noting that their protections should not be construed to deny legislatures the power to regulate concealed weapons.¹¹

2. *Legislative Regulation Of
Firearms Was Ubiquitous,
Sometimes Banning Pos-
session Of Entire Classes
Of Dangerous Weapons,
Including Handguns.*

State legislatures routinely enacted broad restrictions on the possession of weapons in the years following adoption of the Fourteenth Amendment. These regulations were more pervasive than those enacted during the antebellum period. Even when new state constitutions contained a right to bear arms not expressly subject to legislative regulation,¹²

¹⁰ Florida's grant of legislative authority was effectively as sweeping as that of Idaho, Utah, and the Texas Constitution of 1869. The right protected is only the "right to *bear* arms," Fla. Const. of 1885, art. I, § 20 (emphasis added); it provides no right to *keep* arms. The power to "prescribe the manner in which they may be borne," *id.*, was thus the power to regulate the constitutional right in its entirety.

¹¹ See Colo. Const. of 1876, art. II, § 13; Ky. Const. of 1891, § 1.7; La. Const. of 1879, art. III; Miss. Const. of 1890, art. III, § 12; Mo. Const. of 1875, art. II, § 17; Mont. Const. of 1889, art. III, § 13; N.C. Const. of 1875, art. I, § 30.

¹² See Ala. Const. of 1868, art. I, § 28; Ark. Const. of 1868, art. I, § 5; Del. Const. of 1897, art. I, § 20; Or. Const. of 1857, art. I, § 27; Pa. Const. of 1874, art. I, § 21; S.C. Const. of 1868,

legislatures still regulated firearms.¹³ Several even imposed outright bans on handguns.

The most common regulations of the period were concealed-weapons laws. At least fifteen states prohibited the carrying of concealed pistols and deadly weapons, some explicitly covering all firearms or all weapons.¹⁴ Although three of these statutes created exceptions for travelers, persons on their own premises, or those with a legitimate fear of attack,¹⁵ the majority contained no such exceptions.

But concealed-weapons laws were not the only legislative prerogative exercised at the time. At least four states went further, banning the possession of all non-military handguns. Tennessee criminalized carrying, “publicly or privately, any ... belt or

art. I § 28; S.D. Const. of 1889, art. VI, § 24; Wash. Const. of 1889, art. I, § 24; Wyo. Const. of 1889, art. I, § 24.

¹³ See Ark. Act of Apr. 1, 1881; Laws of Oregon 1885, An Act to Prevent Persons from Carrying Concealed Weapons, § 1–4, p. 33; 1880 S.C. Acts 448, § 1; S.D. Terr. Pen. Code § 455 (1877); Wash. Code § 929 (1881); 1876 Wyo. Comp. Laws ch. 52, § 1.

¹⁴ See Ark. Act of Apr. 1, 1881; 1881 Colo. Rev. Stat. p. 229 § 149; Fla. Act of Feb. 12, 1885, ch. 3620, § 1; Ill. Act of Apr. 16, 1881; 1880 Ky. Gen. Stat. ch. 29, § 1; 1893 Neb. Cons. Stat. § 5604; 1879 N.C. Sess. Laws ch. 127; N.D. Pen. Code § 457 (1895); Laws of Oregon 1885, An Act to Prevent Persons from Carrying Concealed Weapons, § 1–4, p. 33; 1880 S.C. Acts 448, § 1; S.D. Terr. Pen. Code § 457 (1877); Tex. Act of Apr. 12, 1871; 1869–1870 Va. Acts 510; Wash. Code § 929 (1881); W. Va. Code ch. 148, § 7 (1870).

¹⁵ See 1893 Neb. Cons. Stat. § 5604; 1879 N.C. Sess. Laws ch. 127; 1880 S.C. Acts 448, § 1.

pocket pistol, revolver, or any kind of pistol, except the army or navy pistol, usually used in warfare, which shall be carried openly in the hand.” 1879 Tenn. Pub. Acts ch. 186. The only persons exempted from the statute were military personnel and those performing specified law enforcement functions. *Id.* Perhaps most pertinent here, the Tennessee Supreme Court construed the act to apply even “upon one’s own farm or premises, or in fact in *any place*.” *Dycus v. State*, 74 Tenn. 584, 585 (1880) (emphasis added); see also *Barton v. State*, 66 Tenn. 105, 105-06 (1874).

Tennessee was not alone in such regulation. Wyoming likewise forbade anyone from “bear[ing] upon his person, concealed or openly, any fire-arm or other deadly weapon, within the limits of any city, town or village.” 1876 Wyo. Comp. Laws ch. 52, § 1. Arkansas and Texas enacted similar bans. See Ark. Act of Apr. 1, 1881; Tex. Act of Apr. 12, 1871. States also outlawed the sale of non-military pistols,¹⁶ or prohibited specific weapons elected officials determined were public dangers.¹⁷

Municipalities likewise enacted their own regulations. Dodge City, Kansas, for example, banned the carrying of pistols and other dangerous weapons in response to violence accompanying western cattle drives. See Dodge City, Kan., Ordinance No. 16, § XI

¹⁶ See Ark. Act of Apr. 1, 1881; 1879 Tenn. Pub. Acts ch. 96.

¹⁷ See Fla. Act of Aug. 8, 1868; Ill. Act of Apr. 16, 1881; 1850 Mass. Gen. Laws, ch. 194, § 2; N.D. Pen. Code § 457 (1895); S.D. Terr. Pen. Code § 455 (1877).

(Sept. 22, 1876); Robert R. Dykstra, *The Cattle Towns* 121-22 (1968).

For these reasons, it was widely understood in the years following adoption of the Fourteenth Amendment that states and municipalities could balance any right to bear arms against the state's duty to protect the public; and that balancing included the authority to ban the use of handguns.

3. *Courts Routinely Upheld
Restrictions On Carrying
Handguns Such As Pistols
Or Revolvers.*

In the wake of the Fourteenth Amendment, state courts also recognized state legislative authority to regulate dangerous weapons, such as handguns. The Tennessee Supreme Court's *Andrews v. State* decision is illustrative. The plaintiffs there challenged a statute forbidding any person to "publicly or privately carry any ... pocket pistol ... or revolver," Tenn. Act. of June 11, 1870, asserting "that it is in violation of, and repugnant to" the Second Amendment of the U.S. Constitution and Tennessee's constitution. 50 Tenn. 165, 171 (1871). The court interpreted the statute to "amount[] to a prohibition to keep and use such weapon for *any and all purposes*." *Id.* at 187 (emphasis added). Although the court held that the federal Constitution did not limit the state legislature, *id.* at 175, it interpreted the state right-to-bear-arms provision *in pari materia* with the Second Amendment, *id.* at 177. Nevertheless, this right did not extend to "every thing that may be useful for offense and defense." *Id.* at 179. Weapons such as the pocket pistol and revolver could be prohibited *altogether*. *Id.* Even the use of weapons such

as “the rifle ... , the shot gun, the musket, and repeater,” could “be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good.” *Id.* at 179-80; *see also State v. Wilburn*, 66 Tenn. 57, 59-60 (1872).

Similarly, the Arkansas Supreme Court upheld that state’s prohibition on carrying pistols. *See Fife v. State*, 31 Ark. 455 (1876). Tracking the reasoning of *Andrews*, the Arkansas Supreme Court upheld that State’s prohibition as a lawful “exercise of the police power of the State without any infringement of the constitutional right” to bear arms. *Id.* at 461. So, too, the Texas Supreme Court upheld a conviction for carrying an unloaded pistol for the purpose of getting it repaired, and concluded that such carrying is not “in any way protected either under the State or Federal Constitution.” *English v. State*, 35 Tex. 473, 473, 478 (1871).

Courts in Georgia, West Virginia, and Oklahoma followed suit. *See Hill v. State*, 53 Ga. 472, 474 (1874); *State v. Workman*, 35 W. Va. 367, 373 (1891); *Ex parte Thomas*, 97 P. 260, 262 (Okla. 1908). In the Georgia case, the author of the Court’s opinion noted that he was “at a loss to follow the line of thought that extends the guarantee”—in the state Constitution of the “right of the people to keep and bear arms”—“to the right to carry pistols, dirks, Bowie-knives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day.” 53 Ga. at 474.

At the time surrounding the enactment of the Fourteenth Amendment, then, the constitutional

right to bear arms—whether state or federal—was not believed to bar states from exercising their police powers to enforce appropriate safety regulations, including broad bans of categories of weapons such as pistols and revolvers.

4. *Leading Treatises Recognized States' Authority To Regulate Arms To Protect The Public Safety.*

The major legal treatises of the day cement the conclusion that states were widely understood to have authority to regulate weapons. Some commentators observed that the “right in the people to keep and bear arms, although secured by ... the constitution, is held in subjection to the public safety and welfare.” Joel Tiffany, *A Treatise on Government and Constitutional Law* 394 (1867).

As Judge John Dillon explained, even where there is a right to bear arms, “the peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons.” Hon. John Dillon, *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 Cont. L.J. 259, 287 (1874). And so the law must “strike some sort of balance between these apparently conflicting rights.” *Id.*

In *Heller*, this Court cited John Norton Pomeroy’s treatise as representative of “post-Civil War 19th-century sources” commenting on the right to bear arms. 128 S. Ct. at 2812. As this Court noted, Pomeroy observed that while “[t]he object of” the Second Amendment “is to secure a well-armed mili-

tia,” “a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons,” and so the government “is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms.” John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 152 (1868). The very next sentence in Pomeroy’s treatise is: “But all such provisions, all such guarantees, must be construed with reference to their intent and design. This constitutional inhibition is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons, or laws forbidding the accumulation of quantities of arms with the design to use them in a riotous or seditious manner.” *Id.* at 152-53.

In his authoritative survey of police power, published in 1904, Ernst Freund reviewed nineteenth-century weapons regulations to conclude that the constitutional guarantees of the Second Amendment and similar state constitutional provisions had “not prevented the very general enactment of statutes forbidding the carrying of concealed weapons, and the *possession or use of certain deadly weapons*.” Freund, *The Police Power*, *supra*, at 90-91 (emphasis added). He deemed this a classic illustration of the more general principle whereby “constitutional rights must if possible be so interpreted as not to conflict with the requirements of peace, order and security.” *Id.* at 91.

In the wake of the Fourteenth Amendment’s adoption, respected legal authorities would thus have seen the ordinances challenged in this case—which, much like the laws of Tennessee and other states at the time, prohibit the keeping of handguns

while allowing other types of firearms—as striking a reasonable balance between an individual’s right and the public’s expectation that the state will protect them from the dangers inherent in small and dangerous weapons.

C. The Fourteenth Amendment Prohibited Discriminatory Laws That Targeted Certain Classes Of *People*.

Petitioners and their *amici* cite little if any evidence from the historical record suggesting that the enactment and ratification of the Fourteenth Amendment prevented states, through the exercise of their police powers, from enacting reasonable safety regulations, including banning *classes of weapons* that states and municipalities deemed dangerous. Instead, they point to a variety of historical sources demonstrating that the Fourteenth Amendment was meant and understood to preclude state laws and actions targeted at certain *classes of people*, in particular African-Americans.

For example, the NRA (at 10-11) and Constitutional Law Professors (at 25-26) both describe concern in Congress about the Black Codes. As they note, laws in Mississippi, South Carolina, and elsewhere explicitly discriminated against the rights of freedmen and other African-Americans, including by preventing those individuals from possessing the types of arms others were permitted to own. Petitioners and the NRA also cite an order from General Sickles, issued in January 1866, to suspend the South Carolina Black Codes. *See* Pet. Br. 11; NRA Br. 14. Both quote the order selectively, however, cutting off the provision in mid-sentence. Read in full, it provides: “The 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.” Order of General Sickles, disregarding the Code, art. XVI (January 17, 1866). The same provision further provides “And no disorderly person, vagrant, or disturber of the peace, shall be allowed to bear arms.” *Id.* The Sickles order was consistent with the authority of states and localities, exercising their police powers, to enact generally applicable safety regulations. The same goes for other firearms regulations in the Reconstruction South, including a prohibition on the sale of pistols and knives in Charleston, and a ban in St. James, South Carolina, on carrying “guns, pistols, or other weapons of War.”¹⁸

Likewise, the NRA (at 12) and Constitutional Law Professors (at 29) place great emphasis on the second Freedman’s Bureau Bill, which Congress enacted in response to discriminatory laws enacted and enforced by Southern States. But that bill focused on barring state action discriminating against African-Americans. The relevant language provided that the right “to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, includ-

¹⁸ See Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol’y Rev. 615, 621 & nn.19-20 (2006) (citing Letter from Brvt. Brig. Gen. W. Bennet to Capt. Rice (Feb. 27, 1866)).

ing the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery.” Act of July 10, 1866, § 14, 14 Stat. 173, 176-77. Although petitioners’ *amici* highlight the portion of this provision noting a “right to bear arms,” they ignore the text surrounding that phrase, *viz.* “equal benefit of all laws” and “without respect to race or color or previous condition of slavery.” *Id.*; see also Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. Law. 1, 73 (2009).

Other legislation enacted by the Reconstruction Congress likewise targeted discriminatory state action. For example, the Civil Rights Act of 1866, which the Fourteenth Amendment was meant to constitutionalize,¹⁹ explicitly enacted an antidiscrimination rule. See Rosenthal, *supra*, at 58-59. At the same time, Senator Trumbull noted that the Act would “in no manner interfere ... with the municipal regulations of any State which protects all alike in their rights of person and property.” Cong. Globe, 39th Cong., 1st Sess. 1760-61 (1866).

The NRA also relies (at 17, 46) on the Pomeroy treatise, but that source also reflects a non-discrimination understanding of the Fourteenth Amendment. As Pomeroy observed, if a state statute provided that “certain classes of the inhabitants—

¹⁹ See, e.g., James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435, 444 (1985).

say negroes—are required to surrender their arms,” the federal Bill of Rights offered no relief. Pomeroy, *supra*, 150-51. The “first section” of the Fourteenth Amendment “now pending before the people,” however, “would give the nation complete power to protect its citizens against local injustice and oppression * * *.” *Id.* at 151 (quoted in NRA Brief at 17). But, Pomeroy emphasized, it would not “interfere with any of the rights, privileges, and functions which properly belong to the individual states.” *Id.* And as already noted, *supra* p. 21, Pomeroy recognized that the constitutional right to bear arms is consistent with bans on “dangerous” weapons.

Indeed, Pomeroy’s view—that the first section of the Fourteenth Amendment prohibited state statutes directed at “certain classes of the inhabitants,” Pomeroy, *supra*, at 150, but did not prohibit reasonable and neutral regulations aimed at protecting the public—also reflected the view of the Reconstruction Congress. Senator Morrill (R-Me.), for example, emphasized that the “principle of equality before the law ... does not prevent the State from qualifying the rights of the citizen according to the public necessities.” Cong. Globe, 39th Cong., 2d Sess. 40 (1866). Representative Thaddeus Stevens (R-Pa.) noted that the Fourteenth Amendment “allow[ed] Congress to correct the unjust legislation of the States, so far that the law which operates on one man shall operate equally upon all.” Cong. Globe, 39th Cong., 1st Sess. 2459 (1866). Representative Hotchkiss (R-N.Y.) argued that “no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another.” *Id.* at 1095. As a result of the Fourteenth Amendment, states could thus no longer enact or enforce firearms

laws that discriminated against “classes of inhabitants.” Pomeroy, *supra*, at 150. But, consistent with the views of these Republican Congressmen, “Republican state officials believed they wielded a well-established right . . . to control the use of firearms . . . when it threatened public safety or state authority.” Emberton, *supra*, at 626.

By contrast, petitioners cite no source from the period—and we are not aware of any—suggesting that the Fourteenth Amendment limited states’ long-recognized police powers to protect the public safety, including by banning classes of weapons deemed particularly dangerous by elected officials.

* * * * *

The historical record, as summarized above, shows that states and localities had broad authority during the Reconstruction period to determine what would “best serve the public interest.” The people of Chicago, through their elected representatives, have determined that the regulations at issue in this case serve the important and longstanding local mission of preserving public safety. The city’s non-discriminatory exercise of its police powers reflects a two-century’s old tradition at the heart of this nation’s democratic system of government. No one in the era leading up to and following the adoption of the Fourteenth Amendment contemplated that the federal Constitution would, should, or could remove decisions of this kind from local communities and their elected leaders, by placing them instead in the hands of federal judges in a distant locale. Accordingly, it would be contrary to the early practice under that Amendment to invalidate the reasonable safety regulations at issue here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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SELECTED STATE STATUTES

Alabama

1837

AN ACT To suppress the use of Bowie Knives.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened,* That if any person carrying any knife or weapon, known as Bowie Knives or Arkansas Tooth-picks, or either or any knife or weapon that shall in form, shape or size, resemble a Bowie-Knife or Arkansaw [sic] Tooth-pick, on a sudden rencounter, shall cut or stab another with such knife, by reason of which he dies, it shall be adjudged murder, and the offender shall suffer the same as if the killing had been by malice and aforethought.

Section 2. *And be it further enacted,* That for every such weapon, sold or given, or otherwise disposed of in this State, the person selling, giving or disposing of the same, shall pay a tax of one hundred dollars, to be paid into the county Treasury; and if any person so selling, giving or disposing of such weapon, shall fail to give in the same to his list of taxable property, he shall be subject to the pains and penalties of perjury.

Approved June 30, 1837.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 146 (1999).)

1839

AN ACT

To suppress the evil practice of carrying weapons secretly.

Sec. 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened*, That if any person shall carry concealed about his person any species of fire arms, or any bowie knife, Arkansas [sic] tooth-pick, or any other knife of the like kind, dirk, or any other deadly weapon, the person so offending, shall on conviction thereof, before any court having competent jurisdiction, pay a fine not less than fifty nor more than five hundred dollars, to be assessed by the jury trying the case; and be imprisoned for a term not exceeding three months, at the discretion of the Judge of said court.

Approved Feb. 1, 1839.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 151-52 (1999).)

Arkansas

1838

Every person who shall wear any pistol, dirk, butcher or large knife, or a sword in a cane, concealed as a weapon, unless upon a journey, shall be adjudged guilty of a misdemeanor, and upon conviction thereof, in the county in which the said offence shall have been committed, shall be fined in any sum not less than twentyfive dollars, nor more than one hundred dollars, one half to be paid into the county treasury, the other half to the informer, and shall also be imprisoned not less than one, nor more than six months.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 150 (1999).)

1881

Ark. Act of Apr. 1, 1881, as codified in Ark. Stat., chap. 45 (1884).

Section 1907. Any person who shall wear or carry in any manner whatever as a weapon any dirk or bowie knife, or a sword, or a spear in a cane, brass or metal knucks, razor, or any pistol of any kind whatever, except such pistols as are used in the army or navy of the United States, shall be guilty of a misdemeanor. *Provided*, that officers whose duties require them to make arrests, or to keep and guard prisoners, together with persons summoned by such officers to aid them in the discharge of such duties,

while actually engaged in such duties, are exempted from the provisions of this act. *Provided, further,* that nothing in this act be so construed as to prohibit any person from carrying any weapon when upon a journey or upon his own premises.

Section 1908. Any person, excepting such officers or persons on a journey and on their premises as are mentioned in section 1907, who shall wear or carry any such pistol as is used in the army or navy of the United States, in any manner except uncovered and in his hand, shall be deemed guilty of a misdemeanor.

Section 1909. Any person who shall sell, barter or exchange, or otherwise dispose of, or in any manner furnish to any person, any dirk or bowie knife, or a sword or a spear in a cane, brass or metal knucks, or 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.

Section 1910. Any person convicted of a violation of any of the provisions of this act shall be punished by a fine of not less than fifty nor more than two hundred dollars.

Colorado

1881 Colo. Rev. Stat. pt. 229 § 149, as codified in Colo. Stat. Ann., chap. 35 (1911).

Section 1830. Carrying concealed weapons—Second offense—Search without warrant—Confiscation.

SEC 223. No person, unless authorized to do so by the chief of police of a city, mayor of a town or the sheriff of a county, shall use or carry concealed upon his person any fire arms, as defined by law, nor any pistol, revolver, bowie knife, dagger, sling shot, brass knuckles or other deadly weapon. Any person who violates the foregoing provisions shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment in jail for a period of not exceeding one year or by a fine of not more than five hundred (\$500.00) dollars, or by both such fine and imprisonment. Any person who has been once convicted hereunder shall for a second offense be guilty of a felony and, upon conviction shall be punished by a fine of not more than one thousand (\$1,000.00) dollars or by imprisonment in the penitentiary for not exceeding two (2) years, or by both such fine and imprisonment.

Florida

Fla. Act of Feb. 12, 1885, Chap. 3620, § 1, as codified in Fla. Rev. Stat., tit. 2, pt. 5 (1892).

2421. Carrying concealed weapons. — Whoever shall secretly carry arms of any kind on or about his person, or whoever shall have concealed on or about his person any dirk, pistol or other weapon, except a common pocket knife, shall be punished by imprisonment not exceeding six months, or by fine not exceeding one hundred dollars.

Fla. Act of Aug. 6, 1888, Chap. 1637, subchap. 7, § 10, as codified in Fla. Rev. Stat., tit. 2, pt. 5 (1892).

2423. Persons engaged in criminal offence having weapons. — Whoever, when lawfully arrested while committing a criminal offence or a breach or disturbance of the public peace, is armed or has on his person slung-shot, metallic knuckles, billies, firearms or other dangerous weapon, shall be punished by imprisonment not exceeding one year and by fine not exceeding fifty dollars.

Fla. Act of Feb. 12, 1885, Chap. 3620, § 3, as codified in Fla. Rev. Stat., tit. 2, pt. 5 (1892).

2424. Officer to take possession of arms. — The officer making any arrest under the preceding sections shall take possession of any arms or weapons found upon the person arrested, and shall retain the same until after the trial of such person, and if he be convicted, said arms or weapons shall be forfeited and the sheriff shall sell the same at public

sale and account for and pay over the proceeds thereof, as in the case of fines collected, but if such person be acquitted, the said arms or weapons shall be returned to him.

Fla. Act of Aug. 8, 1868, as codified in Fla. Rev. Stat., tit. 2, pt. 5 (1892).

2425. Manufacturing or selling slung-shot. — Whoever manufactures, or causes to be manufactured, or sells or exposes for sale any instrument or weapon of the kind usually known as slung-shot, or metallic knuckles, shall be punished by imprisonment not exceeding six months, or by fine not exceeding one hundred dollars.

Georgia

1837

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by the authority of same.* That, from and after the passage of this act, it shall not be lawful for any merchant, or vender of wares or merchandize in this State, or any other person or persons whatsoever, to sell, or offer to sell, or to keep, or have about their person or elsewhere, any of the hereinafter described weapons, to wit: Bowie, or any other kind of knives, manufactured and sold for the purpose of wearing, or carrying the same as arms of offence or defence, pistols, dirks, sword canes, spears, & c., shall also be contemplated in this act, save such pistols as are known and used, as horseman's pistols, &c.

Section 2. *And be it further enacted by the authority aforesaid,* That any person or persons with in the limits of this State, violating the provisions of this act, except as hereafter excepted, shall for each and every such offence, be deemed guilty of a high misdemeanor, and upon trial and conviction thereof, shall be fined, in a sum not exceeding five hundred dollars for the first offence, nor less than one hundred dollars at the direction of the Court; and upon a second conviction, and every after conviction of a like offence, in a sum not to exceed one thousand dollars, nor less than five hundred dollars, at the discretion of the Court.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 146-48 (1999).)

Illinois

Ill. Act of Apr. 16, 1881, as codified in Ill. Stat. Ann.,
Crim. Code, ch. 38 (1885).

88. Possession or sale forbidden – Penalty.

§ 1. Be it enacted by the People of the State of Illinois represented in the General Assembly. That whoever shall have in his possession, or sell, give or loan, hire or barter, or whoever shall offer to sell, give, loan, have or barter, to any person within this State, any slung shot or metallic knuckles, or other deadline weapon of like character, or any person in whose possession such weapons shall be found, shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than ten dollars (\$10), nor more than two hundred dollars (\$200).

91. Concealed weapon - Flourishing weapon.

§ 4. Whoever shall carry a concealed weapon upon or about his person of the character in this Act specified, or razor as a weapon, or whoever, in a threatening or boisterous manner, shall display or flourish any deadly weapon, shall be guilty of a misdemeanor and shall be fined, in any sum not less than twenty-five dollars (\$25) nor more than two hundred dollars (\$200).

Indiana

1820

AN ACT to prohibit the wearing of concealed weapons.

Approved, January 14, 1820

Sec. 1. *BE it enacted by the General Assembly of the State of Indiana*, That any person wearing any dirk, pistol, sword in cane, or any other unlawful weapon, concealed, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not exceeding one hundred dollars, for the use of county seminaries: *Provided, however*, that this act shall not be so construed as to affect travellers.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 145 (1999).)

1831

Sec. 58. That every person, not being a traveller, who shall wear or carry a dirk, pistol, sword in a cane, or other dangerous weapon concealed, shall upon conviction thereof, be fined in any sum not exceeding one hundred dollars.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 145-46 (1999).)

Kentucky

1813

AN ACT to prevent persons in this Commonwealth from wearing concealed Arms, except in certain cases.

Sec. 1. *Be it enacted by the General Assembly of the commonwealth of Kentucky*, That any person in his commonwealth, who shall hereafter wear a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when travelling on a journey, shall be fined in any sum, not less than one hundred dollars; which may be recovered in any court having jurisdiction of like sums, by action of debt, or on the presentment of a grand jury — and a prosecutor in such presentment shall not be necessary. One half of such fine shall be to the use of the informer, and the other to the use of the commonwealth.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 143-44 (1999).)

1880

1880 Ky. Gen. Stat. ch. 29, §§ 1, 5

§ 1. If any person shall carry concealed a deadly weapon upon or about his person other than an ordinary pocket knife, or shall sell a deadly weapon to a minor other than an ordinary pocket knife, such person shall, upon indictment and conviction, be fined not less than twenty five nor more than one

hundred dollars and imprisoned in the county jail for not less than ten nor more than thirty days in the discretion of the court or jury trying the case.

§ 5. Carrying concealed deadly weapons shall be lawful in the following cases: 1st. When the person has reasonable grounds to believe his person or the person of some of his family, or his property is in immediate danger from violence or crime; 2nd. By sheriffs, constables, marshals, policemen, and other ministerial officers, when necessary for their protection in the discharge of their official duties.

Louisiana

1813

Sec. 1. *Be it enacted by the senate and the house of representatives of the State of Louisiana in general assembly convened,* That from and after the passage of this act, any person who shall be found with any concealed weapon, such as a dirk, dagger, knife, pistol or other deadly weapon, concealed in his bosom, coat or in any other place about him that do not appear in full open view, any person so offending, shall on conviction thereof before any justice of the peace, be subject to pay a fine not to exceed fifty dollars nor less than twenty dollars, one half to the use of the state, and the balance to the informer, and should any person be convicted of being guilty of a second offence before any court of competent jurisdiction, shall pay a fine of not less than one hundred dollars to be applied as aforesaid, and be imprisoned for a time not exceeding six months.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 144-45 (1999).)

Massachusetts

1850 Mass. Gen. Lawa, ch. 194, §§ 1, 2, as codified in Mass. Gen. Stat., chap. 164 (1873).

SECT. 10. Whoever when arrested upon a warrant of a magistrate issued against him for an alleged offence against the laws of this state, and whoever when arrested by a sheriff, deputy-sheriff, constable, police officer, or watchman, while committing a criminal offence against the laws of this state, or a breach or disturbance of the public peace, is armed with, or has on his person, slung shot, metallic knuckles, billies, or other dangerous weapon, shall be punished by fine not exceeding fifty dollars, or by imprisonment in the jail not exceeding one year.

SECT. 11. Whoever manufactures, or causes to be manufactured, or sells, or exposes for sale, any instrument or weapon of the kind usually known as slung shot, or metallic knuckles, shall be punished by fine not less than fifty dollars, or by imprisonment in the jail not exceeding six months.

Nebraska

1893 Neb. Con. Stat. § 5604

Whoever shall carry a weapon or weapons concealed on or about his person, such as a pistol, bowie-knife, dirk, or other dangerous weapon, on conviction of the first offense shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not more than thirty days, and for the second offense not exceeding one hundred dollars or imprisoned in the county jail not more than three months, or both, at the discretion of the court; *Provided, however,* If it shall be proved from the testimony on the trial of any such case that the accused was, at the time of carrying any weapon or weapons as aforesaid, engaged in the pursuit of any lawful business, calling or employment and the circumstances in which he was placed at the time aforesaid were such as to justify a prudent man in carrying the weapon or weapons aforesaid, for the defense of his person, property, or family, the accused shall be acquitted.

North Carolina

1879 N.C. Sess. Laws ch. 127, as codified in North Carolina Code, Crim. Code, ch. 25 (1883)

Sec. 1005. Concealed weapons, the carrying of unlawfully, a misdemeanor.

If any one, except when on his own premises, shall carry concealed about his person any pistol, bowie knife, dirk, dagger, slungshot, loaded cane, brass, iron or metallic knuckles or razor or other deadly weapon of like kind, he shall be guilty of a misdemeanor, and fined or imprisoned at the discretion of the court. And if any one, not being on his own lands, shall have about his person any such deadly weapon, such possession shall be *prima facie* evidence of the concealment thereof. This section shall not apply to the following persons: officers and soldiers of the United States army, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the state guard when called into actual service, officers of the state, or of any county, city or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties.

North Dakota

N.D. Penal Code §§ 456, 457, as codified in N.D. Rev. Code (1895).

§ 7312. Carrying or using slung shot. Every person who carries upon his person, whether concealed or not, or uses or attempts to use against another, any instrument or weapon of the kind usually known as slung shot, or of any similar kind, is guilty of a felony.

§ 7313. Carrying concealed weapons. Every person who carries concealed about his person any description of firearms, being loaded or partly loaded, or any sharp or dangerous weapon, such as is usually employed in attack or defense of the person, is guilty of a misdemeanor.

Ohio

Act of Mar. 18, 1859, 1859 Ohio Laws 56.

If it shall be proved to the jury, from the testimony on the trial of any case presented under the [section of this act banning the carrying of concealed weapons], that the accused was, at the time of carrying any of the weapon or weapons aforesaid, engaged in the pursuit of any lawful business, calling, or employment, and that the circumstances in which he was placed at the time aforesaid were such as to justify a prudent man in carrying the weapon or weapons aforesaid for the defense of his person, property or family, the jury shall acquit the accused.

(Reprinted from Saul Cornell & Nathan DeNino, *A Well Regulated Right: Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004).)

Oregon

An Act to Prevent Persons from Carrying Concealed Weapons, Feb. 18, 1885, as codified in Ore. Code, ch. 8 (1892).

§ 1969. It shall be unlawful for any person to carry concealed about his person in any manner whatever any revolver, pistol, or other fire-arm, or any knife (other than an ordinary pocket-knife), or any dirk or dagger, slung-shot or metal knuckles, or any instrument by the use of which injury could be inflicted upon the person or property of any other person.

§ 1970. Any person violating any of the provisions of section 1969 shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than five days nor more than one hundred days, or by both fine and imprisonment, in the discretion of the court. Nothing in this act shall be construed to apply to any sheriff, constable, police, or other peace officer, whose duty it is to serve process or make arrests. Justices of the peace shall have concurrent jurisdiction to try any person or persons charged with violating any of the provisions of this act.

South Carolina

1880 S.C. Acts 448, §§ 1, 4, as codified in S.C. Rev. Stat. (1894).

SEC. 129. (2472.) Any person carrying a pistol, dirk, dagger, slungshot, metal knuckles, razor, or other deadly weapon usually used for the infliction of personal injury, concealed about his person shall be guilty of a misdemeanor, and upon conviction thereof before a Court of competent jurisdiction shall forfeit to the County the weapon so carried concealed, and be fined in a sum not more than two hundred dollars or imprisoned not more than twelve months, or both, in the discretion of the Court. Nothing herein contained shall be construed to apply to peace officers while in the actual discharge of their duties as such officers, or to persons carrying concealed weapons while upon their own premises.

South Dakota

S.D. Terr. Pen. Code §§ 455-57, as codified in S.D. Rev. Code, Penal Code (1903).

§ 469. Every person who manufactures or cause to be manufactured, or sells or offers or keeps for sale, or gives or disposes of any instrument or weapon of the kind usually known as slung shot, or of any similar kind, is guilty of a misdemeanor.

§ 470. Every person who carries upon his person, whether concealed or not, or uses or attempts to use against another, any instrument or weapon of the kind usually known as slung shot, or of any similar kind, is guilty of a felony.

§ 471. Every person who carries concealed about his person any description of firearms, being loaded or partly loaded, or any sharp or dangerous weapon, such as is usually employed in attack or defense of the person, is guilty of a misdemeanor.

Tennessee

1838

An Act to suppress the sale and use of Bowie Knives and Arkansas Tooth Picks in this State.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That if any merchant, pedlar, jeweler, confectioner, grocery keeper, or other person or persons whatsoever, shall sell, or offer to sell, or shall bring into this State, for the purpose of selling, giving or disposing of in any other manner whatsoever, any Bowie knife or knives, or Arkansas tooth picks, or any knife or weapon that shall in form, shape or size resemble a Bowie knife or any Arkansas tooth pick, such merchant, pedlar, jeweler, confectioner, grocery keeper, or other person or persons for every such Bowie knife or knives, or weapon that shall in form, shape or size resemble a Bowie knife or Arkansas tooth pick so sold, given or otherwise disposed of, shall be guilty of a misdemeanor, and upon conviction thereof upon indictment or presentment, shall be fined in a sum not less than one hundred dollars, nor more than five hundred dollars, and shall be imprisoned in the county jail for a person not less than one month nor more than six months.

Section 2. That if any person shall wear any Bowie knife, Arkansas tooth pick, or other knife or weapon that shall in form, shape or size resemble a Bowie knife or Arkansas toothpick under this clothes, or keep the same concealed about his person, such person shall be guilty of a misdemeanor, and upon

conviction thereof shall be fined in a sum not less than two hundred dollars, nor more than five hundred dollars, and shall be imprisoned in the county jail not less than three months and not more than six months.

Sec. 3. That if any person shall maliciously draw or attempt to draw any Bowie knife, Arkansas tooth pick, or any knife or weapon that shall in form, shape, or size resemble a Bowie knife or Arkansas tooth pick, from under his clothes or from any place of concealment about his person, for the purpose of sticking, cutting, awing, or intimidating any other person, such person so drawing or attempting to draw, shall be guilty of a felony, and upon conviction thereof shall be confined in the jail and penitentiary house of this State for a period of time not less than three years, nor more than five years.

Sec. 4. That if any person carrying any knife or weapon known as a Bowie knife, Arkansas tooth pick, or any knife or weapon that shall in form, shape or size resemble a Bowie knife, on a sudden rencounter, shall cut or stab another person with such knife or weapon, whether death ensues or not, such person so stabbing or cutting shall be guilty of a felony, and upon conviction thereof shall be confined in the jail and penitentiary house of this State, for a period of time not less than three years, nor more than fifteen years.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 148-49 (1999).)

1879

1879 Tenn. Pub. Acts ch. 96, as codified in Tenn. Code (1884).

5522. Any person who carries under his clothes, or concealed about his person, a bowie-knife; Arkansas tooth-pick, or other knife or weapon of like form, shape, or size, is guilty of a misdemeanor, and, upon such conviction, shall be fined not less than two hundred dollars nor more than five hundred, and shall be imprisoned in the county jail not less than three nor more than six months.

5523. It is misdemeanor to sell, or offer to sell, or into this State for the purpose of selling, giving away, or otherwise disposing of any knife or weapon mentioned in the preceding section; and the person guilty thereof, for each knife shall, upon conviction be fined not less than one hundred nor more than five hundred dollars, and be imprisoned in the county jail not less than one month nor more than six months.

1879 Tenn. Pub. Acts ch. 186, as codified in Tenn. Code (1884).

5533. It shall not be lawful for any person to carry, publicly or privately, any dirk, razor concealed about his person, sword cane, loaded cane, slung-shot or brass knucks, Spanish stiletto, belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol, usually used in warfare, which shall be carried openly in the hand.

5534. Any person guilty of such offense shall be subject to presentment or indictment, and on conviction shall be fined fifty dollars and imprisoned in the county jail of the county where the offense was committed, the imprisonment only in the discretion of the court; *Provided*, the defendant shall give good and sufficient security for all the costs, fine, and any jail fees that may accrue by virtue of his imprisonment.

Texas

Tex. Act of Apr. 12, 1871, as codified in Tex. Penal Code (1879).

Art. 163. If any person, other than a peace officer, shall carry any gun, pistol, bowie knife, or other dangerous weapon, concealed or unconcealed, on any day of election, during the hours the polls are open, within the distance of one-half mile of any poll or voting place, he shall be punished as prescribed in article 161 of this Code.

Art. 316. If any person shall discharge and gun, pistol or fire-arm of any description, on or across any public square, street or alley in any city, town or village in this state, he shall be fined in a sum not exceeding one hundred dollars.

Art. 318. If any person in this state shall carry 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 purposes of offense or defense, he shall be punished by fine of not less than twenty-five nor more than one hundred dollars; and, in addition thereto, shall forfeit to the county in which he is convicted, the weapon or weapons so carried.

Art. 319. The preceding article shall not apply to a person in actual service as a militiaman, nor to a peace officer or policemen, or person summoned to his aid, nor to a revenue or other civil officer engaged in the discharge of official duty, nor to the carrying

of arms on one's own premises or place of business nor to person traveling, nor to one who has reasonable ground for fearing an unlawful attack upon his person, and the danger is so imminent and threatening as not to admit of the arrest of the party about to make such attacked, upon legal process.

Art. 320. If any person shall go into any church or religious assembly, any school room, or other place where persons are assembled for sacrament or for educational or scientific purposes, or into any circus, show, or public exhibition of any kind, or into a ball-room social party, or social gathering, or to any election precinct on the day or days of any election, where any portion of the people of this state are collected to vote at any election, or to any other place where people may be assembled to muster, or to perform any other public duty, or to any other public assembly, and shall have or carry about his person a pistol or other fire-arm, dirk, dagger, slung-short, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of a knife manufactured and sold for the purpose of offense and defense, he shall be punished by fine not less than fifty nor more than five hundred dollars, and shall forfeit to the county the weapon or weapons so found on his person.

Virginia

1838

An ACT to prevent the carrying of concealed weapons.

Be it enacted by the general assembly. That if any person shall hereafter habitually or generally keep or carry about his person any pistol, dirk, bowie knife, or any other weapon of the like kind, from the use of which the death of any person might probably ensue, and the same be hidden or concealed from common observation, and he be thereof convicted, he shall for every such offence forfeit and pay the sum of not less than fifty dollars nor more than five hundred dollars, or be imprisoned in the common jail for a term not less than one month or more than six months, and for each instance at the discretion of the jury; and a moiety of the penalty recovered in any prosecution under this act, shall be given to any person who may voluntarily institute the same.

(Reprinted from Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 150-51 (1999).)

1869

1869-70 Va. Acts, ch. 349, pt. 510, as codified in Virginia Code, tit. 54 (1873).

7. If a person habitually carry about his person, hid from common observation, any pistol, dirk, bowie knife, or any weapon of the like kind, he shall be fined fifty dollars, and imprisoned for not more than

twelve months in the county or corporation jail. The informer shall have half of such fine.

1856-57 Va. Acts, ch. 140, pt. 554, as codified in Virginia Code, tit. 54 (1873).

8. If a person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family or property, he may be required to give a recognizance, with the right of appeal, as before provided, and like proceedings shall be had on such appeal.

Washington

Wash. Code § 929 (1881).

If any person carry upon his person any concealed weapon, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not more than one hundred dollars, or imprisoned in the county jail not more than thirty days: *Provided*, That this section shall not apply to police officers and other persons whose duty it is to execute process or warrants, or make arrests.

West Virginia

W. Va. Code ch. 148, § 7 (1870)

If any person, habitually, carry about his person, hid from common observation, any pistol, dirk, bowie knife, or weapon of the like kind, he shall be fined fifty dollars. The informer shall have one half of such fine.

W. Va. Code ch. 153, § 8 (1870)

If any person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property, he may be required to give a recognizance, with the right of appeal, as before provided, and like proceedings shall be had on such appeal.

Wyoming

1876 Wyo. Comp. Laws ch. 52 § 1, as codified in Wyo. Rev. Stat., Crimes (1887).

Carrying concealed weapon.

SEC. 980. 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 fire-arm or other deadly weapon, within the limits of any city, town or village.

1876 Wyo. Comp. Laws ch. 52 § 2, as codified in Wyo. Rev. Stat., Crimes (1887).

Non-resident carrying weapons after notification by officer.

SEC. 981. If any person not a resident of any town, city or village of Wyoming Territory, shall, after being notified of the existence of the last preceding section by a proper peace officer, continue to carry or bear upon his person any fire-arm or other deadly weapon, he or she shall be deemed to be guilty if a violation of the provisions of said section and shall be punished accordingly.

1876 Wyo. Comp. Laws ch. 52 § 3, as codified in Wyo. Rev. Stat., Crimes (1887).

Penalty for violating last two sections.

SEC. 982. Any person violating any of the provisions of the last two preceding sections shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than five dollars nor more than fifty dollars, and, in the default of the payment of any fine which may be assessed against him, shall be imprisoned in the county jail for not less than five days nor more than twenty days.

1884 Wyo. Sess. Laws ch. 67 § 1, as codified in Wyo. Rev. Stat., Crimes (1887).

Exhibiting deadly weapon in angry manner.

SEC. 983. whoever shall, in the presence of one or more persons, exhibit any kind of fire-arms, bowie knife, dirk, dagger, slung shot or other deadly weapon, in a rude, angry or threatening manner not necessary to the defense of his person, family or property, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than ten dollars, nor more than one hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

1879 Wyo. Sess. Laws ch. 43 § 1, as codified in Wyo. Rev. Stat., Crimes (1887).

SEC. 984. It shall be unlawful for any person in this territory to fire any rifle, revolver or other fire-arm of any description whatever, from any window, door, or other part of any railroad car or train, engine or trailer, or along the line of railroad during the passing of any train or engine, or when any person is passing in the vicinity of the person having in his possession, such fire-arm, and any person so offending, shall, on conviction, be fined in a sum not exceeding twenty dollars, and for second offense, confined in the county jail for a term not exceeding sixty days. And it shall be the duty of any railroad company to post a copy of this and the next succeeding section in every railroad car used for the transportation of passengers passing through this territory. But nothing in this section contained, shall be construed as preventing employees on railroad trains from carrying fire arms, and using the same when necessary for protection of themselves and the persons and property under their charge.

1876 Wyo. Comp. Laws ch. 35 § 127, as codified in Wyo. Rev. Stat., Crimes (1887).

Having possession of offensive weapons.

SEC. 1027. If any person or persons shall have upon him any pistol, gun, knife, dirk, bludgeon or other offensive weapon, with intent to assault any person, every such person, on conviction, shall be fined in any sum not exceeding five hundred dollars, or

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imprisoned in the county jail not exceeding six months.