

The First Congressional Debate on Public Carry and What It Tells Us About Firearm Regionalism

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ABSTRACT

In the aftermath of District of Columbia v. Heller, a prominent issue remains unresolved: whether, or to what extent, the Second Amendment protects an individual right to keep and bear arms outside of the home. This Article explores this unresolved issue through a newly uncovered source, the congressional debates surrounding the District of Columbia's public carry law in the 1890s.

These debates provide new insights into the understanding of the right to keep and bear arms in the years following the drafting and ratification of the Fourteenth Amendment. Two conclusions can be drawn from the debate. First, there was no national consensus regarding a right to public carry under the Second Amendment. This is important because the Supreme Court in Heller stated that the Second Amendment "codified venerable, widely understood liberties." Second, the Senators' and Congressmen's varied positions on the Second Amendment and the permissible scope of public carry regulations generally fell into regional patterns. Representatives of states in the North and West supported a more limited public carry right, while those representing states in the Deep South, with some exceptions, supported a broader Second Amendment right. Because the Northern Republicans were the ideological force behind the drafting and ratification of the Fourteenth Amendment, their restrictive view of public carry should be given special weight when determining the constitutionality of contemporary public carry regulations.

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INTRODUCTION

In the aftermath of *District of Columbia v. Heller*,¹ in which the Supreme Court struck down the District of Columbia’s handgun ban and found an individual right to keep and bear arms under the Second Amendment, a prominent issue remains unresolved: whether or to what extent the Second Amendment protects an individual right to keep and bear arms *outside of the home*—often referred to as the right to “public carry.” This Article explores this unresolved issue through a newly uncovered source, the congressional debates surrounding another D.C. firearm law—the regulation of public carry—in the 1890s.

Since *Heller*, three public carry-related issues have arisen in Second Amendment litigation: (1) whether the Second Amendment protects a right to carry firearms in public at all; (2) whether the Second Amendment protects a right to a specific kind of carry—open (a firearm exposed to public view

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

in a holster) or concealed; and (3) whether it is permissible to require an applicant for a concealed/open carry permit to make a showing of “good cause” or a special need for self-defense to carry a firearm in public. The Seventh Circuit and D.C. District Court have struck down total carry bans under the Second Amendment.² At least two courts have upheld regulations banning open carry but allowing concealed carry.³ Several federal circuit courts of appeals have upheld the constitutionality of requiring applicants for carry permits to show “good cause” or a “special need” to carry a firearm, with the D.C. Circuit being an important outlier.⁴ The Supreme Court has yet to weigh in on any of these regulations.⁵

With minimal guidance provided by the Supreme Court, the circuit courts have generally coalesced around a two-step test for laws regulating firearms.⁶ At step one, a court analyzes whether the challenged law falls within the scope of the Second Amendment based primarily on the text, history, and tradition.⁷ This step is heavily reliant on historical case law, statutes, and treatises to make a determination whether the challenged law falls within the historical scope of the right protected by the Second Amendment.⁸ If a court finds that the law impinges on the right as historically understood, then at step two, some form of heightened scrutiny

2. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014).

3. *Nichols v. Harris*, 17 F. Supp. 3d 989 (C.D. Cal. 2014), *argued*, No. 14-55873 (9th Cir. Feb. 15, 2018); *Norman v. State*, 159 So. 3d 205 (Fla. Dist. Ct. App. 2015), *aff'd*, 215 So. 3d 18 (Fla.), *cert. denied*, 138 S. Ct. 469 (2017).

4. *Compare* *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (upholding a law requiring a showing of “good cause” to obtain a concealed carry permit), *cert. denied sub nom.* *Peruta v. California*, 137 S. Ct. 1995 (2017), *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) (upholding a “requirement that applicants demonstrate a ‘justifiable need’ to publicly carry a handgun for self-defense”), *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013) (holding that “the good-and-substantial-reason requirement is constitutional under the Second Amendment as applied” in this case), *and* *Kachalsky v. County of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012) (upholding a law “limiting handgun possession in public to those who show a special need for self-protection”), *with* *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017) (striking down a “good reason” law).

5. The Supreme Court did obliquely address the issue of “good cause” public carry in 1894 when it stated that a person convicted under Texas’s law prohibiting public carry absent good cause was not “denied the benefit” of the right to bear arms. *Miller v. Texas*, 153 U.S. 535, 538 (1894). Justices Thomas and Gorsuch also issued a dissent from denial of certiorari in *Peruta v. California*, indicating that they would likely strike down a good-cause issuance regime if it reached the Court. 137 S. Ct. 1995 (2017) (Thomas, J., dissenting).

6. *See, e.g., United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

7. *Id.* at 89–90.

8. *Id.* at 89–95.

is applied: intermediate or strict, depending on how close the challenged law falls to the core of the right.⁹

Because of this methodology, the historical understanding of the right to keep and bear arms, as well as the historical scope of firearms regulation, has played a prominent role in Second Amendment litigation. Unfortunately, this history has often been mischaracterized by gun-lobby scholars in supporting constitutional challenges to contemporary public carry regulations. They argue that the only historical doctrinal debate surrounding the Second Amendment was whether it protected an individual right or pertained to a collectivist militia-based right—a legal debate which *Heller* ended.¹⁰ They also claim that public carry was historically unregulated across the country and, therefore, the individual right recognized in *Heller* should apply broadly outside the home.¹¹ Historians and legal scholars have recently disputed both arguments, finding instead that founding-era state laws consistently regulated carry, while Civil War- and post-Civil War-era state laws—and views on the scope of the Second Amendment right—varied dramatically by region.

These findings are most clearly articulated by Saul Cornell and Eric Ruben in an article published in the Yale Law Journal Forum, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*.¹² Cornell and Ruben argue that, during the founding era, most states adopted preexisting English law regulating the carrying of weapons, specifically the Statute of Northampton, a 1328 English law that prohibited carrying weapons in public.¹³ Many states adopted the Statute of Northampton in their legal codes, and it was applicable through the common

9. *Id.* at 95–96.

10. See *Peruta v. County of San Diego*, 742 F.3d 1144, 1149 (9th Cir. 2014), *modified on reh'g en banc*, 824 F.3d 919, 939 (9th Cir. 2016), *cert. denied sub nom.* *Peruta v. California*, 137 S. Ct. 1995 (2017).

11. See, e.g., Brief of Amici Curiae Historians, Legal Scholars, & CRPA Foundation in Support of Appellees and in Support of Affirmance at 14, *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (No. 15-7057) (“No State Prohibited the Public Carrying of Arms in the Early Republic”).

12. Eric Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 *YALE L.J.F.* 121 (2015); see also Michael P. O’Shea, *The Second Amendment Wild Card: The Persisting Relevance of the “Hybrid” Interpretation of the Right of Keep and Bear Arms*, 81 *TENN. L. REV.* 597 (2014).

13. Ruben & Cornell, *supra* note 12, at 128–29 (citing 1328, 2 *Edw. 3 c. 3* (Eng.), *reprinted in* *THE STATUTES OF THE REALM* 258 (Dawsons of Pall Mall 1963) (1810)); see Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 *CLEV. ST. L. REV.* 1 (2012); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 *CLEV. ST. L. REV.* 373 (2016).

law in other states.¹⁴ While there is some debate as to the scope of the prohibition under the Statute of Northampton and its progeny, no credible scholar from either side of the debate disputes that the Northampton formulation governed public carry during the period.¹⁵

By the 1830s, this national uniformity had broken down, and at least two regional traditions developed, according to Cornell and Ruben.¹⁶ The “Massachusetts model,” common in the North and Midwest, prohibited carrying firearms in public generally, with an exception for those with a specific reason to fear for their safety.¹⁷ In the Deep South, an alternative tradition developed, which allowed open carry but prohibited concealed carry.¹⁸ After the Civil War, a third tradition developed in the Western states, which prohibited carry completely in populated cities and towns but allowed carry with no restrictions in the lawless rural frontier.¹⁹ The Massachusetts

14. See Act of Mar. 15, 1821, ch. 76, § 1, 1821 Me. Laws 285, 285; Act of Nov. 1, 1692, ch. 18, § 6, 1692–93 Mass. Acts 51, 52–53; Acts of Apr. 6–19, 1686, ch. 9, in AARON LEAMING & JACOB SPICER, THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 283, 289–90 (2d ed., Phila., W. Bradford 1881); Acts of Mar. 1–28, 1682, ch. 18, in THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY, *supra*, at 227, 250; 1328, 2 Edw. 3 c. 3 (Eng.), reprinted in FRANCOIS-XAVIER MARTIN, A COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA 60–61 (Newbern, N.C., 1792) (indicating North Carolina’s adoption of England’s public carry prohibition); Act of Nov. 13, 1801, ch. 22, § 6, 1715–1820 Tenn. Laws 708, 710; An Act Forbidding and Punishing Affrays, ch. 49, 1786 Va. Laws 35, 35.

15. See Brief of Amici Curiae Historians, Legal Scholars, & CRPA Foundation in Support of Appellees and in Support of Affirmance, *supra* note 11.

16. Ruben & Cornell, *supra* note 12, at 132.

17. See ME. STAT. tit. 12, ch. 169, § 16 (1841); MASS. REV. STAT. ch. 134, § 16 (1836); MICH. REV. STAT. ch. 162, § 16 (1846); MINN. REV. STAT. ch. 112, § 18 (1851); OR. REV. STAT. ch. 16, § 17 (1853); Act of Mar. 31, 1860, no. 375, § 6, 1860 Pa. Laws 427, 432; Act of Mar. 14, 1848, ch. 14 § 16, 1848 Va. Acts 93, 129; Act of July 4, 1839, § 16, 1839 Wis. Sess. Laws 379, 381.

18. See ALA. CODE §§ 3273–3275 (1852); GA. CODE § 4413 (1861).

19. See Act of Mar. 18, 1889, no. 13, 1889 Ariz. Sess. Laws 30; Act of Feb. 4, 1889, § 1, 1889 Idaho Sess. Laws 23, 23 (struck down by *In re Brickey*, 70 P. 609 (Idaho 1902), a curious case worthy of further discussion in another venue); Act of Jan. 29, 1869, ch. 32, § 1, 1869 N.M. Laws 72, 72; Act of Dec. 2, 1875, ch. 52, § 1, 1876 Wyo. Sess. Laws 352, 352. Many localities, especially those in the frontier West, passed their own public carry laws. See L.A., CAL., ORDINANCES AND RESOLUTIONS §§ 35–36 (1878); WICHITA, KAN., ORDINANCES no. 1641, §§ 1–4 (1900); SALINA, KAN., ORDINANCES no. 268 (1879); NEB. CITY, NEB., LAWS, ORDINANCES, AND RULES no. 7 (1872); Checotah, Okla., Ordinance 11, § 3 (Oct. 29, 1898); MCKINNEY, TEX., REV. ORDINANCES no. 20 (1899); Dall., Tex., Ordinance Prohibiting and Punishing the Unlawful Carrying of Arms (July 18, 1887); RAWLINS, WYO., ORDINANCES art. 7 (1893).

model also moved into some Deep South and border states during this time period.²⁰

The congressional debates discussed in this Article, which occurred surrounding the consideration and passage of a public carry law for the District of Columbia, further support the Cornell-Ruben position in two ways. First, they show no national consensus existed regarding a right to public carry under the Second Amendment. Some, especially in the Deep South, believed the Second Amendment required a broad right to open carry, others thought carry could be limited to situations where a person experienced a particular need for self-defense, and some did not believe the Second Amendment protected any individual right to carry in public at all. Because the Supreme Court in *Heller* stated that the Second Amendment “codified venerable, widely understood liberties,” this lack of consensus casts doubt on the claims of gun-lobby scholars that a permissive public carry regime is constitutionally mandated.²¹

Second, the senators’ and congressmen’s varied positions on the Second Amendment and the permissible scope of public carry regulations generally fell into regional patterns. Representatives of states in the North and West supported a more limited public carry right, while those representing states in the Deep South, with some exceptions, supported a broader Second Amendment right. Because the Northern Republicans were the ideological force behind the drafting and ratification of the Fourteenth Amendment, through which the Second Amendment applies to the states, their restrictive view of public carry should be given special weight when determining the constitutionality of contemporary public carry regulations.²² In contrast, the Southern Democrats’ views should not be controlling, as their legal traditions were in direct opposition to the principles driving the Fourteenth Amendment.

Section I.A of this Article surveys the history of public carry regulation in the District of Columbia from its founding to 1890. Section I.B discusses

20. See Act of Apr. 1, 1881, no. 96, § 1, 1881 Ark. Acts 191, 191; Act of Dec. 14, 1871, ch. 90, § 1, 1871 Tenn. Acts 81, 81; 1879 Tex. Crim. Stat. 318 (enacted Apr. 12, 1871); W. VA. CODE ch. 153, § 8 (1870). For an explanation of how this occurred in Texas, see Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95 (2016).

21. *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

22. This is not a completely uncontroversial view. The compelled passage of the Fourteenth Amendment by at least six Southern states was necessary for the Amendment’s eventual ratification. That being said, Northern Republicans were clearly the primary force behind the drafting and ratification of the Fourteenth Amendment, and to the extent Southern states participated in ratification, it was on terms dictated by the Northern states. See Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 DUKE J. CONST. L. & PUB. POL’Y 167 (2018).

the introduction of a bill in the 51st Congress to increase the punishment for carrying a weapon in the District and the Senate debate associated with the bill. Section I.C examines the corresponding debate in the House of Representatives. Section I.D discusses consideration of the bill in the 52nd Congress, focusing on the debate in the Senate immediately preceding the bill's ultimate passage. Section I.E reviews the subsequent history of public carry regulation in the District from the 1890s to the present. Part II analyzes what the debate and passage of the District's 1892 public carry law can teach us about the contemporary debate surrounding the original meaning of the Second Amendment, as incorporated through the Fourteenth Amendment.

I. THE FIRST CONGRESSIONAL DEBATE ON PUBLICLY CARRYING FIREARMS

A. *Early Public Carry Regulation in the District of Columbia*

Since its creation, the District of Columbia has regulated the carrying of firearms in public. From 1791 to 1857, the District operated under the Statute of Northampton, a general prohibition on public carry, which it inherited from Maryland as common law.²³ In 1857, the City Council for the City of Washington passed an ordinance prohibiting public carry, essentially codifying the existing common law ban.²⁴ The following year, the ordinance was amended to specifically include concealed carry.²⁵ Meanwhile, the City of Georgetown, which had its own local government during that time period, had also enacted a public carry ban at some earlier point.²⁶ Also in 1857, an effort was made to codify and standardize the laws of the District as a whole, given that the District had three separate government entities at the time: the City of Washington, the City of Georgetown, and the County of Washington.²⁷ The final product of this effort included a Massachusetts

23. D.C. CODE § 40 (1819) (Noting the continued application of the Statute of Northampton in Washington, D.C.). Upon its creation, the District adopted the laws of Maryland within the portion ceded by Maryland and the laws of Virginia within the portion ceded from Virginia (present-day Arlington and Alexandria counties). Act of Feb. 27, 1801, ch. 15, § 1, 2 Stat. 103, 103–05.

24. Act of Nov. 4, 1857, ch. 5, *in* GENERAL LAWS OF THE CORPORATION OF THE CITY OF WASHINGTON 75 (Robert A. Waters ed., 1860).

25. Act of Nov. 18, 1858, ch. 11, *in* GENERAL LAWS OF THE CORPORATION OF THE CITY OF WASHINGTON, *supra* note 24, at 114.

26. *See generally A Resolution for the Relief of J. Hammersleig*, EVENING STAR (D.C.), July 7, 1860, at 3 (reporting the remission of a fine imposed for carrying a deadly weapon).

27. *See* D.C. Organic Act of 1871, ch. 62, 16 Stat. 419 (revoking the charters of the cities of Georgetown and Washington and creating a single government entity in the District of Columbia).

model law, which would have banned carry except in cases of special need; but because of reasons unrelated to firearms, a referendum to adopt the code failed.²⁸

In 1871, the three District governments merged. The newly unified District government passed an ordinance identical to the one enacted by the City of Washington in 1858.²⁹ The ordinance made it a crime for persons in the District “to carry or have concealed about their persons any deadly or dangerous weapons.”³⁰ Violations of the law resulted in forfeiture of the weapons and fines ranging from \$20 to \$50 (about \$500 to \$1,200 today, adjusted for inflation).³¹

In 1890, after repeated public calls for a harsher penalty for carrying dangerous weapons, the District Attorney of the District of Columbia sent a request to Congress seeking legislation to increase the severity of the sanction for carrying dangerous weapons.³² That request resulted in the first congressional debate on public carry regulation—one that dragged on for several years and pitted Northern Republicans in favor of regulation against Southern Democrats who opposed it.³³ The following sections describe that debate and its ramifications for understanding the historical scope of the Second Amendment.

B. Introduction and Quick Passage in the Senate

On March 14, 1890, Senator Charles Faulkner of West Virginia introduced a bill “to punish the carrying or selling of deadly or dangerous weapons within the District of Columbia.”³⁴ The proposed legislation made

28. See *Georgetown Affairs*, EVENING STAR (D.C.), Feb. 16, 1858, at 3; see also D.C. CODE ANN., at XVII, XX (1973).

29. See D.C. Organic Act; see also D.C. CODE ch. 16, § 119 (1894) (enacted July 20, 1871).

30. D.C. CODE ch. 16, § 119.

31. *Id.*; see also 21 CONG. REC. 4448 (1890). Whether the 1871 law covered all carry or only concealed carry is an issue of debate in current Second Amendment litigation. The law made it a crime “to carry or have concealed about their persons any deadly or dangerous weapons,” and later stated, “and any person or persons who shall be duly convicted of so carrying or having concealed about their persons any such weapons shall forfeit.” D.C. CODE ch. 16, § 119.

32. See 21 CONG. REC. 4448 (1890) (statement of Sen. Ingalls).

33. Congress had addressed firearm regulation in debates during Reconstruction in the context of challenging discriminatory “Black Codes,” passed in the South, specifically prohibiting freedmen from carrying firearms. See Stephen P. Halbrook, Heller, *the Second Amendment, and Reconstruction: Protecting All Freedmen or Only Militiamen?*, 50 SANTA CLARA L. REV. 1073, 1075 (2010). However, Congress had not addressed firearm regulation through its own law enforcement powers before 1890.

34. 21 CONG. REC. 2225 (1890).

it illegal for any person “to have concealed about their person any deadly or dangerous weapons, such as daggers, air guns, pistols, bowie knives, dirk knives or dirks, blackjacks, razors, razor blades, sword canes, slung shots, brass or other metal knuckles” and “to carry openly any such weapon . . . with intent to unlawfully use the same.”³⁵ Violations of the proposed law would result in forfeiture of the weapons, fines of up to \$200 (about \$5,500 today, adjusted for inflation), and up to six months’ imprisonment.³⁶ A second violation under the law called for one-to-three years in prison.³⁷ The law also prohibited the transfer of firearms to those under the age of twenty-one and made such transfers punishable by up to a \$100 fine (\$2,250 today, adjusted for inflation) and three months in jail.³⁸ The legislation only exempted law enforcement officers, members of the military, and militia members.³⁹

The bill initially moved quickly; it was reported out of the Senate Committee on the District of Columbia in only two weeks.⁴⁰ On May 10, 1890, the full Senate debated the bill and passed an amendment to ensure the law would not be over-interpreted to prevent individuals from carrying weapons in their own homes or places of business or from carrying weapons to and from their place of purchase or a gunsmith.⁴¹ Only one Senator, Joseph Dolph of Oregon, spoke in opposition to the amendment. He claimed the amendment was unnecessary because “every man and boy in the whole city can carry any one of these weapons under this section, if it is carried openly and with the intention of using it for a lawful purpose, that is, for self-defense.”⁴² Senator Dolph presumably interpreted the original bill as banning concealed carry altogether but permitting open carry for lawful purposes. This is a plausible reading, but it is unclear if other senators

35. *Local Legislation*, EVENING STAR (D.C.), Dec. 9, 1890, at 3.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. 21 CONG. REC. 2741 (1890).

41. *Id.* at 4448. The amendment read:

Provided further, [t]hat nothing contained in the first or second sections of this act shall be so construed as to prevent any person from keeping or carrying about his place of business, dwelling house, or premises any such dangerous or deadly weapon, or from carrying the same from place of purchase to his dwelling house or place of business or from his dwelling house or place of business to any place where repairing is done, to have the same repaired, and back again.

Id. While an amendment of this kind might seem like over-legislating, there were examples of prosecutions under concealed carry bans for carrying firearms concealed within one’s home. *See, e.g., Owen v. State*, 31 Ala. 387 (1858).

42. 21 CONG. REC. 4448 (1890) (statement of Sen. Dolph).

interpreted the open carry provision of the bill so expansively, as the bill as amended passed without further revision or debate.⁴³

C. Fierce Debate and Delay in the House

On May 12, 1890, passage by the Senate was reported to the House, and the bill was referred to the House Committee on the District of Columbia.⁴⁴ The House moved less expeditiously than the Senate; the bill was not reported out of committee until four months later on September 19, 1890.⁴⁵ On December 8, 1890, Congressman William Grout, a Republican from Vermont and Chairman of the Committee on the District of Columbia, presented the bill to the full House.⁴⁶ The ensuing debate, which was much more robust than in the Senate, showed the sharp divide between the states on the constitutionality and wisdom of regulating public carry.

Congressman James Blount, a Democrat Confederate Army veteran from Georgia,⁴⁷ most vehemently opposed the bill.⁴⁸ Blount's opposition stemmed from his belief that the bill banned both open and concealed carry altogether, which casts doubt on the conflicting interpretation of Senator Dolph, discussed above. Blount stated:

I submit that it is certainly an infringement of the right of any citizen to undertake by law to say to him that "if you carry these weapons secretly you are liable to indictment and if you carry them openly you are liable to indictment," because it amounts to saying that he shall not carry them at all.⁴⁹

Blount's position was that a total carry ban violated the Second Amendment but that a concealed carry ban that permitted open carry would be acceptable: "It does seem to me, Mr. Speaker, that the restraint that he shall carry it openly is a sufficient safeguard to allow the citizen the privilege which the Constitution undoubtedly gives to him."⁵⁰

43. *Id.*

44. *Id.* at 4572; *id.* at 4685.

45. *Id.* at 10,270.

46. 22 CONG. REC. 223 (1890) (statement of Rep. Grout). Congressman Grout presenting the law is a bit ironic, as Vermont, then as now, had no law regulating the public carry of firearms.

47. John S. Whitehead, *James Blount (1837–1903)*, NEW GA. ENCYCLOPEDIA (Jan. 28, 2013), <https://perma.cc/MY96-RWR8>. Blount was an attorney and plantation owner prior to the Civil War and served in the Confederate Army before being wounded and returning to his legal practice and plantation. *Id.* He was a leading Georgia Redeemer and was elected to Congress after Reconstruction ended in Georgia. *Id.*

48. See 22 CONG. REC. 223–25 (1890).

49. *Id.* at 224 (statement of Rep. Blount).

50. *Id.*

This view was consistent with the antebellum-era constitutional decisions of the Georgia Supreme Court—Blount’s home state—which had rejected the state legislature’s attempts to prohibit carry altogether and instead limited the legislature to regulating the manner of carry.⁵¹ In fact, Blount was almost certainly referring to this and other Georgia court decisions when he stated that “the courts have required that the weapons should be carried openly and that there was no infringement where they were carried openly.”⁵² Blount acknowledged that his view was inconsistent with that in other regions of the country, noting “the gentleman [presumably Congressman Grout, the bill’s sponsor] tells us that such legislation has met the approval of the older and more civilized States and the larger cities throughout the country.”⁵³ However, Blount maintained his position that “the Constitution designed that a person might carry weapons wherever he pleased; that it was a right which could not be infringed.”⁵⁴

Next to speak was Congressman Benjamin Enloe, a Democrat from Tennessee, who also opposed the bill but in a much narrower manner. Like Blount, he accepted the bill’s prohibition on concealed carry but rejected a complete carry ban under the Second Amendment.⁵⁵ Unlike Blount, he believed the bill would have passed constitutional muster had it permitted open carry of only weapons used in warfare.⁵⁶ Enloe stated:

I think the right to bear arms, as defined by the Constitution, has been clearly settled to be the right to bear only such arms as are used in warfare, and that the manner of carrying them may be regulated by statute. This bill does not meet the requirements of the case and should be amended.⁵⁷

Enloe’s position was consistent with the view of the Supreme Court of Tennessee, his home state.⁵⁸

Congressman Roger Mills, a Democratic Confederate Army veteran from Texas, next spoke to reject Congressman Enloe’s narrower view of the Second Amendment right.⁵⁹ Mills backed Blount’s position and, in fact, referenced a Georgia Supreme Court decision in doing so:

[I]n the old courts, where the old men presided who helped to found the Government, it was held that th[e] right was without any limitation whatever. One of the ablest decisions ever rendered in any court in this Union was

51. *See Nunn v. State*, 1 Ga. 243 (1846).

52. 22 CONG. REC. 225 (1890) (statement of Rep. Blount).

53. *Id.* at 224.

54. *Id.* at 225.

55. *Id.* at 224 (statement of Rep. Enloe).

56. *Id.* at 225.

57. *Id.*

58. *See Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871).

59. 22 CONG. REC. 225 (1890) (statement of Rep. Mills).

rendered by Judge Lumpkin, of Georgia, in a case in which a citizen was indicted under the laws of that State for carrying a pistol, and the same argument was made that I have heard mentioned here to-day, that the language of the Constitution had reference to military weapons, but that judge held, in accordance with the terms of the Constitution, that the State government of Georgia had no power to infringe the right of the citizen to carry whatever character of arms he pleased in defense of his person.⁶⁰

Unlike Blount and Enloe, Mills's position differed from the law of Texas, his home state. At the time, Texas prohibited public carry, with an exception for open carry when a person faced an imminent threat.⁶¹ The Texas Supreme Court had repeatedly and decisively upheld the law.⁶² Interestingly, other than the reference to the Georgia court decision, Mills's criticism of the Texas law and proposed D.C. bill was based not on constitutional concerns but practical ones—namely, the standard refrain of the gun lobby that good guys with guns are needed to stop bad guys with guns.⁶³ Mills asserted:

What is the effect of [Texas's carry] law? My own State has a similar provision [to the Second Amendment] in its constitution, and you may pick up a paper almost any day and see where the law has been violated, and sometimes life is taken by these arms which are prohibited from being borne, but which are still carried by men whose home is on a horse, who have no property, who have no home, who have nothing to fix them upon any spot on the earth. They can defy the law at pleasure; but the man who can not afford to go to jail, the man who has some reputation at stake, the man who has a family and a home and character, must obey the law and allow his life to be endangered and the security of his person to be violated because the law will not permit him to defend himself. These laws are all unwise. You can not increase the security of the people by disarming the law-abiding element of the country and permitting men who persistently defy the laws to carry arms and take the lives of their fellow-citizens.⁶⁴

60. *Id.* (referring to *Nunn v. State*, 1 Ga. 243, 251 (1846)); *see also* *Cockrum v. State*, 24 Tex. 394, 402 (1859) (“The right of a citizen to bear arms, in the lawful defense of himself or the state, is absolute.”).

61. 1879 Tex. Crim. Stat. 318 (enacted Apr. 12, 1871).

62. *See Frassetto, supra* note 20, at 113–18.

63. *See Nunn*, 1 Ga. 243.

64. 22 CONG. REC. 225 (1890) (statement of Rep. Mills). It should not be surprising that Mills opposed his own state's law. It was passed during Reconstruction by Radical Republican Governor Edmund J. Davis in an effort to reduce racial violence against freedmen. *See Frassetto, supra* note 20, at 101. Mills was a political opponent of Davis during the Reconstruction period and achieved his place in Congress upon the collapse of Republican control in Texas. *Roger Quarles Mills of Corsicana, Navarro County, Texas*, NAVARRO COUNTY TEX. GENEALOGICAL & HIST. WEBSITE, <https://perma.cc/9WCD-93AF>.

Congressman John Rogers, a Democrat from Arkansas who became a federal district court judge six years later, rejected Mills's arguments. Rogers felt that a complete carry ban was appropriate: "My own mind, my own judgment, from an experience in the Western country in turbulent times, leads me to believe that this is a proper subject of legislation, and that there should be police regulation of the carrying of concealed weapons."⁶⁵ Like the other members of Congress (Mills notwithstanding), Rogers's view of the Second Amendment closely followed the legal tradition of his home state, which had adopted a strictly militia-based view of the right and did not recognize a right to carry.⁶⁶ Rogers went so far as to propose new language for the bill:

I would suggest the provision which is contained in the statute of our State [Arkansas], prohibiting the carrying of these things at all as weapons. We prohibit a man from carrying any of these things as a weapon at all. We hold that he has no business to go with his little pistol stuck in his breeches pocket walking about the streets waiting to get into a difficulty, whether by his own fault or by the fault of someone else. I think that provision ought to be adopted here, because if the object of this bill is a proper one the law should be made effective.⁶⁷

Congressman Grout, the bill's sponsor, supported the proposal, responding: "So far as I am personally concerned I do not object to the language suggested by the gentleman from Arkansas. I think it would be perhaps as good as that used in the bill."⁶⁸

While most of the debate featured Southern Democrats, who themselves did not present a monolithic front, some Northern Republicans also weighed in. Pennsylvania Republican Congressman Marriot Brosius suggested the bill be amended to adopt Pennsylvania's law, which prohibited

65. 22 CONG. REC. 225–26 (1890) (statement of Rep. Rogers).

66. See *Haile v. State*, 38 Ark. 564 (1882); *Fife v. State*, 31 Ark. 455 (1876); *State v. Buzzard*, 4 Ark. 18 (1842).

67. 22 CONG. REC. 226 (1890) (statement of Rep. Rogers). It is unclear whether Congressman Rogers was correct about the status of Arkansas law. The author's understanding is that the law in Arkansas was similar to that in Tennessee, requiring a person to carry weapons openly in the hand. Compare Act of Dec. 14, 1871, ch. 90, § 1, 1871 Tenn. Acts 81, 81, with Act of Apr. 1, 1881, no. 96, § 1, 1881 Ark. Acts 191, 191. That being said, Arkansas precedent had made clear that there was no right to publicly carry a firearm or other weapon. See *Buzzard*, 4 Ark. 18. It is certainly possible that Arkansas's law was understood as a total ban on carry because of the extremely unusual and burdensome method required to carry.

68. 22 CONG. REC. 226 (1890) (statement of Rep. Grout). This offhand comment is interesting because Vermont had no law regulating public carry. While it would be wrong to draw any real conclusions from it, Grout's comment suggests that this hands-off treatment of public carry stemmed from public carry simply not being a problem in the tightly knit rural state.

carrying a concealed weapon when carried with the “intent therewith unlawfully and maliciously to do injury to any other person” and allowed the jury to infer the intention to do injury from the fact the pistol was carried in a concealed manner.⁶⁹ Practically speaking, Pennsylvania’s law functioned as a total ban on concealed carry.

Meanwhile, Congressman Charles Grosvenor, a Republican attorney and Union Army veteran from Ohio, took a position consistent with the Massachusetts model and his home state’s treatment of concealed carry.⁷⁰ He suggested that the bill as drafted would violate the Second Amendment if it did not include an exception for when a person faced a specific threat. Grosvenor stated:

Now, it is proposed to make it a penitentiary offense and felony to carry a pistol, no matter for what purpose. I do not believe that such a statute can be enforced under the Constitution of the United States. I do not believe that the provision in the Constitution of the United States ever intended, nor has there ever been a construction of a court put upon it, that, in order that I may be allowed to defend myself against a threatened assault, I shall be compelled to carry a cannon, a musket, or a saber; and the whole question must be put in such a shape that it shall apply to unlawful carrying.⁷¹

In response to Grosvenor’s concerns, Congressman Grout brought forward an amendment from Congressman Samuel Lanham, a Democrat and veteran of the Confederate Army from Texas.⁷² Lanham’s proposal, which mirrored Texas’s public carry statute, allowed for the carrying of firearms when a person had “reasonable ground[s] for fearing an unlawful attack” and did not have time for law enforcement to intervene.⁷³

Lanham strongly supported the D.C. bill with his amendment based on his experience with Texas’s public carry law. Lanham stated:

Mr. Speaker, the amendment which I have proposed is in the exact terms of the statute of my State inhibiting the unlawful carrying of arms so far as it relates to the question of bearing arms in self-defense, and that statute has operated most successfully in the State of Texas, so that to-day our laws against carrying arms are as well and thoroughly enforced as perhaps anywhere in this American Union.

. . . .

Now, I am in favor, Mr. Speaker, of the general purpose of this bill, and believe that, with the amendment proposed, it will substantially accomplish

69. *Id.* at 227.

70. *See* Act of Mar. 18, 1859, 1859 Ohio Laws 56.

71. 22 CONG. REC. 228–29 (1890) (statement of Rep. Grosvenor).

72. *Lanham, Samuel Willis Tucker, (1846–1908)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS 1774–PRESENT, <https://perma.cc/PP7S-UPJF>.

73. 22 CONG. REC. 229 (1890) (statement of Rep. Lanham).

the end intended as well as sufficiently guard the rights of the citizen. The courts in my State have construed the provision of the Constitution which I have read, as well as the statute from which I have quoted, and nowhere in their decisions is it denied that the State has the authority to regulate the carrying of weapons and enforce the same by suitable penalties. In order to bring about proper conditions of law and good order, it has been found necessary in that State to adopt the statute which I have read. Its constitutionality has been judicially affirmed, and to-day, as I have said, its operations are successful and satisfactory.⁷⁴

Lanham's view contrasted sharply with that of his Texas colleague Congressman Mills but, as evidenced by Lanham's own statement, was consistent with Texas practice and case law.⁷⁵

The differing views from this single day of debate in the House showcase the widely divergent understanding of the Second Amendment in the wake of the Civil War.⁷⁶ While Southern Democrats voiced the strongest opposition to the restrictions on public carry, even they were split as to the proper scope of the Second Amendment in that context.⁷⁷ Congressman Mills's testimony, in particular, suggests that the opposition was not always motivated by constitutional concerns and was instead based on practical concerns that not everyone shared (e.g., Congressman Lanham).

What is clear from the 1890 House debate is that reconciliation of the varying views was a difficult task. In fact, rather than attempt to piece together the various proposals, Congressman Grout instead recommitted the D.C. carry bill to the Committee on the District of Columbia, where it died for the session.⁷⁸

D. Reconsideration and Ultimate Passage in the 52nd Congress

On December 16, 1891, Senator Faulkner introduced a new D.C. carry bill in the 52nd Congress.⁷⁹ The bill was identical to the prior version but included an amendment similar to Congressman Lanham's earlier proposal allowing judges to issue licenses to carry firearms if an applicant could make a showing of necessity.⁸⁰ The amendment provided for the issuance of one-month carry permits "upon satisfactory proof to [a judge] of the necessity for the granting thereof" and upon the filing of a bond that would be forfeited if

74. *Id.*

75. See Frassetto, *supra* note 20.

76. See *supra* notes 46–66 and accompanying text.

77. See *supra* notes 61–62 and accompanying text; notes 72–73 and accompanying text.

78. 22 CONG. REC. 230 (1890) (statement of Rep. Grout). The bill was reported out of committee but never saw action on the floor. H.R. REP. NO. 51-3293 (1890).

79. 23 CONG. REC. 69 (1891).

80. Act of July 13, 1892, ch. 159, § 2, 27 Stat. 116, 116–17 (1893).

the permittee used the firearm “save in the case of necessary self-defense.”⁸¹ On January 18, 1892, the bill was reported out of the Senate Committee on the District of Columbia.⁸² On February 11, 1892, the bill came to the floor of the Senate, where it passed with little debate.⁸³

The bill was then reported to the House and again assigned to the Committee on the District of Columbia.⁸⁴ On April 21, 1892, the Committee reported out H.R. 8294 as a substitute for the Senate bill, which was virtually identical to the Senate bill.⁸⁵ In contrast to the previous session’s intense debate, the 1892 bill, despite being quite similar to the controversial 1890 bill, passed the House without debate.⁸⁶

The House bill was then reported to the Senate, where it passed out of the Committee on the District of Columbia without amendment.⁸⁷ On July 6, 1892, the bill came up for debate.⁸⁸ The bill faced criticism on two fronts. First, Democratic Senator Edward White of Louisiana objected to the amendment that allowed judges to issue permits to carry firearms.⁸⁹ Senator White claimed the licensing regime granted magistrates “unlimited discretion.”⁹⁰ White instead favored a flat ban on publicly carrying firearms, with no exceptions.⁹¹

Second, Texas Senator Roger Mills, who had achieved elevation to the Senate in the 1890 election, renewed the criticisms of the law he had espoused two years earlier while a member of the House of Representatives.⁹² Mills again claimed virtually any regulation on publicly carrying firearms eviscerated the right protected by the Second Amendment.⁹³ Mills attacked the law, saying while it was intended to “secure the person of the citizen, [it] result[ed] in rendering him more

81. *Id.*

82. 23 CONG. REC. 355 (1892).

83. *Id.* at 1050–51.

84. *Id.* at 1095.

85. *Id.* at 3510. Compare S. 1060, 52d Cong. (as amended on Jan. 18, 1892), with H.R. 8294, 52d Cong. (1892).

86. 23 CONG. REC. 5253 (1892). This may have been in part because Congressman Mills had been elected to the Senate.

87. *Id.* at 5486.

88. *Id.* at 5788.

89. *Id.* (statement of Sen. White).

90. *Id.*

91. *Id.*

92. *Id.* (statement of Sen. Mills); *Roger Quarles Mills of Corsicana, Navarro County, Texas*, *supra* note 64.

93. 23 CONG. REC. 5788 (1892) (statement of Sen. Mills).

insecure.”⁹⁴ Mills, who was a prominent Redeemer,⁹⁵ then stated without apparent irony that he would “never vote in this or any other legislative assembly for the deprivation of any citizen of a single natural right that he has, if I know it, and his right to defend himself is one of the rights with which he is invested by his Maker.”⁹⁶

Senator Edward Wolcott, a Republican from Colorado, Union veteran of the Civil War, and graduate of Harvard Law School, rejected Mills’s interpretation of the Second Amendment.⁹⁷ Wolcott stated:

In reference to what was said by the Senator from Texas [Mr. MILLS] I do not know except by the public press how the law permitting the carrying of weapons generally operates down in Texas, but I do know that in our cities of the North there is no law which serves so much in the interests of justice and the police power and the preservation of the public peace as acts which prohibit the carrying of concealed weapons. The constitutional provision is not affected by such a law. This bill is intended to apply to the criminal classes in the alleys of Washington who carry razors in their pockets, who carry concealed weapons, and brass knuckles. It is intended to reach them, and it is not intended to affect the constitutional right of any citizen who desires to obey the law.

For my part, I think it is a very late day for anybody to claim that under the provisions of the Constitution of the United States we have no right to enact a law which shall prohibit assassins and thugs from carrying concealed weapons. Bearing arms and carrying concealed weapons are very different things.⁹⁸

Senator Wolcott’s view ultimately prevailed. Senator White’s motion to remove the licensing provision from the bill was rejected by a voice vote.⁹⁹ The bill then passed by a margin of 34 to 13 (41 not voting), with Republicans, Northerners, and those from states with strong public carry laws generally supporting, and Democrats from states with weak carry laws generally opposing.¹⁰⁰ The only Republican who opposed the measure was

94. *Id.*

95. Redeemers were white Democrats, often Confederate veterans of the Civil War, who seized power in the South at the end of Reconstruction. *See generally* ERIC FONER, RECONSTRUCTION 587 (Henry Steele Commager & Richard B. Morris eds., 1988).

96. 23 CONG. REC. 5788 (1892) (statement of Sen. Mills).

97. *Wolcott, Edward Oliver, (1848–1905)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS 1774–PRESENT, <https://perma.cc/Y3QS-M3J5>.

98. 23 CONG. REC. 5789 (1892) (statement of Sen. Wolcott).

99. *Id.* at 5789.

100. *Id.* at 5790. Supporting: Aldrich (R.I. Rep.), Allen (Wash. Rep.), Allison (Iowa Rep.), Berry (Ark. Dem.), Cameron (Pa. Rep.), Carey (Wyo. Rep.), Chandler (N.H. Rep.), Cockrell (Mo. Dem.), Cullom (Ill. Rep.), Davis (Minn. Rep.), Dolph (Or. Rep.), Dubois (Idaho Rep.), Felton (Cal. Rep.), Frye (Me. Rep.), Gallinger (N.H. Rep.), Hansbrough (N.D.

Orville H. Platt from Connecticut, the heart of the gun manufacturing industry at the time. On July 13, 1892, President Benjamin Harrison signed the bill into law.¹⁰¹

E. Subsequent History of Public Carry Regulation in the District

The District's public carry law would remain generally the same for the next eighty-five years, with minor revisions enacted in 1932 and 1943.¹⁰² During this time, there were numerous prosecutions under the law, none of which resulted in the law's constitutionality being challenged.¹⁰³ In 1976, the District completely banned the registration of new handguns, although it technically still allowed the issuance of concealed carry permits for grandfathered firearms.¹⁰⁴ The Supreme Court struck down the handgun ban in its *Heller* decision in 2008.¹⁰⁵ In the wake of *Heller*, the District modified its firearms regulations to allow the sale of new handguns but to prohibit the issuance of carry permits altogether.¹⁰⁶ In 2014, a federal district court struck down this prohibition.¹⁰⁷ Following that decision, the District revised its

Rep.), Harris (Tenn. Dem.), Higgins (Del. Rep.), Hunton (Va. Dem.), Jones (Ark. Dem.), Kyle (S.D. Prog.), McMillan (Mich. Rep.), Manderson (Neb. Rep.), Paddock (Neb. Rep.), Pettigrew (S.D. Rep.), Proctor (Vt. Rep.), Quay (Pa. Rep.), Sawyer (Wis. Rep.), Shoup (Idaho Rep.), Stockbridge (Mich. Rep.), Vilas (Wis. Dem.), Warren (Wyo. Rep.), Washburn (Minn. Rep.), Wolcott (Colo. Rep.). *Id.* Opposing: Bate (Tenn. Dem.), Call (Fla. Dem.), Coke (Tex. Dem.), Daniel (Va. Dem.), Gorman (Md. Dem.), Gray (Del. Dem.), Mills (Tex. Dem.), Platt (Conn. Rep.), Turpie (Ind. Dem.), Vest (Mo. Dem.), Voorhees (Ind. Dem.), Walthall (Miss. Dem.), White (La. Dem.). *Id.* For state and party affiliations, see W.H. MICHAEL, OFFICIAL CONGRESSIONAL DIRECTORY: FIFTY-SECOND CONGRESS (2d ed. 1892).

101. See Act of July 13, 1892, ch. 159, 27 Stat. 116 (1893).

102. See Act of July 8, 1932, ch. 465, § 4, 47 Stat. 650, 651; Act of Nov. 4, 1943, ch. 296, 57 Stat. 586.

103. See, e.g., *Flourished a Revolver*, EVENING STAR (D.C.), Jan. 9, 1895, at 10 (reporting that a man was sentenced to four months in jail for displaying a revolver and using "reckless language"); *Local News of All Sorts*, WASH. TIMES, Oct. 14, 1894, at 6 (reporting that two men were sentenced to 180 days in jail for "carrying deadly weapons"); *Concealed Weapons Case*, MORNING TIMES (D.C.), June 20, 1896, at 2 (reporting that a man was sentenced to a fine of fifty dollars or six months in jail for carrying a slung shot).

104. See 23 D.C. Reg. 2464 (Oct. 1, 1976); Firearms Control Regulations Act of 1975, 23 D.C. Reg. 1091 (July 23, 1976); see also *District of Columbia v. Heller*, 554 U.S. 570, 574–75 (2008).

105. *Heller*, 554 U.S. at 636.

106. D.C. CODE § 22-4504 (West, Westlaw through 2009 legislation), *invalidated by* *Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014).

107. *Palmer*, 59 F. Supp. 3d at 182–83.

public carry law yet again—this time, banning open carry altogether and permitting concealed carry only upon a showing of special need.¹⁰⁸

In essence, the District went full circle and reverted to the 1892 framework. Gun lobby lawyers challenged this revised version of D.C.'s public carry law.¹⁰⁹ The revised version of the law was then struck down by the D.C. Circuit in *Wrenn v. District of Columbia* as violative of the Second Amendment.¹¹⁰ The District's application for en banc review was denied, and the attorney general and mayor decided not to pursue the case to the Supreme Court.¹¹¹ After *Wrenn*, D.C. is left with a licensing system requiring training and an in-depth background check but generally allowing any applicant without a serious criminal record or history of severe mental illness to get a license to carry a concealed firearm.¹¹²

II. WHAT THE CONGRESSIONAL DEBATE AND PASSAGE OF THE DISTRICT'S 1892 PUBLIC CARRY LAW CAN TEACH ABOUT THE ORIGINAL PUBLIC MEANING OF THE RIGHT TO BEAR ARMS INCORPORATED IN THE FOURTEENTH AMENDMENT

The debate surrounding whether the Second Amendment protects a right to carry guns in public is one of the most contentious in the legal field, so it is important not to overstate the significance of the materials presented in this Article. That being said, the history of public carry regulation in Washington, D.C. and the debate surrounding congressional passage of the 1892 law support two important conclusions. The first, and what should be a non-controversial conclusion, is that in the wake of the Civil War and ratification of the Fourteenth Amendment, there was not a clear national consensus about how, and even if, the Second Amendment applied to the carrying of firearms in public. Consistent with the Cornell-Ruben model, there was a geographic and political split in ideology about firearms that generally resulted in Democrats and those in the Deep South supporting a broader Second Amendment right and Republicans and those in the North and West supporting a more limited public carry right. This was not uniform, as there were notable exceptions in the South, including Tennessee, Arkansas, and Texas, which maintained fairly strict regulations, and

108. D.C. CODE ANN. § 22-4506 (West 2015), *invalidated by* *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).

109. *Wrenn v. District of Columbia*, 107 F. Supp. 3d 1 (D.D.C.), *vacated*, 808 F.3d 81 (D.C. Cir. 2015).

110. *Wrenn*, 864 F.3d at 651.

111. Ann E. Marimow & Peter Jamison, *D.C. Will Not Appeal Concealed Carry Gun Ruling to Supreme Court*, WASH. POST (Oct. 5, 2017), <https://perma.cc/LC6S-7VP2>.

112. See D.C. CODE § 7-2509.02 (Supp. 2017).

Connecticut and Vermont in the North, which operated under less restrictive firearms regimes.¹¹³ Second, because Northerners and Republicans were the primary force behind the drafting and ratification of the Fourteenth Amendment, their historical tradition should be the lens through which courts interpret and analyze the meaning of the Second Amendment as incorporated by the Fourteenth Amendment.

A. *The Lack of a Clear National Consensus About the Scope of the Right to Bear Arms Undermines Claims that the Second Amendment Protects a Broad Right to Carry Firearms in Public.*

In *Heller*, Justice Scalia defended the Court's decision against Justice Stevens's dissent, stating:

Justice Stevens' view [that the Second Amendment protects a right tied to militia service] thus relies on the proposition, *unsupported by any evidence, that different people of the founding period had vastly different conceptions of the right to keep and bear arms*. That simply does not comport with our longstanding view that the Bill of Rights codified *venerable, widely understood liberties*.¹¹⁴

What the debate surrounding the passage of the District's 1892 public carry law clearly shows is that in the period after the ratification of the Fourteenth Amendment, the Second Amendment and its state analogues were not "widely understood" to protect a broad right to carry in public.¹¹⁵

113. The author has discussed the Texas example in another article. See Frassetto, *supra* note 20. Why Tennessee and Arkansas developed unique traditions would be an interesting topic for future articles. The lax regulation in some Northern states creates a different set of questions. Was their permissive regulation of carry a conscious policy choice or was public carry simply not enough of a problem to warrant legislative action?

114. *District of Columbia v. Heller*, 554 U.S. 570, 604–05 (2008) (emphases added).

115. Whether the relevant time period when analyzing the right as applied to the states through the Fourteenth Amendment backdates to the time of the ratification of the Second Amendment or is analyzed at the time of the ratification of the Fourteenth Amendment is an open question in originalist methodology. See *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014) (analyzing the scope of the right in 1791 but considering late nineteenth century sources); *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) ("[T]he Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified."); see also Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 15 (2008) (looking to state constitutional rights at the time of the ratification of the Fourteenth Amendment because of their potential relevance in understanding unenumerated rights protected by the Fourteenth Amendment's Due Process and Privileges and Immunities Clauses); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1099–1100 (1995) (discussing whether the 1868 understanding of the Establishment Clause should be controlling

Then, as now, there was a broad regional variation between what level of weapons people were comfortable with in public spaces and how states regulated carrying firearms in public.¹¹⁶ Many Western states prohibited carrying guns in urban areas while broadly allowing carry on the frontier.¹¹⁷ Several Southern states prohibited concealed carry while generally allowing open carry.¹¹⁸ Many Northern and a few Southern states prohibited carrying firearms in public but included exceptions when a person faced an imminent threat.¹¹⁹ States like Tennessee and Arkansas had idiosyncratic systems, only allowing public carry openly and in the hand.¹²⁰ Others have noted similar patterns in protection of the right to bear arms in state constitutions. Fewer states in the Midwest, Northeast, and West codified a right to keep and bear arms in their state constitutions, while a supermajority of Southern states had Second Amendment analogues.¹²¹ With this level of variation, it is impossible to say any conception of the Second Amendment, let alone a conception mandating a broad right to carry firearms in public, constituted a widely understood right.¹²²

in Establishment Clause cases). *See generally* Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1968–69 (2017) (discussing Justice Scalia's apparently contradictory opinions on this issue). The author sides with Justice Scalia's view in *McIntyre v. Ohio Elections Comm'n*: "I doubt that the Fourteenth Amendment time-warped the post-Civil War States back to the Revolution." 514 U.S. 334, 375 (1995) (Scalia, J., dissenting).

116. For a detailed analysis of current public carry laws, see *Gun Law Navigator*, EVERYTOWN FOR GUN SAFETY, <http://every.tw/2ow20mK> [<https://perma.cc/T99S-PZ67>].

117. *See* Act of Mar. 18, 1889, no. 13, 1889 Ariz. Sess. Laws 30; Act of Apr. 1, 1881, no. 96, § 1, 1881 Ark. Acts 191, 191; Act of Feb. 4, 1889, § 1, 1889 Idaho Sess. Laws 23, 23; Act of Mar. 4, 1881, ch. 37, § 23, 1881 Kan. Sess. Laws 79, 92; Act of Jan. 29, 1869, ch. 32, § 1, 1869 N.M. Laws 72, 72; Act of Dec. 2, 1875, ch. 52, § 1, 1876 Wyo. Sess. Laws 352, 352.

118. *See* ALA. CODE § 3273–3275 (1852) (including an exception to concealed carry restrictions when facing a threat); Act of June 2, 1893, ch. 4124, § 1, 1893 Fla. Laws 51, 51; GA. CODE § 4413 (1861); Act of Mar. 22, 1871, ch. 1888, 1871 Ky. Acts 89; Act of Feb. 28, 1878, ch. 46, § 1 1878 Miss. Laws 175, 175 (including an exception to concealed carry restriction when facing a threat); Act of Mar. 5, 1883, 1883 Mo. Laws 76; Act of Dec. 24, 1880, no. 362, § 1, 1881 S.C. Acts 447, 447–48; Act of Oct. 29, 1870, ch. 349, § 1, 1870 Va. Acts 510, 510.

119. *See* ME. STAT. tit. 12, ch. 169, § 16 (1841); MASS. REV. STAT. ch. 134, § 16 (1836); MICH. REV. STAT. ch. 162, § 16 (1846); MINN. STAT. ch. 104, § 17 (1881); OR. STAT. ch. 16, § 17 (1854); Act of Mar. 31, 1860, no. 375, § 6, 1860 Pa. Laws 427, 432.

120. *See* Act of Apr. 1, 1881, no. 96, § 2, 1881 Ark. Acts 191, 192; Act of Dec. 14, 1871, ch. 90, § 1, 1871 Tenn. Acts 81, 81.

121. Calabresi & Agudo, *supra* note 115, at 29.

122. The author has argued that the Northern and Eastern tradition actually predominated, especially in a period after ratification of the Fourteenth Amendment in the second half of the nineteenth and early twentieth century. *See* Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellants & Reversal at 25, *Grace v. District of Columbia*, *decided sub nom.*

That is not to say that complete unanimity is required to find a historical understanding of a Second Amendment right.¹²³ There will certainly be cases where a predominant historical understanding of the right can be adopted by a court applying originalism, even when there is some evidence of disparate traditions.¹²⁴ Where to draw the line between a sufficient historical record to uphold a firearm regulation and a record that is too sparse is an open question in the courts and in the academic originalist debate.¹²⁵ However, as the debate discussed above shows, during the period immediately following the ratification of the Fourteenth Amendment, there was clearly no broad understanding of the right to carry arms in public.

B. When Analyzing the Scope of the Right to Bear Arms, as Incorporated in the Fourteenth Amendment, the Understanding Adopted by the Amendment's Northern and Republican Proponents Should Carry More Weight

As discussed above, the variation in the understanding of the right to bear arms generally fell into regional patterns. Congressmen from Northern states generally viewed the right as more limited, while representatives of Southern states believed the right extended more broadly.¹²⁶ With certain exceptions, especially among Democrats, the distinctions also broke down

Wrenn v. District of Columbia, 864 F.3d 650, (D.C. Cir. 2017) (No. 16-7067); Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellees & Affirmance at 23–27, *Wrenn*, 864 F.3d 650 (No. 16-7025).

123. For a discussion of the various possibilities for burden of proof in the originalist analysis, see Ramsey, *supra* note 115, at 1970–73.

124. The author has argued elsewhere that the bipartisan understanding of the right to bear arms at the time of the ratification of the Fourteenth Amendment allowed states to prohibit the carrying of firearms except for those with an immediate need for self-defense. Frassetto, *supra* note 20 (discussing the bipartisan legal consensus in Texas for upholding fairly restrictive public carry laws in the mid-1870s).

125. See *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 139 n.14 (D.D.C. 2016) (requiring a “universal and long-established tradition” (internal quotations omitted)); *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 202–04 (5th Cir. 2012) (finding “a longstanding, historical tradition” of restricting firearms possession by those under the age of twenty-one based, in part, on restrictions enacted in nineteen states and the District of Columbia in the nineteenth century); John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 918 (2016) (arguing that the judiciary should strike down the actions of the other branches “only when they conflict with a meaning of the Constitution which the judiciary finds to be clear”).

126. Other research has found similar results. One survey of state constitutions found that in 1868, when the Fourteenth Amendment was ratified, 73% of Southern state constitutions had right to bear arms provisions, while only 60% of constitutions in Northeastern states and 42% of Midwestern and Western states had Second Amendment analogues. Calabresi & Agudo, *supra* note 115, at 51.

along party lines, with Republicans generally supportive of additional regulation and Democrats favoring fewer restrictions.¹²⁷

To the extent one of these traditions should prevail, it is the Northern Republican tradition of restricting public carry to those with a specific need that should ultimately carry more weight.¹²⁸ Northern Republicans were responsible for the drafting—and were the primary force behind the ratification—of the Fourteenth Amendment.¹²⁹ Northern states constituted nineteen of the twenty-seven states necessary for ratification.¹³⁰ The Southern states that supported ratification were compelled to provide the necessary votes as a precondition for readmission into the Union, so it is not clear whether their traditions should carry any weight. As a result, “we should focus on the resonance of the Fourteenth Amendment text with *Northern* legal ideas, not those that could span both North and South. To the extent they differ from their Southern counterparts, Northern notions of equality, civil liberty, and due process are the Fourteenth Amendment’s interpretive key.”¹³¹

Applying this standard, the Northern view that firearms could be broadly regulated—and specifically that the carrying of firearms outside of the home could be licensed or limited to those with a specific need—should predominate. The Fourteenth Amendment was not intended to adopt the Southern view of a broad, though not unlimited, right to possess firearms and carry them in public. Courts considering Second Amendment challenges to state concealed carry laws, generally adopted in Northern and Western states,

127. See 23 CONG. REC. 5790 (1892) (listing the roll-call vote on final passage in the Senate); W.H. MICHAEL, OFFICIAL CONGRESSIONAL DIRECTORY: FIFTY-SECOND CONGRESS (2d ed. 1892).

128. See Green, *supra* note 22, at 202 (“Therefore, the text of the Amendment should be read through the lens of Northern views of equality, due process, and the privileges of citizens, not as if the Amendment was genuinely co-authored with the South.”); Calabresi & Agudo, *supra* note 115, at 53–54 (“The fact that the right was such a distinctly Southern one in 1868 may also bear on whether most Americans recognized it as a fundamental right at [the time of ratification.]”).

129. See Gerard N. Magliocca, Opinion, *The Father of the 14th Amendment*, N.Y. TIMES (Sept. 17, 2013, 12:29 PM), <https://perma.cc/WT24-5VHX> (discussing John Bingham’s role in the drafting of the Fourteenth Amendment).

130. Christopher R. Green, *The South Tried to Secede, and You’ll Never Guess What Happened Next: Loyal Denominatorism and the Fourteenth Amendment*, LA. L. REV. (forthcoming), <https://perma.cc/722S-MYMG>. Green supports the theory that the ratification of a constitutional amendment only requires three-quarters of loyal states, meaning the Fourteenth Amendment was actually ratified earlier with the support of nineteen Northern states and Tennessee. *Id.*

131. Green, *supra* note 22, at 202; see also *id.* at 202 n.167 (noting that there were “a few Republicans who described the Fourteenth Amendment as the export of Northern civil liberties to the South”).

should analyze the Second Amendment through the lens of the Northern and Republican historical tradition.

Even if one rejects the idea that Northern views should predominate when interpreting the Fourteenth Amendment, it is beyond debate that the Amendment was not originally understood to be an effort to replace Northern and Republican views about the scope of rights with Southern and Democratic views.¹³² At the time of the Fourteenth Amendment's ratification, Northern states generally had more stringent firearms regulations than Southern states, and no evidence in history or logic suggests that the Northern states responsible for the Fourteenth Amendment's ratification intended to abrogate their traditions and to nationalize the Southern view.¹³³

CONCLUSION

The material presented here is meant to add another piece of evidence to the academic and judicial discussion about the original public meaning of the Second Amendment. Obviously, no single source can be decisive in understanding the historical scope of a right, especially the Second Amendment, for which the historical inquiry is extremely wide-ranging. However, a historical inquiry ranging across hundreds of years and dozens of jurisdictions is always in need of additional scholarship to clarify and add needed nuance to the field.

While it certainly does not end the Second Amendment historical debate, the history of public carry regulation in Washington, D.C. and the debate surrounding the enactment of the District's 1892 public carry law does foreclose certain arguments. First, in the period after ratification of the Fourteenth Amendment, there was clearly no national consensus in support of a broad right to carry firearms in public. This defeats the argument that at the time of ratification, or in the period afterwards, the right to keep and bear arms was "widely understood" to protect a broad right to carry in public. Second, consistent with the Ruben-Cornell model, it is no longer a plausible argument to claim that distinct regional traditions did not exist. The North, West, and South clearly had distinct constitutional traditions surrounding the right to keep and bear arms.

More controversially, but still intuitively, these distinct regional traditions lend further support to the view that, when applying the Second Amendment to the states, the Northern tradition should be the lens through which courts view the right as incorporated by the Fourteenth Amendment.

132. *See id.* at 202.

133. *See* Ruben & Cornell, *supra* note 12, at 127.

This Northern tradition, which allowed for a broad range of firearm regulations to protect public safety, makes clear that the drafters and ratifiers of the Fourteenth Amendment always understood firearms regulation to be consistent with the right to bear arms.