

## The Law and Politics of Firearms Regulation in Reconstruction Texas

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## I. Introduction

The current state of scholarship on Second Amendment history paints post-Civil War firearms regulations as racist efforts by Southern states to prevent blacks from defending themselves against racial violence.<sup>1</sup> This reading distorts the historical record by ignoring the actors responsible for numerous gun laws across the former Confederacy. This article is, in part, an effort to respond to such accounts by presenting the first detailed analysis of the post-war legislative response to widespread firearm violence in Texas, as well as the judicial interpretations of that legislation.<sup>2</sup> More fundamentally, this article provides an in-depth account of the political views of the Republican Unionists, who followed their ratification of the Fourteenth Amendment with strict regulation on publicly carrying firearms to protect freedmen from racial violence.

Given the Supreme Court's instruction in *District of Columbia v. Heller* that the historical understanding should inform how the right to keep and bear arms is understood today,<sup>3</sup> the views of those who wrote the Fourteenth Amendment (through which the Second Amendment applies to the states) are plainly relevant.<sup>4</sup> As this article's account of Texas history makes clear, the

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<sup>1</sup> See Stephen Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bills of Rights*, 41 Baylor L. Rev. 629 (1989) (Directly discussing the subject of this article, but portraying the events described in an every anti-Republican manner.); Robert J. Cottrol & Raymond T. Diamond, *Never Intended to be Applied to the White Population: Firearms Regulation and Racial Disparity – The Redeemed South's Legacy to a National Jurisprudence*, 70 Chicago Kent Law Review 1307 (1995); Clayton Cramer, *The Racist Roots of Gun Control*, Kansas Journal of Law and Public Policy 1995 (Cramer's work is especially historically inaccurate on this topic).

<sup>2</sup> Several major provisions of the laws discussed in this article were repealed by the Texas state legislature during the 2015 legislative session. See Tex. H.B. 910, 84th Leg. (2015)(Repealing; S.B. 11, 84th Leg. (2015). Everytown for Gun Safety opposed both changes.

<sup>3</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626-627 (2008).

<sup>4</sup> See McDonald v. City of Chicago, 561 U.S. 742, 771-80 (2010); Akhil Reed Amar, *The Second Amendment as a Case Study in Constitutional Interpretation*, 2001 Utah. L. Rev. 889 (2001); Nicholas Johnson, George Mocsary, Clayton Cramer, *The Public Meaning of the Second Amendment When the Fourteenth Amendment was Ratified*, 17 George Washington L. Rev. 823 (2010).

Republican Unionists who ratified the Fourteenth Amendment held a narrow view of the right to carry firearms in public, and believed public carry could be broadly regulated. By contrast, it was the Southern Democrats—who had fought relentlessly against the Fourteenth Amendment after losing the Civil War—who advocated an expansive view of the right to carry guns in public, a view which gun rights proponents continue to espouse today.

In Part II, this article explains that Texas, like most Southern states, suffered widespread violence against freedmen and their Republican supporters during the Reconstruction period.<sup>5</sup> But unlike in many states, Republican Unionists in Texas confronted racist reactionaries' violence with strong legislative and executive action. On the heels of the Fourteenth Amendment—which Republicans drafted and ratified—Republicans in Texas enacted a law prohibiting the carrying of firearms under most circumstances.

Part III of this article recounts the diverging outcomes of two legal challenges to Texas's broad restrictions on public carry, in which the Texas Supreme Court evaluated both federal and state constitutional attacks on the law. The first challenge, in 1872, was considered by a high court made up of Republicans and Unionists, who decisively upheld the law under both the

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<sup>5</sup> In this article, the terms “Republican” or “Radical Republican” will be used to identify Unionists who generally supported black civil rights, the policies of reconstruction and the administration of Edmund J. Davis. “Democrat” will be used to refer to secessionists who opposed reconstruction, black civil rights, and the administration of Edmund J. Davis. The political divisions in Reconstruction Texas were not nearly this clear cut, but a more detailed taxonomy would go beyond the level of detail necessary for this article. Reconstruction refers to the period of Federal and Republican control in Texas from 1865 – 1874 and nationally from 1863-1877. Reconstruction is generally divided into two periods. The first, Presidential Reconstruction, during which the rebel states were treated indulgently by the federal government and the Southern pre-war political order generally remained in place, took place from 1865 to early 1867. The second period, known as Congressional Reconstruction, began when the Radical Republican majorities elected in 1866 took office. The Radical Republican Congress passed the Reconstruction Acts, which placed the rebel states under military control and excluded former Confederates from politics. During Congressional reconstruction, control was eventually passed from Federal military governors to Republican controlled state governments, most of which included blacks. Reconstruction ended at different times in each state when control returned to conservative white Democrats known as “redeemers”. See Generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 (1988).

Second Amendment and its analogue in the Texas Constitution. By 1874, when the Court heard the second challenge, its membership had completely changed. That Court—made up entirely of Democrats, four-fifths of whom were former Confederate officers—took a much broader view of the right to bear arms. However, even this Democrat-controlled Court concluded that the law did not infringe upon the right to bear arms.

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

## **II. Texas’s Reconstruction-Era Restrictions on Public Carry in Historical Context**

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

Texas was a uniquely violent place, both before and after the Civil War. While violence in every Confederate state far exceeded violence in the North, Texas’s levels of violence stood out even among the Confederate states.<sup>6</sup> At the time of annexation in 1845, the homicide rate in lawless South Texas was a staggering 100 per 100,000 and at least 50 per 100,000 in the slaveholding portion of East Texas.<sup>7</sup> As a reference point, the 2013 U.S. murder rate was 4.5 per

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<sup>6</sup> See generally HORACE V. REDFIELD, HOMICIDE NORTH AND SOUTH, BEING A COMPARATIVE VIEW OF CRIME AGAINST THE PERSON IN SEVERAL PARTS OF THE UNITED STATES (J.B. Lippincott & Co. 1880).

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

100,000.<sup>8</sup> Visitors to Texas before the Civil War often commented on the high levels of violence and how well-armed many Texans were. Frederick Law Olmstead, the famed landscape architect, wrote after touring Texas in the 1850s:

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

Violence continued in Texas during the War, especially against Unionists. In 1862, 42 suspected Union sympathizers were lynched in Gainesville, while in 1863, German-American Unionists were massacred while attempting to flee to Mexico.<sup>10</sup>

A report commissioned by the 1868-69 Constitutional Convention (the “Convention Report”) found that violence further increased in the period after the Civil War ended in 1865. Homicides had increased from a reported total of 98 in 1865 to 347 in 1867.<sup>11</sup> While the investigators admitted these numbers “came far short of representing the actual number,” as they included full reports from only thirty of Texas’s 127 counties, they did show the trend of increasing violence in Texas, much of it political.<sup>12</sup> Even with the Convention Report’s under-

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

<sup>8</sup> Uniform Crime Reports: Murder, Federal Bureau of Investigation, available at <http://1.usa.gov/1YNrV3N>.

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

<sup>10</sup> *Great Hanging at Gainesville*, Texas State Historical Society, available at <http://bit.ly/1W53ai6>; CARL H. MONEYHON, EDMUND J. DAVIS 48 (TCU Press 2010).

<sup>11</sup> Ann Patton Baenziger, *The Texas State Police during Reconstruction: A Reexamination*, 72 Sw. Hist. Q. 470 (1969)(Subsequently “Baenziger”).

<sup>12</sup> Crouch and Brice, *supra* note \_\_\_, at 20.

inclusive numbers, the murder rate in Texas during the period from 1860 to 1868 was 45 times that in New York.<sup>13</sup> Texas led the nation in murders throughout the post-War period. In 1870, Texas had at least 323 murders, a staggering 195 more than the next-most-deadly state.<sup>14</sup> The Convention Report authors wrote they doubted “such a record of blood can be exhibited in any Christian or civilized State in the world in a time of peace.”<sup>15</sup>

### Minimum Homicide Rates in Reconstruction Texas<sup>16</sup>

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

<sup>13</sup> Crouch and Brice, supra note \_\_, at 20; Tex. Reconstruction Convention J. at 501, 2d Rep. of the Comm. on Lawlessness and Violence, (July 21, 1868) (New York state suffered a total of 47 murders in 1867, 300 less than Texas in a state with at least five times the population).

<sup>14</sup> Baenziger, supra note \_\_, at 473.

<sup>15</sup> Crouch and Brice, supra note \_\_, at 20.

<sup>16</sup> These rates are calculated using Reconstruction Journal Records for the homicide numbers and 1860 and 1870 census information for the population numbers. The Convention Report records are clearly and admittedly under inclusive, so these numbers provide only a minimum homicide rate during the period. The actual homicide rate may have been significantly higher – possibly double or triple the calculated rate. Populations are calculated by dividing the difference between the 1860 and 1870 census evenly and allocating across the ten years.

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

<sup>18</sup> Number calculated based on statistics released by the Census Bureau and published in the Daily State Journal (Austin), August 31, 1871; See Baenziger, supra note \_\_ at 473. See also Roth, supra note \_\_, at 569, N123 (estimating a homicide rate of 268 per 100,000 in South and West Texas).

Texas was especially resistant to emancipation and Reconstruction, resulting in staggering levels of violence against blacks and Unionists. Presidential Reconstruction-era governor James Thockmorton even proposed a system of gradual emancipation be implemented, in clear violation of both the Emancipation Proclamation and Thirteenth Amendment.<sup>19</sup> Provisional military governor Andrew J. Hamilton in a letter to President Johnson described reports of “shooting and hanging of Negroes by the half dozen at a time, for the crime of leaving their former masters.”<sup>20</sup> General W.E. Strong described freedmen being treated “unmercifully and shot down like wild beasts, without any provocation.”<sup>21</sup> And fifth military district Commander Major General Joseph J. Reynolds reported “murder of negroes is so common as to render it impossible to keep an accurate account of them.”<sup>22</sup> The Convention Report showed that between 1865 and 1867, for every white person murdered by a black person, 37 black people were murdered by whites.<sup>23</sup> Many of the 460 murders of whites during that time period were also attacks on white Republicans by Democrats.<sup>24</sup>

Given the frequency of attacks on blacks and Republicans, the investigation and prosecution of these crimes left much to be desired. Abner Doubleday, a Civil War General stationed in Texas after the War, reported that not a single white man had been convicted of murder in Texas since it achieved independence from Mexico.<sup>25</sup> This was obviously an exaggeration, but the reality was only slightly less extreme. Of the approximately 1,000 homicides reported in Texas between 1865-69, there were only 279 indictments, five

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<sup>19</sup> Moneyhon, Edmund J. Davis *supra* note \_\_\_, at 77.

<sup>20</sup> Crouch and Brice, *supra* note \_\_\_, at 11-12.

<sup>21</sup> *Id.* at 12.

<sup>22</sup> *Id.* at 21.

<sup>23</sup> Tex. Reconstruction Convention J. at 194, First Rep. of the Comm. on Lawlessness and Violence (July 2, 1868).

<sup>24</sup> Tex. Reconstruction Convention J. at 195, First Rep. of the Comm. on Lawlessness and Violence (July 2, 1868).

<sup>25</sup> Crouch and Brice, *supra* note \_\_\_, at 15.

convictions, and one execution (a freedman).<sup>26</sup> That meant only one of every 200 murderers was actually punished for his crime. The Convention Report stated bluntly why these numbers were so low: “It is our solemn conviction that the courts, especially juries, as a rule, will not convict ex-rebels for offenses committed against Union men and freedmen.”<sup>27</sup> Even when a conviction was secured, justice was often still out of reach. In one case, a white man who had attacked and nearly beat to death a freedman was arrested by a Freedman’s Bureau agent, turned over to civil authorities, and convicted; the punishment was a fine of one cent.<sup>28</sup> In 1870, a reported 702 murderers and 413 attempted murderers were on the loose in Texas.<sup>29</sup> Crime, especially directed toward blacks and Unionists, was out of control.

### **B. The Radical Republican Administration of Edmund Davis**

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

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<sup>26</sup> Baenziger, *supra* note \_\_\_, at 473; These numbers were not broken down by race, so it is possible Doubleday’s statement about murder prosecutions was accurate during the post War period.

<sup>27</sup> Reconstruction Convention Journal at 199, First Report of the Committee on Lawlessness and Violence, July 2, 1868.

<sup>28</sup> *Id.*

<sup>29</sup> Baenziger, *supra* note \_\_\_, at 473.

## 1. Edmund Davis's Rise to Governor.

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

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

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<sup>30</sup> *Edmund Jackson Davis*, Texas State Historical Association, available at <http://bit.ly/1XT3kLm>.

<sup>31</sup> *Id.*

<sup>32</sup> Carl H. Moneyhon, Edmund J. Davis, *supra* note \_\_, at 40-41; Sam Houston was also removed as Governor for refusing to swear loyalty to the Confederacy, an action akin to removing George Washington from office. *Sam Houston*, Texas State Historical Association, available at <http://bit.ly/1UnCfMQ>.

<sup>33</sup> Moneyhon, Edmund J. Davis, *supra* note \_\_, at 59-72.

<sup>34</sup> *Id.* at 79-80.

<sup>35</sup> *Id.* at 82-83 (Davis may have meant suffrage for blacks meeting educational or literacy thresholds).

between conservatives and Radical Republicans for convention president.<sup>36</sup> During the conference, Davis assumed leadership of the radical Republicans. His able management of an extremely contentious conference propelled him to statewide prominence.<sup>37</sup>

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

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

<sup>37</sup> Id. at 122 (The convention collapsed without finalizing a state constitution).

<sup>38</sup> Dale Baum, *Chicanery and Intimidation in the 1869 Texas Gubernatorial Race*, 97 Sw. Hist. Q. 36 (Jul. 1993).

<sup>39</sup> Id.

<sup>40</sup> Id. at 49.

<sup>41</sup> Id. at 38 (Baum states discontinuing voting in Milam and Navarro counties almost certainly did not swing the election results).

<sup>42</sup> Id. at 40.

## 2. The Davis Administration: 1870-1872

In the midst of this chaos and widespread resistance, Davis began his term as governor. In his inaugural message, Davis called the legislature's attention to the "consideration of measures to establish law and order throughout the State, and the punishment and repression of crime."<sup>43</sup> Davis proposed several policies to reduce crime in Texas, including reorganizing the state militia, which had been disbanded under military rule; establishing a state police force; creating an impartial court system; and establishing free, state-funded, public schools (which Davis identified as a long-term crime prevention measure).<sup>44</sup> The state legislature adopted all of these policies in one form or another.<sup>45</sup> As a first step, Davis created a racially integrated state police force to "follow up and arrest offenders" where the "authorities are too weak to enforce respect [for the law] or are indisposed to do so."<sup>46</sup> The creation of the force drew sharp opposition from both Democrats and conservative Republicans, who claimed that creating the state police was an inappropriate transfer of power from local governments to the Governor. State Senator and former slave Matthew Gaines cut to the true heart of the opposition, stating it was not the result of fear over executive power, but rather opposition to the "idea of gentleman of my color being armed and riding around after desperadoes."<sup>47</sup>

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<sup>43</sup> Baenziger, supra note \_\_ at 473.

<sup>44</sup> Journal of the Twelfth Legislature of Texas 19 (April 28, 1870) (inaugural address of Governor Edmund J. Davis).

<sup>45</sup> 1870 Tex. Acts 11, c. 10, *An Act to provide for the enrollment of the Militia, the organization and discipline of the State Guards, and for the public defense*; 1870 Tex. Acts 19, c. 13, *An act to establish a State Police, and to provide for the regulation and government of the same*; 1870 Tex. Acts 21, c. 14, *An act to provide for districting the State of Texas into judicial districts*; 1870 Tex. Acts 113, c. 68, *An Act to Establish a System of Public Schools for the State of Texas*. The school system adopted by the Davis administration provided equal funding for all students in the state, in contrast with the system in effect in Texas 100 years later and controversially upheld by the Supreme Court in *San Antonio Independent School District v Rodriguez*, 411 U.S. 1 (1973).

<sup>46</sup> Texas House Journal at 18 (April 29, 1870).

<sup>47</sup> Baenziger, supra note \_\_, at 474.

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

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

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

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<sup>48</sup> 1870 Tex. Acts 19, c. 13, § 8, *An Act to Establish a State Police, and Provide for the Regulation and Government of the Same*.

<sup>49</sup> 1870 Tex. Acts 19, c. 13, § 5.

<sup>50</sup> Crouch & Brice, *supra* note \_\_, at Appx; Baenziger, *supra* note \_\_, at 474 (Crouch and Brice dispute the forty percent cited by Baenziger, and originally used as a criticism of the state police force, but do not dispute that the state police were integrated to a degree unprecedented at the time).

<sup>51</sup> *Id.* at 475.

<sup>52</sup> *Journal of the Twelfth Legislature of Texas 19* (April 28, 1870) (inaugural address of Governor Edmund J. Davis).; Handguns accounted for around 2/3 of the murders in Texas during the period, an aberrationally high percentage for the time. See Roth at 356.

That summer, the state legislature partially fulfilled Governor Davis's request by passing a law forbidding the carrying of any "bowie-knife, dirk or butcher-knife, or fire-arms whether known as a six shooter, gun or pistol of any kind" at "any church or religious assembly, any school room or other place where persons are assembled for educational, literary or scientific purposes, or into a ball room, social party, or other social gathering composed of ladies and gentlemen, or to any election precinct on the day or days of any election. . . or to any other place where people may be assembled to muster or to perform any other public duty, or any other public assembly."<sup>53</sup> The fine for violating the new law was a whopping \$50 to \$500 (the modern equivalent of \$1,000 to \$10,000).<sup>54</sup>

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

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<sup>53</sup> 1870 Tex. Gen. Acts 63, *An Act Regulating the Right to Keep and Bear Arms*; Crouch and Brice at 26.

<sup>54</sup> Calculated using inflation calculator at <http://www.westegg.com/inflation/>, which is based on consumer price index statistics going back to 1800.

<sup>55</sup> Crouch & Brice, *supra* note \_\_, at 61 (Arrest of Joseph Elliot for wearing arms in a public assembly during efforts to stop the notorious West Gang).

<sup>56</sup> Journal of the House of Representatives of the Twelfth Legislature, Part First (1871) at 57.

<sup>57</sup> *Id.*

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

In response to concerns about the effectiveness of the 1870 Act, and likely partially as a result of the confusion in Madison County, the Texas Legislature drafted a bill in 1871 that prohibited the carrying of any "pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-

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<sup>58</sup> Crouch & Brice at 39-40 (Patrick would be fired in December 1870); Confusion does not seem to have been limited to Patrick, in one instance a district court judge, F.P. Wood, ordered anyone who carried a gun in town, not just those at public assemblies, to be arrested. Crouch and Brice, *supra* note \_\_\_, at 62.

<sup>59</sup> *Id.* at 40.

<sup>60</sup> *Id.* at 40.

knuckles, bowie-knife or any other kind of knife” “without reasonable grounds for fearing an unlawful attack on his person.”<sup>61</sup> The bill punished first offenses with confiscation of the weapon and a fine of between \$25 and \$100 (approximately \$500-\$2000 with inflation)<sup>62</sup> and up to sixty days in prison for a second offense.<sup>63</sup> The law’s exception allowing publicly carrying a firearm when in fear of unlawful attack was further narrowed by requiring the defendant to show that the danger was “immediate and pressing,” and “of such a nature as to alarm a person of ordinary courage,” that “the weapon was borne openly and not concealed beneath the clothing,” and that the claimed danger did not have “origin in a difficulty first commenced by the accused.”<sup>64</sup> This clarified that the exception did not apply when a person had carried a firearm due to a generalized fear of crime, but rather only when a specific threat existed. The penalties for the 1870 Act were also amended to provide for confiscation of the weapon and imprisonment for up to 90 days for subsequent offenses.<sup>65</sup> The law granted the governor the power to exempt counties from the carry prohibition if they were dubbed a frontier county “liable to incursions of hostile Indians.”<sup>66</sup> The law also included exceptions for people carrying weapons on their own property or in their place of business, members of the militia in active service, law enforcement officers, and the transportation of arms in the baggage of travelers.<sup>67</sup>

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<sup>61</sup> 1871 Texas 25, § 1, *An Act to Regulate the Keeping and Bearing of Deadly Weapons*.

<sup>62</sup> Calculated using inflation calculator at <http://www.westegg.com/inflation/> which is based on consumer price index statistics going back to 1800.

<sup>63</sup> 1871 Tex. Gen. Laws 25, § 1, *An Act to Regulate the Keeping and Bearing of Deadly Weapons*.

<sup>64</sup> *Id.* at § 2.

<sup>65</sup> *Id.* at § 3.

<sup>66</sup> *Id.* at § 4.

<sup>67</sup> *Id.* at § 1.

The bill titled “An Act to Regulate the Keeping and Bearing of Deadly Weapons,” was introduced by Republican Representative Frederick Grothaus on January 24, 1871.<sup>68</sup> The bill passed out of the Judiciary Committee 5-3, receiving primarily Republican support.<sup>69</sup> On March 9, 1871, the House passed the bill by a margin of 60-12, with all twelve black representatives voting in favor of the Bill.<sup>70</sup> On March 29, 1871, the Senate passed the bill by a 20-4 margin with support of both of the State’s black Senators.<sup>71</sup> In both chambers opposition to the law consisted primarily of Democrats and conservative Republicans who had served in the Confederate Army.<sup>72</sup> Governor Davis signed the bill on April 12, 1871.<sup>73</sup>

The new prohibition on public carry was widely enforced across the State, especially by the state police.<sup>74</sup> Line police officers consistently sent their superiors reports of arresting those

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<sup>68</sup> Journal of the House of Representatives of the Twelfth Legislature, Part First 95 (January 21, 1871); *Frederick Edward Grothaus*, Texas State Historical Association, available at <http://bit.ly/1Llq64O> (Germans in Texas tended to be oppose secession and support Republicans after the war).

<sup>69</sup> Texas House Journal 443-44 (March 1, 1871) (Judiciary Committee Report dated February 28, 1871).

<sup>70</sup> Texas House Journal 523-32 (March 9, 1871) ; the black representatives who supported the measure were Richard Allen, D.W. Burley, Silas Cotton, Goldstein Dupree, Jeremiah J. Hamilton, Mitchell Kendall, David Medlock, John Mitchell, Henry Moore, Sheppard Mullens, Benjamin Franklin Williams, and Richard Williams.

<sup>71</sup> Senate Journal March 29, 1871 at 538; G.T. Ruby and freedman Matthew Gaines were the two black senators who supported the Amendment.

<sup>72</sup> Members of the House voting Nay: Abbot (Democrat, Confederate Officer); English (Unknown Party, Confederate Officer); M.A. Gaston (Democrat); Hawkins (Conservative); F. Kyle (Democrat, Confederate Officer); J.W. Lane (Democrat); Jas. A. Miller (Democrat); W.C. Pierson (Radical/Democrat\*); Robb (Democrat, Confederate Officer); E. Ross (Democrat); Self (Unknown); G.H. Slaughter (Radical Republican) \* There is some dispute as to the political affiliation of W.C. Pierson he is listed as a Radical Republican in the Texas State Almanac from 1870, but his obituary states he was one of the few Democrats who served in the Texas House of Representatives During Reconstruction. Members of the Senate Voting Nay: Bowers (Conservative, Confederate Officer); Cole (Democrat); Dillard (Democrat, Confederate Officer); Picket (Conservative). See Texas House Journal 523-32 (March 9, 1871); Texas Senate Journal 538 (March 29, 1871); Party affiliation drawn from TEXAS ALMANAC (1870); Biographical Information drawn when Available from Texas State Historical Association Handbook Online, available at <http://bit.ly/1Sln9J3>.

<sup>73</sup> 1871 Tex. Gen. Laws 25, § 3, *An Act to Regulate the Keeping and Bearing of Deadly Weapons*.

<sup>74</sup> See generally, *English v State*, 35 Tex. 473 (1872); *Jenkins v State*, 36 Tex. 638 (1872); *Waddell v. State*, 37 Tex. 354 (1873); *Baird v State*, 38 Tex. 599 (1873); *State v Duke*, 42 Tex. 455 (1874); *Young v. State*, 42 Tex. 462 (1874); *Smith v State*, 42 Tex. 464 (1874); *Titus v State*, 42 Tex. 578 (1874); *State v Clayton*, 43 Tex. 410 (1875); *Cathey v State*, 23 Tex. Ct. App. 492 (1887); *Wilson v State*, 27 Tex. Ct. App. 47 (Tex. Ct. App. 1889); *McNell v State*, 29 Tex. Ct. App. 48 (Tex. Ct. App. 1890); *Ex Parte Jones*, 38 Tex. Crim. 142 (1897); *Davidson v State*, 45 S.W. 488 (Tex. Ct. Crim. App., 1898); *Sexton v State*, 45 S.W. 920 (Tex. Ct. Crim. App. 1898) *Harris v. State*, 58

carrying weapons.<sup>75</sup> Local law enforcement also participated in arresting those carrying weapons illegally.<sup>76</sup> In fact, Governor Davis declared martial law in Limestone County, in part because of the aftermath of a shootout between police and a man they were trying to arrest for carrying a pistol.<sup>77</sup> Davis specifically mentioned the citizens' failure to obey the law against carrying pistols and other weapons as a reason for the declaration.<sup>78</sup>

While state and local law enforcement worked to carry out the ban, many citizens resisted. Some tried to circumvent the law by posing as state or local law enforcement that were exempted from the restrictions on public carry. It was difficult to know who was lying, but in at least one case, an imposter was discovered carrying a revolver, arrested and fined.<sup>79</sup> Similarly, a few state police officers who were terminated for misconduct continued to fraudulently act as officers and on occasion were arrested for illegally carrying firearms.<sup>80</sup> Some efforts to enforce the law turned violent, including the Lampasas Massacre of 1873, the deadliest single incident in the brief existence of the state police. Four state police officers were murdered by members of a local cattle-rustling gang when they attempted to arrest a gang member who was violating the carry ban.<sup>81</sup> Despite this resistance, law enforcement efforts to enforce the public-carry prohibition continued.

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Tex. Crim. 523 (Tex. Ct. Crim. App. 1910); *Mayfield v State*, 75 Tex. Crim. 103 (Tex. Ct. Crim. App. 1914); *Roberson v State*, 88 Tex. Crim. 587 (Tex. Ct. Crim. App. 1921); *George v. State*, 90 Tex. Crim. 179 (Tex. Ct. Crim. App. 1921).

<sup>75</sup> *Crouch and Brice*, supra note \_\_\_, at 122.

<sup>76</sup> *An Acting Officer Murdered*, *Dallas Herald* (Dallas, Tex.) Sept. 21, 1871 at 4; *The Weekly Democratic Statesman* (Austin, Tex.) Sept. 21, 1871 at 4.

<sup>77</sup> *A Negro Outrage at Springfield*, *The Weekly Democratic Statesman* (Austin, Tex.) Oct. 5, 1871 at 3.

<sup>78</sup> *Crouch and Brice*, supra note \_\_\_, at 108.

<sup>79</sup> *Id.* at 120.

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

<sup>81</sup> *Id.* at 150-156

### 3. The Davis Administration: 1873-1874.

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

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

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<sup>82</sup> Journal of the House of Representatives of the State of Texas being the Session of the Thirteenth Legislature 33-34 (1873).

<sup>83</sup> Baenziger, *supra* note \_\_, at 488.

<sup>84</sup> ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 440 (1988).

many of the prisoners arrested by the state police.<sup>85</sup> The abolishment of the state police threw sole responsibility for law enforcement back into the hands of the local sheriffs and deputies who had failed so miserably to check crime prior to the police's creation. An Adjutant General's report at the end of the year reported "the 'arms law' [concerning personal weapons] except in the more populous counties, is being entirely disregarded."<sup>86</sup>

In December 1873, Davis lost his reelection bid for governor in an overwhelming defeat as former Confederate supporters were again allowed to vote and Texas saw a massive influx of immigrants from other southern states.<sup>87</sup> But shortly afterwards, the Texas Supreme Court invalidated the election because it had been conducted under an election statute passed by the Democratically-controlled state legislature in violation of the Texas Constitution of 1869.<sup>88</sup> In what was often derisively called "the semicolon case," the Court was tasked with interpreting Article 3, § 6 of the Texas Constitution of 1869, which read "All elections for state, district and county officers shall be held at the county seats of the several counties, until otherwise provided by law; and the polls shall be opened for four days, from 8 o'clock A. M. until 4 o'clock P. M. of each day." The Court held that the provision allowed the legislature to change the location of elections but not the times.<sup>89</sup> Because the election law had limited elections to a single day

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<sup>85</sup> Baenziger, *supra* note \_\_\_, at 488

<sup>86</sup> *Id.* at 489.

<sup>87</sup> Foner, *supra* note \_\_\_, at 549.

<sup>88</sup> *Ex Parte Rodriguez*, 39 Tex. 705 (1873)(Davis had signed the election law).

<sup>89</sup> The Rodriguez decision, and the Davis administration generally have been vilified in Texas history since Democrats regained full control in 1874. *See Generally* T.R. FEHRENBACH, *LONE STAR: A HISTORY OF TEXAS AND TEXANS* (The Macmillan Company 1968); One textbook used in a state-mandated government course at Texas colleges described the "injustice, oppression, and extravagance" of the Davis administration and the twelfth legislature as "undoubtedly, the worst in the history of the state." WILBORN E. BENTON, *TEXAS POLITICS: CONSTRAINTS AND OPPORTUNITIES*, 5<sup>th</sup> Ed. (Nelson-Hall Publishers 1984); However, the Court's reading of the state constitution seems reasonable, although bold in the context the decision was made. Lance A. Cooper, "A Slobbering lame Thing"? *The Semicolon Case Reconsidered*, 101Sw. Hist. Q. 320 (Jan. 1998).

rather than the four days required by the 1869 Constitution, the court tossed out the results of the entire election.<sup>90</sup>

Davis was faced with the unenviable choice of either ignoring a decision of the state Supreme Court (every member of which he had appointed) or refusing to recognize a governor and state legislature elected by a 2-1 margin. Davis knew that retaining the governorship was not feasible, but he also knew that the legal legitimacy of a state government elected through an election that had been invalidated by the state Supreme Court would be dubious. Davis sought a statement of recognition from President Grant for the new legislature before it sat, but President Grant only gave a vague statement that it would be “prudent” and “right” to “yield to the will of the people”<sup>91</sup> Shortly afterwards, the newly elected legislature assembled and sought the recognition of Davis, who refused to grant it without some sort of recognition from the President or Congress. The legislature responded by inaugurating Richard Coke as governor. Davis refused to leave office without federal recognition for the new government, and believed his term ran an additional three months. He posted militia to guard the executive offices from a Democratic takeover.<sup>92</sup> The Democrats responded by placing their own militia to guard the legislative chamber. To avoid conflict, Davis agreed to send his militia forces away. Shortly

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<sup>90</sup> Ex Parte Rodriguez, 39 Tex. 705 (1873); Similarly, another dispute existed surrounding the term of the governor because of inconsistent provisions in the State constitution as to the length of the Governor’s term and the inauguration of a new governor. Carl H. Moneyhon, *Edmund J. Davis in the Coke-Davis Election Dispute of 1874: A Reassessment of Character*, 100 Sw. Historical Quarterly No. 2 (Oct. 1996).

<sup>91</sup> Carl H. Moneyhon, *Edmund J. Davis in the Coke-Davis Election Dispute of 1874: A Reassessment of Character*, 100 Sw. Hist. Q., Vol. 143 (Oct. 1996).

<sup>92</sup> Id.

afterwards, Davis agreed to vacate the governor's mansion under protest.<sup>93</sup> Davis leaving office marked the end of the Reconstruction period in Texas.

### **III. Legal Challenges and Interpretation of the 1871 Prohibition on Public Carry**

In the three years following enactment of the 1871 prohibition on public carry, two major legal challenges reached the Texas Supreme Court. The first was heard by a court made up entirely of Davis appointees sympathetic to Reconstruction—the same Court that later invalidated the election of the Democratic legislature.<sup>94</sup> This ‘semicolon’ Court was held in such disrepute among Democratic “redeemers” that its opinions were only considered quasi-precedential among judges and attorneys in post-Reconstruction Texas.<sup>95</sup> The second challenge came in 1874, after the Democratic legislature, furious at the Court's ruling against the validity of its election, removed the entire bench from office and appointed a new Democratic slate of judges.<sup>96</sup>

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

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<sup>93</sup> Id..

<sup>94</sup> There was one change in Court membership between the English decision and the Semi-colon case. See Supra Hans W. Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and “Redemption” (1866-1882)*, 40 St. Mary's Law Journal 17 (2008).

<sup>95</sup> Id. (I use ‘semicolon’ court here as shorthand for the Court appointed by Governor Davis. The designation has traditionally been used derisively, especially by Southern scholars critical of Reconstruction. Use of the designation here is for clarity only and is in no way intended to be critical of the court. Similarly the use of the term “redeemers” is used only to be consistent with historical discussion of the period and in no way to imply the reassertion of conservative white control was a positive development).

<sup>96</sup> *Semicolon Court*, Texas State Historical Association, available at <http://bit.ly/1KQIYzG>.

Southern Democrats whose rebellion resulted in the passage of the Fourteenth Amendment and the Republican Unionists who supported and passed the Amendment.

### **A. The Texas State Constitution and Arms Bearing**

The Texas Constitution has contained a Second Amendment analogue since the first Constitution of the Republic of Texas which read: “Every citizen shall have the right to bear arms in defense of himself and the Republic. The military shall at all times and in all cases be subordinate to the civil power.”<sup>97</sup> In 1845, in the first Texas State Constitution, the two provisions of the 1836 Constitution were separated and the Second Amendment analogue was tweaked to read: “Every Citizen shall have the right to keep and bear arms, in the lawful defense of himself or the state.”<sup>98</sup> This language remained consistent in both the 1861 Confederate State Constitution and the 1866 Presidential Reconstruction Constitution.<sup>99</sup>

After the takeover of Congress by Radical Republicans and the passage of the First Reconstruction Act, a new Texas constitutional convention was called in 1868. One of the major concerns facing the delegates was the growing lawlessness in Texas, especially targeting freed slaves and Republicans.<sup>100</sup> In his opening message to the convention, Then Governor Elisha Pease stated “crime was never more prevalent in Texas [than now].”<sup>101</sup> Many delegates also likely had in mind the attempted lynching of sitting Supreme Court Justice Colbert Caldwell and the organization of the Ku Klux Klan in Texas, which had recently killed several blacks in a

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<sup>97</sup> Constitution of the Republic of Texas, Declaration of Rights, § 14 (1836).

<sup>98</sup> Texas Constitution of 1845, Art. I, § 13.

<sup>99</sup> Texas Constitution of 1861, Art. I, § 13; Texas Constitution of 1866, Art. I, § 13.

<sup>100</sup> Moneyhon, Edmund J. Davis.

<sup>101</sup> Id. at 116.

march through a freedmen's community.<sup>102</sup> In this lawless period, the delegates narrowed the scope of the firearms right to say: "Every person shall have the right to keep and bear arms, in the lawful defense of himself or the State, under such regulations as the Legislature may prescribe."<sup>103</sup> This constitution was ratified in 1869, and its provision on the right to keep and bear arms was in force when both legal challenges to the public carry law were heard.<sup>104</sup>

### **B. The Texas Supreme Court, 1867-1874**

During the Reconstruction period, the Texas Supreme Court underwent unprecedented upheaval. As a result of changes in federal policy and state politics between 1866 and 1874, Texas went through four different Supreme Courts.<sup>105</sup> During Presidential Reconstruction, in the immediate aftermath of the Civil War, Texas Democrats adopted a Constitution meant to change as little as possible without bringing federal retribution. Under the terms of that constitution, a slate of five democratic Justices were elected four of whom had served as officers in the Confederate army.<sup>106</sup> With the advent of Congressional Reconstruction, the federally appointed military governor of Texas appointed a new Court more sympathetic to the Union.<sup>107</sup> This Court sat until the ratification of the Republican-drafted Constitution of 1869 and the inauguration of Edmund J. Davis as governor in 1870.

In 1870, Davis filled the now three-member state Supreme Court, forming the so-called Semicolon Court. The Court's first three justices were Lemuel Evans, Wesley Ogden, and Moses

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<sup>102</sup> Id. at 117.

<sup>103</sup> Tex. Const. of 1869, art. I § 13

<sup>104</sup> *Constitution of 1869*, Texas State Historical Association, available at <http://bit.ly/11Vwcsy>.

<sup>105</sup> Hans W. Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and "Redemption" (1866-1882)* supra note \_\_ .

<sup>106</sup> Id.

<sup>107</sup> Id. at 50.

B. Walker, all of whom had unionist sentiments and close ties to the North.<sup>108</sup> Evans was a Tennessee-born conservative Republican who was forced to flee Texas during the Civil War after opposing secession, ending up in Washington D.C.<sup>109</sup> Ogden was born in New York and practiced law in Ohio and New York before moving to Texas in 1849. Ogden was also forced to flee Texas after opposing secession, but returned after the War, serving in several judicial positions prior to being appointed to the Court.<sup>110</sup> Walker was the only member of the Court who could fairly be called a carpetbagger. Prior to the War, Walker was a Yale-educated Ohio attorney and failed politician who rose to the rank of brevet brigadier general during the War. Walker remained in the military after the War and was assigned to Texas, where he was appointed to the military Supreme Court.<sup>111</sup>

The 1873 election that unseated Davis also included a referendum on a state constitutional amendment to disband the State Supreme Court and replace it with a new Court made up of five Justices.<sup>112</sup> The newly elected Governor Coke appointed three justices who had previously served on the Confederate Texas Supreme Court and one justice who had served on the court when Democrats controlled it during Presidential Reconstruction. Two of the Justices had been representatives at the Texas Secession convention. Thomas J. Devine, one of the associate justices appointed by Governor Coke, had the distinction of being one of only three

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<sup>108</sup> In 1873 Justice Evans was replaced with John David McAdoo. A unionist before the war, upon secession McAdoo chose Texas over the Union and served in the Confederate military. Rising to the rank of Brigadier General. *See John David McAdoo*, Texas State Historical Association, available at <http://bit.ly/1OiKF3D>.

<sup>109</sup> Baade, *supra* note \_\_, at 81.

<sup>110</sup> *Id.* at 481.

<sup>111</sup> *Moses B. Walker*, Texas State Historical Association, available at <http://bit.ly/1NcaN2f>.

<sup>112</sup> Although the Semicolon Court invalidated the election, the Democrats convened the legislature anyway, passing the Amendment by the required two-thirds vote in each chamber. Baade, *supra* note \_\_, at 121.

people tried for treason after the Civil War.<sup>113</sup> The Fortieth edition of the Texas Reports pointedly acknowledged the transition to the Redeemer Court saying: “with this volume we pass to another era in the judicial history of Texas. Those who have before construed the laws of this State and who have assisted in the effort to preserve constitutional freedom for its citizens again constitute its court of last resort.”<sup>114</sup>

### C. The Semicolon Court Cases

The Semicolon Court’s major case concerning firearms, *English v. State*, arose out of three prosecutions under the 1871 Texas public carry law. English had been convicted for carrying an unloaded ‘out of repair’ pistol while intoxicated, and a second appellant was convicted of carrying a butcher knife at a religious assembly.<sup>115</sup> The appellants challenged both the 1871 general prohibition on carrying firearms in public as well as the specific restriction on carrying in enumerated public places first enacted in 1870. He and his co-defendants brought challenges, under both the federal Second Amendment and Article 1, § 13 of the Texas Constitution of 1869.<sup>116</sup>

Justice Walker wrote the opinion for a unanimous court. The opinion first looked to whether the federal Second Amendment prevented Texas from prohibiting the carrying of firearms. Interestingly, the Court found that unlike other rights enumerated in the Bill of Rights,

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<sup>113</sup> *Id.* at 123.

<sup>114</sup> *Id.* at 124, citing to Alex W. Terrell & Alex S. Walker, Preface to 40 Tex., at v (1882).

<sup>115</sup> *English v. State*, 35 Tex. 473, 480 (1872)(No evidence of the circumstances of third prosecution is available, but the Supreme Court reversed the judgment in that appellant’s case, which presumably means that that court’s ruling was in conflict with the English decision.); A request to the Texas state archives, which houses Texas Supreme Court records for this period, for records related to the English and Duke cases resulted in an archivist informing the author that the Court records for both cases had been lost at some time prior to 1944 when cases were indexed.

<sup>116</sup> *English, v State*, 35 Tex. 473 (1872).

the Second Amendment, standing alone, applied equally to both state and local governments.<sup>117</sup>

This interpretation relied exclusively on the work of New York legal commenter Joel Prentiss Bishop, with the court quoting two entire paragraphs from Bishop’s treatise on Criminal Law.<sup>118</sup> Relying on Bishop, Walker adopted a militia-based view of the Second Amendment, finding that the only weapons protected were those used during service in the militia because (quoting Bishop) “such only are properly known by the name of ‘arms,’ and such only are adapted to promote the security of a free state.”<sup>119</sup>

Justice Walker’s opinion further stated that under the Second Amendment “‘bear’ arms refers merely to the military way of using them, not their use in bravado and affray.”<sup>120</sup>

Walker—who was quite familiar with firearms, having served as a Colonel for the Ohio volunteers during the Civil War, and having been shot three times during the battle of Chickamauga—decisively found that the law did not violate the Second Amendment, stating:

No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the Constitution of the United States, as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to punish and prohibit.<sup>121</sup>

The Court then went on to uphold the law under the Second Amendment, saying: “The act referred to makes all necessary exceptions and points out the place, the time and the manner

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<sup>117</sup> Id. at 475; Citing to JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES: EMBRACING THE GENERAL PRINCIPLES OF INTERPRETATION OF STATUTES, PARTICULAR PRINCIPLES APPLICABLE IN CRIMINAL CASES, LEADING DOCTRINES OF THE COMMON LAW OF CRIMES, AND DISCUSSIONS OF THE SPECIFIC STATUTORY OFFENSES, AS TO BOTH LAW AND PROCEDURE Chapter XXXVI Carrying Weapons (Boston, 1873) Available at The Making of Modern Law (last viewed July 16, 2015).

<sup>118</sup> See Generally Bishop (Notably, Bishop believed the Second Amendment applied to the states by its own terms rather than through either the due-process or privileges and immunities clauses of the Fourteenth Amendment).

<sup>119</sup> Id. at 475; Bishop, *supra* note \_\_ at 497.

<sup>120</sup> English, at 475.

<sup>121</sup> Id. at 476.

in which certain deadly weapons may be carried as means of self-defense, and these exceptional cases, in our judgment, fully cover the wants of society.”<sup>122</sup>

Next, the Court turned to consider the case under Art. 1, § 13 of the Texas State Constitution of 1869. The Court decided that the term “arms” as used in the Texas State Constitution had the same meaning as in the Second Amendment and was limited to militia weapons.<sup>123</sup> It went on to state that the provision of §13 making the right subordinate to the regulations prescribed by the state legislature clearly allowed for the prohibition on publicly carrying firearms except in limited circumstances. Walker’s opinion then clarified that even in absence of the provision allowing regulation, the prohibition on public carry would be valid.<sup>124</sup>

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

This law is not peculiar to our own State, nor is the necessity which justifies the enactment (whatever may be said of us to the contrary) peculiar to Texas. It is safe to say that almost, if not every one of the States of this union have a similar law upon their statute books, and, indeed, so far as we have been able to examine them, they are more rigorous than the act under consideration.<sup>125</sup>

While Walker did not cite the specific statutes he mentioned, he most likely referred to a series of laws primarily enacted in the North, which generally prohibited carrying a firearm or other dangerous weapon without reasonable cause to fear an attack on oneself or one’s family. The

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<sup>122</sup>Id. at 477; Walker also made an interesting distinction between the right protected by the Second Amendment, and a pre-existing right to self-defense, stating: “There is no abridgement of the personal rights, such as may be regarded as inherent and inalienable to man, nor do we think his political rights are in the least infringed by any part of this law.” Id. at 477.

<sup>123</sup> Id. at 478.

<sup>124</sup> Id. at 478-79 (“But we do not intend to be understood as admitting for one moment, that the abuses prohibited are in any way protected either under the State or Federal Constitution.”).

<sup>125</sup> Id. at 479.

laws of Maine, Massachusetts, Michigan, Minnesota, Oregon, Pennsylvania, Virginia, West Virginia, and Wisconsin all included such statutes.<sup>126</sup>

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

It will doubtless work a great improvement in the moral and social condition of men, when every man shall come fully to understand that, in the great social compact under and by which States and communities are bound and held together, each individual has compromised the right to avenge his own wrongs, and must look to the State for redress. We must not go back to the state of barbarism in which each claims the right to administer the law in his own case; that law being simply the domination of the strong and violent over the weak and submissive. . . . The powers of government are intended to operate upon the civil conduct of the citizen; and whenever his conduct becomes such as to offend against public morals or public decency, it comes within the range of legislative authority.<sup>127</sup>

On this point, the Court cited John Stuart Mill's *On Liberty*: "It is one of the undisputed functions of the government, to take precautions against crime before it has been committed as well as detect and punish it afterwards. The right inherent in society, to ward off crimes against itself by antecedent precautions, suggests the obvious limitations to the maxim, 'that purely self regarding misconduct cannot properly be meddled with in the way of prevention and punishment.'"<sup>128</sup>

Walker's opinion rejected the challenge to the portion of the law that prohibited carrying weapons at public assemblies even more vehemently. Justice Walker wrote for the court that:

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<sup>126</sup> See Generally Eric M. Ruben and Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J.F. 121, at 14 (2015) available at <http://bit.ly/1VfmM0w>; 1841 Me. Laws 709, ch. 169, § 16; 1836 Mass. Laws 750, § 16; 1846 Mich. Laws 690, ch. 162, § 16; 1851 Minn. Laws 526, ch. 112, § 18; 1853 Or. Laws 218, ch. 16, § 17; 1861 Pa. Laws 248, 250, § 6; 1847 Va. Laws 127, ch. 14, § 15; 1870 W. Va. Laws 702, ch. 153, § 8; 1838 Wisc. Laws 381, § 16.

<sup>127</sup> Id. at 477-78.

<sup>128</sup> Id. at 478 (The reporter has the Court citing to pages 56 and 57 of John Stuart Mill's *On Liberty* but the actual quotes appear between pages 172 and 175).

“We confess it appears to us little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute into peaceable public assembly, as, for instance, into a church, a lecture room, a ball room, or any other place where ladies and gentlemen are congregated together.”<sup>129</sup> The Court upheld the public assembly provision just as it had the general public carry prohibition.

The Semicolon Court had a few other opportunities to interpret the 1871 Act. In *Jenkins v. State*, the Court, again in a decision by Justice Walker, upheld the sufficiency of an indictment for carrying firearms. The court found that the government was not required to plead that the defendant did not fall into the exceptions in the act; rather it was the defense’s burden to prove the defendant fell within one of the laws exceptions.<sup>130</sup>

In *Waddell v State*, the Court contrasted the right to keep arms for self-defense in the home, which it had recognized as protected in English, with carrying arms in public, which could be strictly regulated. In *Waddell*, it reversed a defendant’s conviction for carrying a firearm when the defendant purchased two pistols, proceeded to several other stores in town seeking ammunition to fit his gun, and then travelled to his home fifteen miles out of town. The court found the conduct within the statute’s exception for keeping or bearing arms on one’s own premises or on a journey, stating: “he had a perfect right to purchase the arms, and for the purpose of obtaining ammunition to suit them, he had the right to take them with him, to any place where ammunition was sold; and then had a perfect right to take them to his home for any lawful purpose he may have intended to serve with them, such as guarding his house against

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<sup>129</sup> *Id.* at 478.

<sup>130</sup> *Jenkins v State*, 36 Tex. 638 (1872) (The headnotes for *Jenkins* describe the offense as “carrying concealed weapons” while the actual statute prohibits carrying weapons generally).

thieves and robbers, defending himself and family against murders or assassins.”<sup>131</sup> The Court advised prosecutors and lower courts against bringing similar cases, saying, “we find nothing in the act which, rightly construed, takes away any right or abridges any reasonable and lawful privilege of the citizen. But if wrong constructions are placed upon this act, and absurd and vexatious prosecutions for acts not within the denunciation of the law are tolerated and entertained by the courts, the law itself must be unpopular, even odious, to a free people, and the legislature will be driven by public indignation and protest to repeal the law.”<sup>132</sup>

In contrast to Waddell, in *Baird v. State*, the court upheld the conviction of a defendant who carried a handgun while hog hunting.<sup>133</sup> The defendant claimed his carrying was legal under the “place of business” exception because he hunted hogs in the forest every winter, which he claimed made it his regular business. The court was unwilling to grant the exception such a broad interpretation, noting that if “place of business” included anywhere a person could conduct business, “every man could plausibly set up the right to keep and bear arms on every occasion, for he could always claim to be at his own business.”<sup>134</sup> The court limited place of business to a particular location dedicated exclusively to a person’s business. The Court also rejected a challenge that the prosecution had failed to show that the person was not on his own property at the time of the crime, saying whether a person owned the property where he was arrested for

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<sup>131</sup> *Waddell v State*, 37 Tex. 354, 356 (1873); This is similar to language in the 1871 Tennessee case *Andrews v State*, 50 Tenn. 165, 178-79 (1871) (“The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the legislature had the right to punish him for it, without violating this clause of the Constitution.”).

<sup>132</sup> *Id.* at 355.

<sup>133</sup> *Baird v State*, 38 Tex. 599 (1873).

<sup>134</sup> *Id.* at 601.

carrying is within the defendant's own knowledge and power of proof.<sup>135</sup> However, the court again cautioned against overly zealous application of the law, saying:

“The constitutionality of the act being admitted, its beneficial effects upon society have been quite fully demonstrated and placed almost beyond question. But while it is generally conceded that the execution of the law, in the spirit, and for the purposes intended by the law-making power, would greatly conduce to the peace and quiet of the citizens of the State, yet it must also be admitted that any attempt to prostitute the law from the purposes for which it was enacted into an instrument of oppression to annoy and harass any peaceful and law-abiding citizen, would greatly tend to bring that law into disfavor, and create and stimulate demand for its repeal. It is therefore, but just and reasonable that this law, as well as all others, should be executed in the spirit intended, for the good of the citizens generally, and not as a snare to entrap the unwary who intend no wrong, and believe they are exercising only their legitimate or inalienable rights.”<sup>136</sup>

Possibly in response to these concerns, after laying down the rule that Baird's conduct violated the law, the Court reversed the conviction on a technical issue.<sup>137</sup>

#### **D. The ‘Redeemer’ Court Cases**

When the Redeemer Democrats took over the governorship, they reconstituted the Supreme Court and appointed Democratic judges to replace the Semicolon Court.<sup>138</sup> While the Democrats repealed most of the Davis administration's accomplishments, they left in place the prohibition on public carry, although enforcement was sporadic.<sup>139</sup> The newly constituted Court

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<sup>135</sup> Id. at 602.

<sup>136</sup> Id. at 600-01 (The Court seems to have wanted to avoid creating an excuse for the now Democratically controlled state legislature to repeal the public carry law).

<sup>137</sup> Baird, at 603.

<sup>138</sup> Baade, *supra* note \_\_\_, at 121.

<sup>139</sup> The Weekly Democratic Statesman (Austin, Tex.) March 26, 1874 at 3; *Row on Sunday*, The Waco Daily Examiner (Waco, Tex.) June 9, 1874 at 3; The Weekly Democratic Statesman (Austin, Tex.) July 30, 1874 at 2; The Weekly Democratic Statesman (Austin, Tex.) Oct. 22, 1874 at 2; The Dallas Daily Herald (Dallas, Tex.) Nov. 13, 1874 at 4; *Mayor's Court*, The Dallas Daily Herald, March 30, 1875 at 4; The Dallas Daily Herald (Dallas, Tex.) March 31, 1875 at 4; *Mayor's Court*, The Dallas Daily Herald (Dallas, Tex.) April 14, 1875 at 4; The Weekly Democratic Statesman (Austin, Tex.) May 6, 1875 at 2; The Dallas Daily Herald (Dallas, Tex.) May 12, 1875 at 4; *Judge Burford's Court*, The Dallas Daily Herald (Dallas, Tex.) at 4; *Mayor's Court*, The Dallas Daily Herald (Dallas, Tex.) June 17, 1875 at 4; *Bold Resistance – The Difficulties of Enforcing Laws*, The Dallas Weekly Herald, July 17, 1875 at 3; The Dallas Daily Herald (Dallas, Tex.) Aug. 8, 1875 at 4; The Weekly Democratic Statesman

heard several challenges to the 1871 Firearms Act during its first year and issued a series of three opinions interpreting the Act. Notably, while all three decisions reversed the defendant's conviction for carrying firearms, even the Redeemer Court concluded that the public carry prohibition was constitutional.

The first and most important case was *State v. Duke*, an appeal by the state after the district court had found an indictment under the 1871 law deficient on constitutional grounds.<sup>140</sup> The 'Redeemer' Court upheld the law as the Semicolon Court had, although with very different reasoning.<sup>141</sup> The first difference arose out of the applicability of the Second Amendment. The 'Redeemer' Court found the Second Amendment did not apply to the states, citing *Barron v. Baltimore* and the *Slaughterhouse Cases*.<sup>142</sup> While this decision was fully supported by law, and anticipated the next year's decision of the United States Supreme Court in *United States v. Cruikshank*, 92 U.S. 542 (1875), it is also consistent with the Democratic desire to minimize the role of the federal government and the reach of federal constitutional law within the state.

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

The arms which every person is secured the right to keep and bear (in defense of himself or the State, subject to legislative regulation), must be such arms as are

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(Austin, Tex.) Aug. 26, 1875 at 2; The Dallas Mayor's Court prosecutions occurred under a Dallas City Ordinance with identical language to Texas's statewide law, *see Ordinances of the City of Dallas*, Dallas Herald (Dallas, Tex.) June 15, 1872 at 1.

<sup>140</sup> *State v. Duke*, 42 Tex. 455 (1874).

<sup>141</sup> *Id.*

<sup>142</sup> *Duke*, at 457 (citing *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) and *The Slaughterhouse Cases*, 83 U.S. 36 (1873); *The Slaughterhouse Cases* were decided after the English decision, but English did not rely on the Fourteenth Amendment for the applicability of the Second Amendment to the States

commonly kept, according to the customs of the people, and are appropriate to open and manly use in self-defense, as well as are proper for defense of the State. If this does not include the double-barreled shot-gun, the huntsman's rifle, and such pistols at least as are not adapted to being carried concealed, then the only arms which the great mass of the people of the State have, are not under constitutional protection.<sup>143</sup>

The court then stated: "Regarding, then, some kinds of pistols as within the meaning of the word, we are of the opinion that the Act in question is nothing more than a legitimate and highly proper regulation of their use. . . It undertakes to regulate the place where, and the circumstances under which, a pistol may be carried; and in doing so, it appears to have respected the right to carry a pistol openly when needed for self-defense or in the public service, and the right to have one at the home or place of business."<sup>144</sup> However, the Court then went on to uphold the lower court's dismissal of the indictment on the grounds that the state failed to plead that the exceptions in the Act did not apply to the defendant's conduct. In doing so, the Court overturned the Semicolon Court's Jenkins decision which had come to the opposite conclusion.<sup>145</sup>

The Semicolon and Redeemer Courts also disagreed about the scope of citizens' self-defense rights. The Semicolon Court was adamant that citizens in a society relinquish the power to settle scores, and instead rely on the state to keep the peace. The Redeemer Court spoke of no

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<sup>143</sup> Duke, at 458-59; Notably, by making this distinction Duke does seem to interpret the Second Amendment as a militia based rather than individual right.

<sup>144</sup> Duke, at 459 (the conviction was then reversed because the prosecution had failed to assert that the defendant did not fall into the statutory exceptions).

<sup>145</sup> Duke, at 461; see generally *Jenkins v State*, 26 Tex. 638 (1872); see also *State v Clayton*, 43 Tex. 410 (1875) (Indictment found valid, which read defendant "unlawfully carry on and about his person a certain pistol, he then and there having no reasonable grounds for fearing an unlawful attack on his person, nor was he then and there either a militiaman in actual service, or a peace officer, or policeman, nor was he then and there in his own premises or at his own place of business." This was sufficient to plead the exceptions.)

such limitations. Rather, the Court essentially permitted citizens to decide the appropriate level of self-defense by upholding a right to keep “commonly kept” arms “appropriate for “open and manly use in self-defense.”<sup>146</sup> The Court went so far as to name several “commonly kept” arms protected by the state constitution, including pistols and double-barreled shotguns.<sup>147</sup>

In a pair of cases decided the same day as *Duke*, the ‘Redeemer’ Court interpreted the exceptions to the public carry ban, overturning convictions in both cases. In *Young v. State* the court reversed a conviction for carrying a pistol, because the trial court judge had refused to let in evidence regarding threats made against the defendant.<sup>148</sup> The defendant claimed he only carried a pistol because he had previously been attacked, and his attacker after being restrained had yelled, “If I didn’t kill you this time, damn you, I will do it yet.” The trial judge, in an extremely narrow reading of the exception, found as a matter of law this was inadequate because the attacker was not physically present at the time defendant was arrested with the gun.<sup>149</sup> The Court disagreed, finding that the issue was a mixed matter of both fact and law that should have gone to a jury. The Court noted: “it is easy to imagine circumstances under which the danger might be most imminent through the person from whom it was threatened was not immediately present.”<sup>150</sup>

In the second decision interpreting the law’s exceptions, the Court reversed a conviction for carrying a pistol on two grounds. First, the indictment did not state that the defendant lacked

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<sup>146</sup> *Duke*, at 458; For a discussion of the culture of honor and violence prevalent in the South *see* BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS & BEHAVIOR IN THE OLD SOUTH* (Oxford University Press 1983).

<sup>147</sup> *Duke*, at 458-59.

<sup>148</sup> *Young v. State*, 42 Tex. 462 (1874).

<sup>149</sup> *Young*, at 463-64.

<sup>150</sup> *Young*, at 464; *see also* *Bailey v. Commonwealth*, 74 Ky. 688, 692-693 (1876)(interpreting similar language to allow carry when a specific threat exists even if that threat is not actually present); *Chatteaux v. State*, 52 Ala. 388 (1875)(continuing to carry a pistol concealed after passing through dangerous area does not meet exception for good reason to apprehend an attack).

reasonable grounds to fear an unlawful attack. Second, the defendant was travelling sixteen miles to a nearby town, a journey he expected to last two or three days. The Court found this was sufficient to bring the defendant within the exception for travelers.<sup>151</sup> While these decisions seem reasonable, they do appear to be part of a pattern of finding technical flaws in indictments and prosecutions in order to avoid subjecting defendants to punishment under the 1871 Act.

However, the ‘Redeemer’ Court did not overturn every firearms conviction that came before it.<sup>152</sup> In *Titus v. State*, the Court upheld a conviction for carrying a pistol while hunting. The court made clear that the statute did not include an exception for hunting and that the use of pistols in hunting is neither “necessary or proper.”<sup>153</sup> While the Semicolon Court’s Baird decision was clearly on point, the court did not cite it as precedent, but rather only stated that Baird “is a case similar to the present.”<sup>154</sup>

#### **IV. Conclusion**

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

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<sup>151</sup> *Smith v. State*, 42 Tex. 464 (1874).

<sup>152</sup> At the time, every criminal defendant was entitled to an appeal as of right to the State Supreme Court. This proved burdensome to the Supreme Court, which resulted in the creation of the Texas Court of Criminal Appeals. Baade, *supra* at \_\_\_, at 126.

<sup>153</sup> *Titus v. State*, 42 Tex. 578, 579 (1874).

<sup>154</sup> *Id.* at 579 (1874) (Semicolon Court cases were held in such ill repute in ‘redeemed’ Texas that attorney’s practicing in Texas avoided citing them as precedent.)

that individuals surrendered their personal right to avenge grievances by entrusting government to maintain societal order.

Contrary to the historical accounts presented by many scholars, these laws were obviously not enacted based on racial animus. Then, as now, gun violence weighed most heavily on the black community.<sup>155</sup> But, unlike the present day inaction of Congress and many state legislatures, in the face of aberrational homicide rates, the government of Texas under Governor Edmund Davis took action. This action was taken with the full support of the black community who it was intended to protect.<sup>156</sup> The law was also enforced in a racially neutral manner during the Davis administration.<sup>157</sup> The Texas state police was a fully integrated police force closely aligned with the Republican governor and fully committed to protecting freedmen from violence perpetrated by whites.

When interpreting the rights protected by the Fourteenth Amendment, scholars should look to the legal views of those who supported the enactment and ratification of the Fourteenth Amendment rather than those who fought to abscond from the constitutional system, and in the case of Texas Democrats, specifically rejected ratification of the Fourteenth Amendment.<sup>158</sup> The Republican-appointed Supreme Court did not struggle to uphold the prohibition on carrying firearms. Justice Walker, a former Union general, found the law consistent with the laws of the rest of the nation and self-evidently valid and beneficial. In contrast, the law was viewed with suspicion when it came before the ‘redeemed’ Supreme Court, which expressed sympathy for a

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<sup>155</sup> See generally, Nate Silver, *Black Americans Are Killed at 12 Times the Rate of People in Other Developed Countries*, June 18, 2015, available at <http://53eig.ht/1RdE3VR>.

<sup>156</sup> See *infra* at page 15.

<sup>157</sup> This article does not speak to the enforcement of the laws in the post-Reconstruction period. While press accounts from the post reconstruction period seem to indicate that the law continued to be enforced against both the white and black population, it is virtually certain that blacks would have been treated unfairly.

<sup>158</sup> Texas Democrats also rejected ratification of the Thirteenth Amendment. *Constitutional Convention of 1866*, Texas State Historical Association, available at <http://bit.ly/1ZYBA6d>.

right to “manly self-defense.” These differing views are representative of the differing Republican and Democratic views about gun rights, self-defense and the role of government. The Republican view was enshrined in the Fourteenth Amendment after the North’s victory in the Civil War. This view should be the guide in interpreting the scope of the Second Amendment now.