

# THE RIGHT TO ARMS IN NINETEENTH CENTURY COLORADO

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## ABSTRACT

This Article details the legal, cultural, and political history of the right to arms in Colorado in the nineteenth century. The Article pays particular attention to the period between 1858, when mass white settlement began with the gold rush, and 1876, when Colorado achieved statehood. When Colorado became the thirty-eighth state, Coloradans chose to adopt a constitution whose right to arms guarantee was stronger than any other state. The choice stemmed in part from pre-statehood conditions, when the settlers had to rely on their own resources for defense against a myriad of dangers. Right from the start, Coloradans established a vigorous and enduring tradition of self-government and self-defense. In the Colorado view, the right to arms is an inherent, inalienable human right, which is protected by legitimate governments, but not created by government. Accordingly, the Article extensively describes the exercise of the right to arms by Colorado Indians. Not only were their rights guaranteed by the 1876 constitution, they had vigorously exercised their natural right to arms since long before the constitution was adopted.

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#### INTRODUCTION

Adopted in 1876 and unchanged ever since, the Colorado Constitution guarantees

[t]hat the right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.<sup>1</sup>

This Article examines the right to keep and bear arms in nineteenth-century Colorado. Part I describes the arms of early Coloradans: the Indians and the mountain men. Part I also covers the dramatic improvements in firearms technology that took place in the quarter century before 1876. Part II describes some of the conditions that made Colorado's arms culture different from neighboring territories. Because the gold rush settlers were remote from any functioning government, they initially had to make their own governments. They created a Colorado tradition of popular self-government that still thrives today. Collectively, the settlers used their arms to defend Colorado from Confederate aggression during the Civil War. Soon after, war with the Arapaho and Cheyenne tribes wiped out trade routes from the states, leaving Coloradans near starvation. The Indians—including Colorado's oldest continuous inhabitants, the Utes—were in their own view exercising their natural right of armed self-defense; the Article pays careful attention to the Indians as actors in their own right. Because government in pre-statehood days was often incapable of securing public safety, Coloradans provided for their own armed defense, generally successfully. Given the need for arms for multiple purposes, firearms businesses thrived in early Colorado. They helped make Denver the “emporium” of the Rocky Mountains. The settlers survived because they had the arms to fight for survival. The pre-statehood period is one reason the 1876 Colorado Constitution affirms the importance of the individual right to arms for personal defense *and* for collective defense.

Part III examines the creation and structure of the Colorado Constitution. It begins with the 1875–1876 Colorado Convention. It then examines the core principles of the Colorado Constitution: that inherent rights precede government; that the people have the right to alter the government; that Coloradans have “the sole and exclusive” right of governing themselves; and that fundamental human rights, including self-defense, are inalienable. Part III also discusses two leading means of collective self-defense in early Colorado: the state militia (article XVII) and the posse comitatus of able-bodied males, who may be summoned by elected county sheriffs or other appropriate officials (article XIV).

Part IV closely examines the text and original meaning of Colorado's right to keep and bear arms. Coloradans chose the strongest language available to secure the right to arms. Each phrase in Colorado provision is studied, showing how Colorado sometimes followed or differed from

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1. COLO. CONST. art. II, § 13 (1876), <http://www.colorado.gov/pacific/sites/default/files/Colorado%20Constitution.pdf>.

other states. Immigrant-friendly Colorado specified that the right belongs to every “person,” not solely to the “citizen.” Personal defense and collective defense were both of fundamental importance, and each was expressly included in the constitutional right. The constitutional text makes it clear that collective defense is to be under the direction of appropriate civil authorities, such as county sheriffs, obviating the need for the vigilance committees that had characterized earlier days. Notwithstanding the broad general language about individual rights, Coloradans did favor one type of gun control—restricting the *concealed* carrying of arms. That was the only gun control expressly authorized by the constitutional text, which removed concealed carry from the right to bear arms.

Part V examines several interpretive issues. First, what types of arms are implicated by the text of the Colorado guarantee? Second, should this understanding be modified by an idea in the personal notes of Territorial Justice E.T. Wells, a distinguished Colorado Founder? Third, how did arms change in the years following the 1876 Colorado Constitution, and did the changes affect Coloradans’ views of what types of arms laws were permissible? In addition, Part V examines the state of law and order in the post-statehood nineteenth century. While the large cities, such as Denver or Colorado Springs, were becoming fairly calm, there was plenty of turbulence elsewhere. Part V examines the frontier town of Trinidad as a case study.

Finally, Part VI describes gun control laws enacted in nineteenth-century Colorado. Most of these were compliant with the 1876 constitution: restrictions on concealed carry, laws against unsafe firearms discharge in towns, and safe storage laws for large quantities of loose gunpowder. The notable exception was an 1891 statute against selling arms to Indians, which cannot be reconciled with the constitutional text.

Rather than examining constitutional text in isolation, this Article aims to describe the cultural and social background of arms use in Colorado. So before getting to the 1875–1876 Constitutional Convention, this Article spends a long time on early Colorado history. This is important not only for the legal history of arms rights in Colorado, but also for general understanding of constitutional originalism and early practice in Colorado. While the original history of the U.S. Constitution is now well documented, scholarly exploration of original meaning in Colorado is not so advanced. The extensive footnotes in this Article are intended, in part, to provide scholars with helpful starting points for new research.<sup>2</sup>

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2. *Bibliographical note:* The following sources are cited often and appear in more than one subdivision of this Article. They are collected here for reader convenience.  
JEAN AFTON ET AL., *CHEYENNE DOG SOLDIERS: A LEDGERBOOK HISTORY OF COUPS AND COMBAT* (1st ed. 1997).

According to legal historian Donald S. Lutz, state constitutions often embody a vision of the “good life.” They “describe what the life should be like and the institutions by of which will be achieved that way of life. A constitution enunciates the values that support the good life . . . .”<sup>3</sup> State constitutions express the “moral values, moral principles, and definition of justice toward which a people aims.”<sup>4</sup> The Colorado Constitution,

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- EUGENE H. BERWANGER, *THE RISE OF THE CENTENNIAL STATE: COLORADO TERRITORY, 1861–76* (2007).
- BILL BRENNEMAN, *MIRACLE ON CHERRY CREEK* (1973).
- RAY C. COLTON, *THE CIVIL WAR IN THE WESTERN TERRITORIES: ARIZONA, COLORADO, NEW MEXICO, AND UTAH* (1984).
- THE CONSTITUTIONALISM OF AMERICAN STATES* (George E. Connor & Christopher W. Hammons eds., 2008).
- DAVID L. ERICKSON, *EARLY JUSTICE AND THE FORMATION OF THE COLORADO BAR* (2008).
- M. MORGAN ESTERGREEN, *KIT CARSON: A PORTRAIT IN COURAGE* (1962).
- T.R. FEHRENBACH, *COMANCHES: THE DESTRUCTION OF A PEOPLE* (1974).
- LOUIS A. GARAVAGLIA & CHARLES G. WORMAN, *FIREARMS OF THE AMERICAN WEST 1866–1894* (1985).
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- JOHN D.W. GUICE, *THE ROCKY MOUNTAIN BENCH: THE TERRITORIAL SUPREME COURTS OF COLORADO, MONTANA, AND WYOMING, 1861–1890* (1972).
- 1 FRANK HALL, *HISTORY OF THE STATE OF COLORADO* (1889).
- 2 FRANK HALL, *HISTORY OF THE STATE OF COLORADO* (1890).
- 3 FRANK HALL, *HISTORY OF THE STATE OF COLORADO* (1891).
- 4 FRANK HALL, *HISTORY OF THE STATE OF COLORADO* (1895).
- PEKKA HÄMÄLÄINEN, *THE COMANCHE EMPIRE* (2008).
- Donald Wayne Hensel, *A History of the Colorado Constitution in the Nineteenth Century* (Aug. 9, 1957) (unpublished Ph.D. dissertation, University of Colorado).
- 2 INDIAN AFFAIRS: LAWS AND TREATIES (Charles J. Kappler ed., 2d ed. 1904) [hereinafter 2 INDIAN AFFAIRS].
- NICHOLAS J. JOHNSON ET AL., *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* (2d ed. 2017).
- HOWARD ROBERTS LAMAR, *THE FAR SOUTHWEST 1846–1912: A TERRITORIAL HISTORY* (rev. ed. 2000).
- RICHARD D. LAMM & DUANE A. SMITH, *PIONEERS & POLITICIANS: COLORADO GOVERNORS IN PROFILE* (2d ed. 2008).
- LEGISLATIVE, HISTORICAL AND BIOGRAPHICAL COMPENDIUM OF COLORADO* (Denver, C.F. Coleman’s Publ’g House 1887) [hereinafter HISTORICAL COMPENDIUM].
- STEPHEN J. LEONARD & THOMAS J. NOEL, *DENVER: MINING CAMP TO METROPOLIS* (1990).
- DORIS MONAHAN, *DESTINATION: DENVER CITY: THE SOUTH PLATTE TRAIL* (1985).
- THOMAS J. NOEL, *COLORADO: A HISTORICAL ATLAS* (2015).
- NELL BROWN PROPST, *THE SOUTH PLATTE TRAIL: STORY OF COLORADO’S FORGOTTEN PEOPLE* (rev. ed. 1984).
- FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* (1994).
- VIRGINIA MCCONNELL SIMMONS, *THE UTE INDIANS OF UTAH, COLORADO, AND NEW MEXICO* (2d ed. 2000).
- MORRIS F. TAYLOR, *TRINIDAD, COLORADO TERRITORY* (1966).
- ELLIOT WEST, *THE CONTESTED PLAINS: INDIANS, GOLDSEEKERS, AND THE RUSH TO COLORADO* (1998).
- J.E. Wharton, *History of the City of Denver: From Its Earliest Settlement to the Present Time to Which is Added a Full and Complete Business Directory of the City by D.O. Wilhelm*, in RICHARD A. RONZIO, *SILVER IMAGES OF COLORADO: DENVER AND THE 1866 BUSINESS DIRECTORY* 10 (1986).
- WILLIAM C. WHITFORD, *COLORADO VOLUNTEERS IN THE CIVIL WAR: THE NEW MEXICO CAMPAIGN IN 1862* (Rio Grande Press, Inc. 1991) (1906).
- RICHENS WOOTTON AS TOLD TO HOWARD LOUIS CONRAD, *UNCLE DICK WOOTTON: THE PIONEER FRONTIERSMAN OF THE ROCKY MOUNTAIN REGION* (M.M. Quaipe ed., Narrative Press 2001) (1890).
3. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 33 (1988).
4. *Id.* at 16.

including the right to arms, aims to support the good life. In text and context, the Colorado Constitution protects the right to possess and carry arms for defense of self and of society. The individual right to arms secures the natural right of self-defense *and* it secures the collective interest in community survival and self-government. It is a constitution by and for a people determined to exercise their right of self-government and defend their inherent rights.

## I. THE EARLY INHABITANTS

### A. *Indians and Their Arms*

Previous legal history of the right to arms and Indians has focused almost entirely on the white side of white-Indian relations: how whites possessed arms for offense or defense against Indians, and how whites attempted to regulate or suppress the gun trade with Indians.<sup>5</sup> This Article includes those perspectives, but it also treats Indians as subjects, not only objects. After all, it is recognized that the Second Amendment codified a preexisting natural right.<sup>6</sup> Whether or not Indians were part of “the people” protected by the text of the Second Amendment, they exercised their natural rights, including their natural right of self-defense and to possess and carry arms. Until the mass white migration beginning in 1858, the overwhelming majority of people in Colorado who exercised the right to arms were Indians, and so any history of the right that did not include them would be incomplete.

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5. In American legal histories of the right to arms, the omission is near universal. One example is the first edition of my law school textbook. *See* NICHOLAS J. JOHNSON ET AL., *FIREARMS LAW & THE SECOND AMENDMENT; REGULATION, RIGHTS, AND POLICY* (1st ed. 2012). The oversight is corrected in the 2017 second edition, which examines the arms culture of Indians in the American colonies, and how Indian arms culture was eventually adopted by the English settlers. JOHNSON ET AL., *supra* note 2, at 187–94, 220, 239–40 (including Indian perspectives and practices, as well as describing colonial arms trade with Indians and legal limits on the trade). For example, firearms culture in the United States places much emphasis on accuracy and on individual initiative. These traditions did not come from England’s arms culture; rather they were Indian traditions that were imitated by the whites. *Id.*

6. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 594–95 (2008) (Second Amendment is an inherent “natural right of . . . self-preservation”) (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*139); *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 367 (3d Cir. 2016) (en banc) (Hardiman, J., concurring) (“These proposals show that there was broad consensus between Federalists and their opponents on the existence and nature of the ‘natural right’ to keep and bear arms for defensive purposes . . . .”); *Ezell v. City of Chicago*, 651 F.3d 684, 700 (7th Cir. 2011) (*Heller*’s original meaning “inquiry led the Court to conclude that the Second Amendment secures a pre-existing natural right to keep and bear arms”); David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235, 235–37 (2008) (discussing natural rights language in *Heller*); Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037, 1048–53 (2009) (founders thought there was a natural right to own certain manmade objects, specifically arms and presses).

### 1. Prehistory

The first settlers of Colorado may have arrived around 12,000 BCE.<sup>7</sup> We know that they were hunters.<sup>8</sup> The archeological records become more detailed with the settlement of Indians around Mesa Verde, in far southwestern Colorado.<sup>9</sup> The leading arm of the time was the atlatl,<sup>10</sup> a spear thrower: “A rod or narrow board-like device used to launch, through a throwing motion of the arm, a dart five to eight feet in length.”<sup>11</sup> Within its range, it was a formidable weapon. In the early 1540s, the conquistador Hernando de Soto discovered that the atlatl could penetrate his soldiers’ armor.<sup>12</sup> The atlatl was also prevalent in Mexico and Central America.<sup>13</sup> Today, the atlatl is used for sport; for example, the game laws of Missouri specify when atlatls may be used in hunting and fishing.<sup>14</sup>

Perhaps around 500 CE, and no later than 1000 CE, North American Indians began to take up the bow; by the time Europeans began arriving, it was pervasive.<sup>15</sup> The bow was not always as powerful as the atlatl, but it had longer range. Also, repeat fire from a bow is much faster than from an atlatl. Repeat fire from a bow is also much faster than from a firearm that must be reloaded after every shot. So, until repeating firearms became common in the mid-nineteenth century, some Indians continued to prefer bows to firearms.<sup>16</sup>

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7. NOEL, *supra* note 2, at 33.

8. *Id.*

9. *See id.* at 36–38.

10. CARL UBBEHODE, MAXINE BENSON & DUANE A. SMITH, A COLORADO HISTORY 20 (10th ed. 2015).

11. MO. CODE REGS. tit. 3, § 10-20.805(4) (2017). In the above regulation, I silently omitted an erroneous parenthetical: (5"-8"). The double-quote means “inches” whereas the written text says “feet.” *Cf.* THIS IS SPINAL TAP (Spinal Tap Productions 1984) (rock star writes a note telling his crew to build an on-stage replica of a Stonehenge monolith; for dimensions, he uses 18" when he means 18'. Following instructions literally, the crew builds a monolith 18 inches tall.); Snagamir, *Spinal Tap-Stonehenge*, YOUTUBE (May 12, 2011), <https://youtu.be/qAXzzHM8zLw> (monolith appears at 2:13).

12. *See* COLIN F. TAYLOR, NATIVE AMERICAN WEAPONS 59–62 (2001).

13. *See, e.g.*, Prehispanic Artifacts From El Salvador, 60 Fed. Reg. 13,352-01, 13,355 (Mar. 8, 1995) (“Most [figurines] appear to represent males who may carry war equipment (such as a dart thrower or atlatl) and large headgear . . .”).

14. MO. CODE REGS. tit. 3, § 10-6.410(1) (approving use of an atlatl for fishing); *id.* § 10-6.415(3)(D) (restricting use of atlatl in fishing in certain areas); *id.* § 10-6.550(1) (providing a daily limit of endangered or game fish that can be hunted with an atlatl); *id.* § 10-6.615(2) (allowing atlatl hunting for bullfrogs and green frogs); *id.* § 10-7.410(1)(I) (allowing atlatl use when hunting wildlife); *id.* § 10-7.431(5) (permitting deer hunting using an atlatl); *id.* § 10-7.445 (establishing limitations for hunting bullfrog and green frogs with the atlatl); *id.* § 10-7.455(1)(A) (permitting atlatl use when hunting turkeys); *id.* § 10-11.165(1) (establishing harvesting limitations for hunting bullfrogs and green frogs with an atlatl); *id.* § 10-11.205(1)(B) (listing areas where hunting certain animals with an atlatl is allowed); *id.* § 10-12.115(1) (allowing the use of atlatl for hunting bullfrogs and green frogs); *id.* § 10-12.135(4) (listing places where certain game can be hunted using an atlatl).

15. *See* REGINALD & GLADYS LAUBIN, AMERICAN INDIAN ARCHERY 1 (1980); TAYLOR, *supra* note 12, at 63, 63 n.13.

16. LAUBIN, *supra* note 15, at 3.

## 2. Territories

Evidence of Ute presence in Colorado is at least hundreds of years old. By 1800, Utes had been living in the mountainous and western regions of Colorado for centuries. They often ventured onto the plains for buffalo hunting and to fight other tribes.<sup>17</sup>

We do not know the full history of Indians in eastern Colorado, but we do know that part of it was once under Apache control.<sup>18</sup> The Apache were later pushed south by the Kiowa and Comanche.<sup>19</sup> They in turn were displaced in part by the Cheyenne and Arapaho, beginning sometime between the late eighteenth century and the 1820s.<sup>20</sup> Until 1750–1780, the Cheyenne had been horticulturalists in the Great Lakes region.<sup>21</sup> As they acquired horses and firearms, they adopted a hunting lifestyle, with many of them (later known as the Southern Cheyenne) migrating to the high plains of western Kansas and eastern Colorado. The Cheyenne–Arapaho alliance may date to around 1830.<sup>22</sup>

As of the mid-nineteenth century, the San Luis Valley was predominantly controlled by the Mohuache Utes and the Jicarilla Apache.<sup>23</sup> Besides the Cheyenne, Arapaho, Kiowa, Comanche, and Apache, another tribe active in Colorado was the Sioux, who dominated much of the upper Midwest and the region north of the South Platte River.<sup>24</sup> They were renowned warriors and one of the largest tribes. The

17. SIMMONS, *supra* note 2, at 29–30, 44–46, 56–57; Ute Indian Museum (Montrose, Colo.) (on file with Museum) (map displays of hunting territory). To be precise, the “buffalo” is an Old World animal. The American animal is formally known as the “bison.” Because “buffalo” was the word that most Coloradans used then, and still do, I follow the common usage.

18. DOLORES A. GUNNERSON, *THE JICARILLA APACHES: A STUDY IN SURVIVAL* 105, 114, 130 (1974); NOEL, *supra* note 2, at 41; *see* WEST, *supra* note 2, at 39 (Apaches came to Colorado about one century or less before Coronado’s 1541 expedition).

19. *See* Laurie Collier Hillstrom, *Comanche*, in 3 *THE GALE ENCYCLOPEDIA OF NATIVE AMERICAN TRIBES* 228, 229 (1998) [hereinafter *GALE ENCYCLOPEDIA*] (Comanches in southeastern Colorado in 1750–1875).

20. *See* JOSEPH JABLOW, *THE CHEYENNE IN PLAINS INDIAN TRADE RELATIONS 1795–1840*, at 62–63 (Univ. of Neb. Press 1994) (1950); LEONARD & NOEL, *supra* note 2, at 14; VIRGINIA COLE TRENHOLM, *THE ARAPAHOES: OUR PEOPLE* 33–34, 48 (1st ed. 1970) (arguing that the Arapaho moved to Colorado before the Cheyenne).

Having obtained metal weapons and horses from the Spanish around 1670, the Apaches dominated the area until other tribes acquired them. GEORGE E. HYDE, *THE PAWNEE INDIANS* 46 (Univ. of Okla. Press 2d. ed. 1974) (1951). Apache also traded for firearms with the French, on the eastern plains. SIMMONS, *supra* note 2, at 32.

21. *See* Morris W. Foster, *Introduction* to JABLOW, *supra* note 20, at vi.

22. JABLOW, *supra* note 20, at 65. During the 1820s and 1830s, the Arapaho and Cheyenne each split into northern and southern branches, with the northern branches based around the North Platte River in Wyoming or thereabouts, and the southern based around the Arkansas River in Colorado. *See* Anne Boyd, *Cheyenne*, in *GALE ENCYCLOPEDIA*, *supra* note 19, at 221, 221–22; Laurie Collier Hillstrom, *Arapaho*, in *GALE ENCYCLOPEDIA*, *supra* note 19, at 192, 193. “Arapaho” is sometimes spelled with an “e” at the end.

23. *See* TAYLOR, *supra* note 2, at 13–14; Morris F. Taylor, *Some Aspects of Historical Indian Occupation of Southeastern Colorado*, 4 *GREAT PLAINS J.* 17, 20 (1964).

24. *See* LAMAR, *supra* note 2, at 208. The Sioux included several different tribes, and today, members of those tribes do not necessarily call themselves “Sioux.” *See* Laurie Collier Hillstrom, *Lakota*, in *GALE ENCYCLOPEDIA*, *supra* note 19, at 287, 287. For purposes of Colorado history, the



Pawnee, whose heartland was in Nebraska, were also present in Colorado.<sup>25</sup>

From time immemorial, possession of land in Colorado (and America) had been by right of conquest, and such possession had lasted only as long as the conquerors could defend their holdings by force of arms.<sup>26</sup> This did not change when population pressures from Old World immigration east of the Mississippi River pushed some tribes westward. In turn, others were pushed further west or south or north. The same was true when mass white immigration began in 1858.<sup>27</sup> The historical experience is reflected in the 1876 Colorado Constitution: it aims to prevent popular government then in power from being displaced by conquest. This was no theoretical matter; as will be detailed below, repeatedly in the 1860s the settlers came close to being conquered.<sup>28</sup>

### 3. Trading Networks

Before the arrival of Europeans, the arms of Colorado tribes included the bow and arrow, spear, lance, tomahawk, club, shield, and body armor of hardened animal hides.<sup>29</sup> As European trade networks developed in the seventeenth century, Indians eagerly sought Europeans goods, especially

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relevant tribe was the Lakota (a/k/a Teton Sioux or Western Sioux). At their peak, they were “the most powerful tribe in North America.” *Id.*

25. See David Masci & Kenneth R. Shepherd, *Pawnee*, in GALE ENCYCLOPEDIA, *supra* note 19, at 331, 332 (explaining that the Pawnee were primarily based in Nebraska but also ranged in to Colorado, as far south as the Arkansas River basin). They obtained metal weapons around 1695. HYDE, *supra* note 20, at 56. During the eighteenth century, the Pawnee had less contact with French traders than did most other plains tribes, so the Pawnee were relatively late in obtaining firearms. See *id.* at 88. The Osage, who got their guns from French Canada, and later from English Canada, used their advantage to attack the Pawnee. See *id.* at 98–101. While the Plains tribes had changing alliances over time, the Pawnee were treated as irreconcilable enemies by all other tribes. Unlike other Plains tribes, the Pawnee continued to cultivate the land even after horses became plentiful. Masci & Shepherd, *supra*, at 332.

26. JAMES L. HALEY, THE BUFFALO WAR: THE HISTORY OF THE RED RIVER INDIAN UPRISING OF 1874, at 2 (1976).

The experience of their history, like that of all primitive peoples, was that one occupied a hunting ground precisely as long as one could hold it by force of arms. Indeed, the very migration of the “South Plains” tribes to the South Plains had occurred because a powerfully expanding Sioux Nation had physically driven them from their old territories, and when they arrived on the South Plains and found them already occupied by Apache Indians, the latter had to be vanquished and driven into the deserts of the Southwest.

*Id.*

27. See *infra* Section II.C, D.

28. See *infra* Section II.C, D.

29. See COLIN F. TAYLOR, NATIVE AMERICAN WEAPONS 15–18, 33, 43, 63–64, 72, 77–79, 82–87, 99–101 (1st ed. 2001).

In eighteenth and nineteenth century usage, “arms” included “armor.” See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 106 (Librairie du Liban 1978) (1755) (stating that “arms” are “[w]eapons of offence, or armour of defence.”); 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 13 (1828) (“Arms” means “Weapons of offense, or armor for defense and protection of the body . . . . A stand of arms consists of a musket, bayonet, cartridge-box and belt, with a sword. But for common soldiers a sword is not necessary.”) (cited with approval in *Heller*, 554 U.S. at 581).

arms. Horses, firearms, and metal-bladed arms (knives, hatchets, etc.) each spread in different ways in America.

Several trading networks operated in Colorado. The Utes traded with New Spain, a colony based in Mexico, but whose claims included most of Colorado.<sup>30</sup> The Spanish introduced horses to North America, and as horses were acquired and bred by various tribes, tribal prosperity greatly increased.<sup>31</sup> The Utes were among the first to get Spanish horses.<sup>32</sup> The Spanish tried to limit arms sales to Indians, and did not permit enterprising persons to go among the tribes for trade or theft.<sup>33</sup> The firearms of the Utes in western Colorado were from illicit Spanish trade.<sup>34</sup> After Mexico won its independence from Spain in 1821, there were few practical limits on arms trade with Indians.<sup>35</sup>

At first, the other major trading network influencing Colorado belonged to New France. Anchored in New Orleans, New France stretched up the Mississippi River and into Canada with a chain of forts and trading posts.<sup>36</sup> The Spanish colonization, which was directly controlled by the Spanish crown, was mainly interested in enslaving the Indians to work on large *encomiendas*.<sup>37</sup> In contrast, the English settlement, led by corporations or individuals with government charters, encouraged mass migration.<sup>38</sup> So the Spanish and English programs both created inherent tensions with the Indians. In contrast, the French were interested mainly in trade, and not settlement, and they had no hesitation about selling arms to Indians.<sup>39</sup> For the French, the most desired good was beaver pelts.<sup>40</sup> For Indians, one of the most desired goods was firearms.<sup>41</sup> Although Colorado

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30. See NOEL, *supra* note 2, at 55 (Spanish claims in Colorado as of 1819); SIMMONS, *supra* note 2, at 33–35, 39–44.

31. See SIMMONS, *supra* note 2, at 29–30.

32. *Id.* at 29. In 1640, Ute warriors who had been captured and enslaved by the Spanish escaped, and took horses with them. *Id.*

33. HYDE, *supra* note 20, at 64–65, 114; see also GUNNERSON, *supra* note 18, at 223–24. After the Spanish acquired French Louisiana in 1763, they had to change their policy, and provide arms to Indians in order to maintain the loyalty of friendly Indians, including those who were used to getting French arms. *See id.*

34. See JOLIE ANDERSON GALLAGHER, COLORADO FORTS: HISTORIC OUTPOSTS ON THE WILD FRONTIER 63, 65 (2013).

35. See FRANK RAYMOND SECOY, CHANGING MILITARY PATTERNS OF THE GREAT PLAINS INDIANS 84–85 (1992).

From the mid-1820s to 1845, Utes could buy arms at Fort Uncompahgre (near the present town of Delta, Colorado) and Fort Uintah (in Utah), both of which were owned by Antoine Robidoux, who had no compunction about violating Mexican laws against selling arms to Indians. GALLAGHER, *supra* note 34, at 62–65.

36. JOHNSON ET AL., *supra* note 2, at 189.

37. See, e.g., LESLEY BYRD SIMPSON, THE ENCOMIENDA IN NEW SPAIN: THE BEGINNING OF SPANISH MEXICO 1–3 (3d ed. 1982).

38. See Merrill Jensen, *Introduction*, in 9 ENGLISH HISTORICAL DOCUMENTS: AMERICAN COLONIAL DOCUMENTS TO 1776, at 23–26 (David C. Douglas & Merrill Jensen eds., 1955).

39. See HYDE, *supra* note 20, at 64–65.

40. See ERIC JAY DOLIN, FUR, FORTUNE, AND EMPIRE: THE EPIC HISTORY OF THE FUR TRADE IN AMERICA 94–100, 107–13 (2010).

41. JOHNSON ET AL., *supra* note 2, at 189; see also DOLIN, *supra* note 40, at 94–100, 107–13 (1st ed. 2010) (discussing the French fur trade).

was beyond the direct range of the French traders, tribes in contact with the French often served as middlemen, acquiring goods from tribes deeper in the interior, in exchange for goods that the middlemen had acquired from the French.<sup>42</sup> Once the French were gone from North America, after the 1803 Louisiana Purchase, some of the Indians who had traded with the French traded with Americans.

During the Colonial Period and thereafter, American laws had attempted to restrict arms sales to hostile Indians.<sup>43</sup> But these laws proved nearly impossible to enforce in practice. In the Early Republic, the federal government established trading posts to conduct its own trade with Western Indians; few licenses were granted for private traders.<sup>44</sup> Then in 1822, John Jacob Astor's American Fur Company convinced Congress to stop operating trading posts and to liberalize private trading licenses.<sup>45</sup> These licenses were "issued almost wholesale by the Superintendent of Indian Affairs."<sup>46</sup>

Even if the United States had somehow suppressed all arms trade, the Indians had another source. Great Britain had taken Canada from France in 1763, and the British readily sold arms to Indians, even if the arms might be used against Americans.<sup>47</sup> So broadly speaking, the "horse frontier" had begun with New Spain in the southwest, and then spread across the continent, as horses were acquired by trading or raiding. Meanwhile, there was also a "gun frontier" from New Spain, and a more plentiful one from the east. Any Indian tribe that acquired horses or guns before its neighbors gained a tremendous advantage in warfare.<sup>48</sup>

The Cheyenne emerged as key middlemen traders in the vast region between the Mississippi River and the Rocky Mountains.<sup>49</sup> They obtained firearms, ammunition, edged weapons, and other goods from tribes in direct contact with the whites to the northeast. They bought and stole horses from the tribes near the Spanish in the southwest. In-between were tribes who had buffalo hides or other natural commodities to sell.<sup>50</sup> Within

42. See, e.g., *infra* text accompanying notes 47–48 (Cheyenne).

43. JOHNSON ET AL., *supra* note 2, at 190–92.

44. DAVID LAVENDER, BENT'S FORT 31 (1954).

45. *Id.*

46. *Id.*

47. In part the British were attempting to entice Indians toward recognizing British, not American, sovereignty, over them.

48. See DAVID J. SILVERMAN, THUNDERSTICKS: FIREARMS AND THE VIOLENT TRANSFORMATION OF NATIVE AMERICA 22–23 (2016).

49. See JABLOW, *supra* note 20, at 58–60, 78–81.

50. *See id.*

According to Cheyenne tradition, when the then-agricultural Cheyenne first saw horses, they asked the All Being for horses for themselves. He replied:

You may have horses . . . You may even go with the Comanches to take them. But remember this: If you have horses, everything will be changed for you forever.

You will have to move around a lot to find pasture for your horses. You will have to give up gardening and live by hunting and gathering, like the Comanches. And you will have to

the plains, the most important trading center, by far, was Bent's Fort, located on the Arkansas River in southeastern Colorado.<sup>51</sup> The Cheyenne and their Arapaho allies had an excellent relationship with the Bent brothers; other Indians did not dare venture near the fort if the Cheyenne or Arapaho were in the vicinity.<sup>52</sup>

Eastern Colorado had long been a scene of endemic intertribal warfare but that changed in 1840, as an indirect consequence of Texas victory in its 1836 war of independence against Mexico. In the Southwest, the Comanche were the dominant power, controlling most of the area from Arizona to Texas.<sup>53</sup> They had obtained large quantities of French firearms around 1750.<sup>54</sup> Since the Spanish (and later, the Mexicans) were so close, stealing horses was straightforward. The Comanche bottled up Spanish/Mexican expansion—allowing trading posts to exist in New Mexico, while looting settlements to the south.<sup>55</sup> Like some other tribes, the Comanche carried on a lucrative slave trade, selling captured members of other tribes to Americans or Mexicans, or sometimes keeping the slaves for themselves.

Texan independence in 1836 soon led to intensified pressure on the southeast side of the empire of the Comanches and their Kiowa allies.<sup>56</sup> Then in the 1838 Battle of Wolf Creek, the Kiowa and Comanche were defeated by Cheyenne and Arapaho.<sup>57</sup> So in 1840, the Kiowa, Comanche, and their Prairie Apache allies concluded a peace treaty with their northern adversaries.<sup>58</sup> The great buffalo pasture between the Arkansas and South Platte Rivers was recognized as Cheyenne and Arapaho territory, while the Kiowa, Comanche, and Prairie Apache would have the area south of

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come out of your earth houses and live in tents. I will tell your women how to make them, and how to decorate them.

And there will be other changes. You will have to have fights with other tribes, who will want your pasture land or the places where you hunt. You have to have real soldiers, who can protect the people. Think, before you decide.

WEST, *supra* note 2, at 86 (quoting ALICE MARRIOT & CAROL K. RACHLIN, PLAINS INDIAN MYTHOLOGY 96–97 (1975)).

51. See JABLOW, *supra* note 20, at 65–66.

52. *Id.*

53. HÄMÄLÄINEN, *supra* note 2, at 2.

54. HYDE, *supra* note 20, at 95.

55. JABLOW, *supra* note 20, at 70.

56. See FEHRENBACH, *supra* note 2, at 280–83, 292–333; see also WEST, *supra* note 2, at 77.

The Kiowa and Comanche had confederated around 1795. HALEY, *supra* note 26, at 1.

57. JABLOW, *supra* note 20, at 70.

58. *Id.* at 72. The peace council was named “Giving-Presents-to-One-Another-Across-the-River.” TRENHOLM, *supra* note 20, at 110.

the Arkansas.<sup>59</sup> All of them could trade freely at Bent's Fort.<sup>60</sup> Friendly trade relations meant more horses for the northern tribes, and more guns for the southern ones.<sup>61</sup>

The Cheyenne would, of course, stop stealing the Comanche and Kiowa horses, but they could freely pass through Comanche and Kiowa territory to raid horses from Mexicans.<sup>62</sup> Conversely, Comanche and Kiowa could freely travel north of the Arkansas.<sup>63</sup>

This did not mean the end of all warfare in Colorado. Everyone was still at war with the Pawnees, and vice versa.<sup>64</sup> And Utes remained at war with the plains tribes. Even so, the 1840 treaty made buffalo hunting in Colorado much easier, with unforeseen consequences, as will be detailed *infra* in Section II.D.1.<sup>65</sup>

#### 4. Types of Arms

American Indian arms consumers were discerning. Whereas colonists in some other parts of the world could get away with selling low-quality, primitive firearms to indigenous peoples, American Indians quickly became sophisticated arms consumers, knowing and demanding quality.<sup>66</sup> In the first half of the nineteenth century, Plains Indian firearms

59. Kiowa arms were the bow and arrow, a short lance or spear for use on horseback, club, tomahawk, circular shield of rawhide from buffalo neck, and guns. MILDRED P. MAYHALL, *THE KIWAS* 121 (2d ed. 1971). The latter "were obtained from the Spaniards and Anglo-Americans." *Id.* Kiowa also traded for guns with the Mexicans, with the Kiowa supplying wild horses. BERNARD MISHKIN, *RANK & WARFARE AMONG THE PLAINS INDIANS* 23 (Univ. Neb. Press 1992) (1966). After the Kiowa had obtained horses, their bows and shields were reduced in size, for easier use on horseback. *Id.* at 7, 19.

In 1854, the Kiowa, Comanche, Arapaho, and Cheyenne assembled a war party of 1,500, the largest in the history of the southern Plains. MAYHALL, *supra*, at 215. They attacked the Sac & Foxes, who were moving into Kansas and competing for buffalo. *Id.* Although there were only 100 Sac & Fox, they had new long-range American rifles, and they utterly defeated the much larger attacking coalition. *Id.*

After 1854, the Kiowa became more aggressive. *Id.* Their raiding increased, and some of them moved to Colorado to fight the Utes. *Id.* By 1871, when Kiowa attacked a Texas wagon train in the Warren Wagon Train Massacre, Kiowa had "Spencer carbines, breech-loading rifles, and pistols," most of which had been acquired from a Caddo Indian named George Washington. *Id.* at 267.

60. See JABLOW, *supra* note 20, at 75.

61. *Id.*

62. JABLOW, *supra* note 20, at 76–77.

63. See TRENHOLM, *supra* note 20, at 150–51. In 1852, a unit of U.S. mounted rifles led by Colonel Sanborn traveled along the Arkansas and then up Cherry Creek and eventually to Laramie, in a mission against the Comanche. 1 HALL, *supra* note 2, at 141 n.\*. Laramie is named for the French fur trader Jacques La Ramie, who was killed by Arapaho in 1823. See TRENHOLM, *supra* note 20, at 46–47.

64. For example, the Arapaho fought the Pawnee in Larimer County in August 1858. TRENHOLM, *supra* note 20, at 150–51.

65. See *infra* text accompanying notes 342–45.

66. See, e.g., CARL P. RUSSELL, *FIREARMS, TRAPS AND TOOLS OF THE MOUNTAIN MEN* 70 (2011) (in the late eighteenth century, Michigan Indians refused "trade guns" made for sale to Indians, and demanded rifles instead); J. Frederick Fausz, *Fighting "Fire" with Firearms: The Anglo-Powhatan Arms Race in Early Virginia*, 3 AM. INDIAN CULTURE & RES. J., no. 4, 1979, at 33, 33. Desire for the best European guns of colonial period (flintlocks) compelled Indians to develop a sophisticated and large scale trade economy; this included eastern tribes obtaining beaver pelts from tribes deep in the interior, in order to trade them to Atlantic seaboard whites for guns. See PATRICK A.

were mostly single-shot muzzleloaders; as breech-loading repeaters became the most common firearms for whites after 1850, the same was true for Indians.<sup>67</sup>

Besides firearms, Indians were particularly interested in edged weapons made of steel or iron.<sup>68</sup> Before European contact, Indian knives had been crude tools not suitable for use as arms.<sup>69</sup> Steel knives for Indians (and whites) were first imported from England, and later made in the United States.<sup>70</sup> The last Indians to acquire them were in the Great Plains, Rocky Mountains, and Pacific Northwest.<sup>71</sup> Well before 1800, even they had large quantities of fine knives.<sup>72</sup> Indians generally preferred fixed blades to folding knives.<sup>73</sup> The predominant types among the Plains Indians were a straight blade with a point and two sharp edges (similar to a dagger), and a curved knife, well-suited for skinning.<sup>74</sup>

Before European contact, the tomahawk was a short pole to which a shaped stone was attached, suitable for use as a club.<sup>75</sup> With the availability of steel and iron, the tomahawk developed into a bladed arm, also handy for noncombat use as an axe or hatchet.<sup>76</sup> There were two centers where the tomahawk was most prevalent: in the larger northeast (from the southern Great Lakes area all the way to New England) and in the Great Plains.<sup>77</sup> In the latter, the ceremonial or status role of the tomahawk sometimes exceeded the mundane use.<sup>78</sup> The most popular type of tomahawk, by far, was the pipe tomahawk, excellent for all traditional tomahawk uses, and for smoking.<sup>79</sup>

As of 1825, about half the Ute Indians had firearms, while the other half used bows and other arms.<sup>80</sup> Known as excellent warriors, the Utes were in near-constant war with the Cheyenne and Arapaho. The latter said that their favorite opponents were the Utes, because the Utes were the

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MALONE, *THE SKULKING WAY OF WAR: TECHNOLOGY AND TACTICS AMONG THE NEW ENGLAND INDIANS* 36 (1991).

67. SECOY, *supra* note 35, at 98–99.

68. HAROLD L. PETERSON, *AMERICAN KNIVES: THE FIRST HISTORY AND COLLECTORS' GUIDE* 116 (1st ed. 1958).

69. *Id.* at 115. In the Arapaho creation stories, some “hard thinking” heroes taught the Arapaho how to make knives, arrow points, and bows, so that they could take and use buffalo. TRENHOLM, *supra* note 20, at 7.

70. PETERSON, *supra* note 68, at 120, 122.

71. *Id.* at 120.

72. *See id.*

73. *See id.*

74. *See id.* at 120–25.

75. HAROLD L. PETERSON, *AMERICAN INDIAN TOMAHAWKS* 8–9 (2d ed. 1971).

76. *Id.* at 10–15.

77. *Id.* at 11–12.

78. *Id.* at 12.

79. *Id.* at 33–39.

80. *See* SIMMONS, *supra* note 2, at 51 (noting that the guns were flintlocks); *cf. id.* at 46 (as of 1821, the Utes had some firearms, but bows and spears were predominant). Even in the 1840s, the Utes often preferred to use bows rather than firearms when fighting on horseback, since bows had a faster rate of repeat fire than single-shot arms. *Id.* at 63.

bravest fighters.<sup>81</sup> Famed explorer and military leader Kit Carson described the Utes as “a very brave, warlike people; they are of rather small size, but hardy, and very fine shots.”<sup>82</sup> New Mexico’s Territorial Governor Abraham Rencher in 1858 called the Utes “the most warlike and formidable of any of our Indian tribes. Their weapons are rifles, which they use with great skill and success.”<sup>83</sup>

When the Cheyenne had been moving from Minnesota to Colorado, they were attacked and defeated by a tribe that had firearms, which the Cheyenne did not.<sup>84</sup> By 1857, that had changed. According to a U.S. Army report of a battle with 300 Cheyenne that year, “most of them had rifles and revolvers.”<sup>85</sup> Cheyenne arms were augmented by 1859 gold rushers, who traveled along the South Platte route and brought lots of Sharps rifles (described below in Section I.C); the Cheyenne acquired many Sharps in trade with argonauts.<sup>86</sup>

Cheyenne arms also include round shields of “the toughest rawhide” and polished lances.<sup>87</sup> Among the Cheyenne and Arapaho, “It was not unusual for female Indians to take part in these battles [raids on other Indian camps]; some could ride astride and shoot as well as warriors . . . .”<sup>88</sup>

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81. *Id.* at 62–63.

82. ESTERGREEN, *supra* note 2, at 264.

83. SIMMONS, *supra* note 2, at 118.

84. *See* GRINNELL, *supra* note 2, at 7. The Cheyenne and the Assinboins were both after the same buffalo herd, and they fought over who could take the buffalo. *Id.* The Cheyenne had clubs and sharp sticks, while the Assinboin had firearms. *Id.* The conflict ended badly for the Cheyenne. *Id.* Grinnell interviewed many Cheyenne who personally remembered the events of the mid-nineteenth century, and sometimes earlier.

“Cheyenne” is the Sioux name for the group, meaning “people who speak an unintelligible language.” The Cheyenne called themselves “Tsistsistas.” *See* AFTON ET AL., *supra* note 2, at 61.

85. MONAHAN, *supra* note 2, at 19.

86. *See* GRINNELL, *supra* note 2, at 352 n.4 (according to the recollection of American Horse, for the period 1858–65). The Cheyenne also had cap and ball revolvers. *See id.* Cheyenne were among the combatants at Little Big Horn in 1876, where about half had guns and half used bows. “The guns were of many sorts—muzzle-loaders, Spencer carbines, old-fashioned Henry rifles, and old Sharps military rifles. The Sharps were probably the best guns they had, except those recently captured from the soldiers.” *Id.* at 352.

The method by which the Indians kept themselves supplied with ammunition for firearms not only loose ammunition, but also fixed, has always been more or less mysterious, but they [Cheyenne whom Grinnell interviewed in the early twentieth century] explain that in those war days they were constantly purchasing powder, lead, primers, and also outfits for reloading cartridges. They carried with them as part of their prized possession sacks of balls they had molded and cans of powder. So far as possible, they saved all the metal cartridge shells they used or found, and no doubt became expert reloaders of shells.

*Id.* at 352 n.4.

87. MONAHAN, *supra* note 2, at 89–90.

88. *Id.* at 91; 2 GEORGE BIRD GRINNELL, THE CHEYENNE INDIANS: WAR, CEREMONIES, AND RELIGION 44 (Bison Books 1972) (1923) (“While it was not common for women to go on the war-path with men, yet they did some sometimes, and often should as much courage and were quite as efficient as the men whom they accompanied.”) Ute women too sometimes joined in warfare. *Id.* at 63. Among the Comanche, “[e]ven the women are daring riders and hunters, lassoing antelope and shooting buffalo.” ALBERT D. RICHARDSON, BEYOND THE MISSISSIPPI: FROM THE GREAT RIVER TO THE

When Boston journalist Albert Richardson visited Colorado in 1859, he observed some Arapaho camps.<sup>89</sup> The boys “were very expert with the bow, easily hitting a silver half-dollar at sixty or seventy yards.”<sup>90</sup> The shields “will usually ward off any rifle ball which does not strike them perpendicularly. The bows have great force, sometimes throwing an arrow quite through the body of a buffalo.”<sup>91</sup> U.S. General Frederick Benteen said that the Cheyenne and Sioux were “[g]ood shots, good riders, the best fighters the sun ever shone on . . . .”<sup>92</sup>

In short, when citizens of the United States first began venturing into Colorado, they met Coloradans who were well-armed and proficient in the use of arms. The history of the white-Indian wars of the mid-nineteenth century will be told *infra*, in Section II.D.<sup>93</sup>

### B. Mountain Men and the Plains Rifle

The United States purchased the Louisiana Territory from France in 1803.<sup>94</sup> The Colorado portion was the northeast part of the modern state: north of the Arkansas River and east of the Continental Divide.<sup>95</sup> The U.S.

GREAT OCEAN: LIFE AND ADVENTURE ON THE PRAIRIES, MOUNTAINS, AND PACIFIC COAST 229 (1867).

89. RICHARDSON, *supra* note 88, at 300.

90. *Id.* at 172.

91. *Id.* at 173.

92. STANLEY VESTAL, JIM BRIDGER: MOUNTAIN MAN 274 (1946).

93. *See infra* text accompanying notes in Section II.D.

94. Treaty Between the United States of America and the French Republic, Fr.-U.S., art. I, Apr. 30, 1803, 8 Stat. 200.

95. The Arkansas River boundary between the U.S. and New Spain was established in 1819 by the Adams-Onís Treaty. Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, Spain-U.S., art. 3, Feb. 22, 1819, 8 Stat. 252, *reprinted in* 2 INDIAN AFFAIRS, *supra* note 2, at 254, 256 [hereinafter Adams-Onís Treaty]. It was negotiated by U.S. Secretary of State (and future President) John Quincy Adams and Spanish foreign minister Luis de Onís y González-Vara. *Id.* at 254 (quoting Adams-Onís Treaty, *supra*, at pmbl.). The Treaty also provided for Spain’s sale of Florida to the United States. *Id.* (quoting Adams-Onís Treaty, *supra*, at art. 2). Before the treaty, Spain had contended that its territory included the northern drainage of the Arkansas. NOEL, *supra* note 2, at 56.

Soon after, in 1821, the United States of Mexico won its independence from Spain. *Id.* Thus, the non-Louisiana part of Colorado became part of Mexico. *Id.* Then in 1836, the Republic of Texas won its independence from Mexico. *Id.* Texas included southeast, south central, and north central Colorado, and even a little bit of south central Wyoming. *See id.* at 57. The northern border of Texas was the Arkansas River. *See id.* at 56. The western border was the Rio Grande River. *Id.* Texas also claimed the land in-between the lines drawn northward for the headwaters of each river (stretching into what is today south-central Wyoming). *Id.* at 57.

Mexico did not recognize the independence of Texas, nor did it recognize the Texan boundary claims. *See id.* at 56. Under President Mirabeau Lamar, the Republic of Texas attempted to take control of eastern New Mexico in 1841 but was defeated. *See* GEO. WILKINS KENDALL, NARRATIVE OF THE TEXAN SANTA FÉ EXPEDITION (N.Y., Harper & Brothers 1844).

In 1845, Texas joined the United States. *See* NOEL, *supra* note 2, at 57. As part of the Compromise of 1850 (dealing with sectional conflicts in the U.S.), Texas sold its northern territory to the federal government. *See id.* at 57.

Even after the Texan Revolution, Colorado west of the Rio Grande River (and west of the line north from the headwaters of the Rio Grande) was agreed by everyone to still be part of the United States of Mexico. *See id.* This land was sold the United States of America in 1848, as part of the Treaty of Guadalupe-Hidalgo, ending the Mexican-American War. *Id.*



government began sending military exploration missions to Colorado. The first of these was in 1805, led by Captain Zebulon Pike (namesake of Pike's Peak). Then came Colonel Long (namesake of Long's Peak) in 1819, and Captain Bonneville in 1832. In 1853, Captain John W. Gunnison explored southwestern Colorado, leading the first group of white men to see the Black Canyon.<sup>96</sup>

Most influential of all the explorers in Colorado was Captain John C. Frémont, who led five expeditions in the 1840s and 1850s, all of which included Colorado.<sup>97</sup> His first expedition dispelled the notion that the high plains of Colorado were barren and unsuited for husbandry or agriculture.<sup>98</sup>

On the way west, Frémont's second expedition encountered a Colorado-bound traveler who had sold all his books to buy the supplies for a journey to Colorado.<sup>99</sup> William Gilpin eagerly joined the Frémont team.<sup>100</sup> Later, in 1861, Gilpin would become the first Territorial Governor of Colorado. In 1856, Frémont would become the first presidential nominee of the Republican party, running under the motto "Free Speech, Free Press, Free Soil, Free Men, Frémont and Victory."<sup>101</sup> The Republican platform was no expansion of slavery into the territories, which should be free soil for industrious free men.

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Of course a detached observer in 1848 would have to say that the Colorado tribes exercised much more practical sovereignty than did Americans, Texans, or Mexicans, whose holdings amounted, at most, to some small settlements, trading posts, and forts.

96. He has been honored as the namesake of a river, county, and town.

97. See generally ALLAN NEVINS, FRÉMONT: PATHMARKER OF THE WEST (1939). The first expedition, in 1842, explored along the South Platte River and then Colorado's northern mountains. *Id.* at 104–05. The second expedition, in 1843–44, went through the small trading village of Pueblo, and thence to Ceran St. Vrain's fort near the northern Front Range; it was guided by Kit Carson through the northern Colorado mountains, and then into Wyoming. *See id.* at 128–29, 136–38. When returning eastward, the expedition crossed Muddy Pass (on present-day U.S. Highway 40, in Jackson and Grand counties), traversed the intermountain park region, and left Colorado via Pueblo and Bent's Fort. *Id.* at 184. The third expedition, commencing in 1845, moved up the Arkansas River, rested at Bent's Fort, and proceeded from there to the Great Salt Lake. *See id.* at 208–09. In 1848–49, the fourth expedition again used Bent's Fort and Pueblo as rest points. *Id.* at 350–51. It attempted to find—during the winter—a westward route from the headwaters of the Rio Grande through the San Juan mountains. *Id.* at 354. Unfortunately, Frémont used the only guide available, "Old Bill" Williams, who did not know the country as well as he claimed. *Id.* at 352–53, 357–60. The entire expedition nearly perished in the San Juans, and several members did not survive. *See id.* at 355, 360–68. The fifth expedition, of 1853–54, again attempted to find a usable railroad route through the San Juans, and this time it succeeded. *See id.* at 412–13. Frémont had indeed discovered the easiest route for a transcontinental railroad. However, the federal government eventually chose a route going through southern Wyoming, because that was more convenient for the Chicago region. *Id.* at 637. For maps of all five expeditions, see *id.* at 211.

98. *See id.* at 124.

99. NELL BROWN PROPST, SOUTH PLATTE TRAIL: STORY OF COLORADO'S FORGOTTEN PEOPLE 17 (2d ed. 1989).

100. *Id.*; NEVINS, *supra* note 97, at 129.

101. NEVINS, *supra* note 97, at 442.

On all discovery expeditions, the arms would have been the best U.S. military arms of their time, typically rifles and handguns.<sup>102</sup>

In the Colonial Period and the Early Republic, almost all Americans lived east of the Appalachians.<sup>103</sup> Except for land that had been cleared for cultivation, most of the area was thickly wooded. In those days, Americans owned a wide variety of firearms, including handguns, muskets, blunderbusses, fowling pieces, shotguns, and rifles. The quintessential American firearm of the late eighteenth and early nineteenth century was the Pennsylvania–Kentucky rifle. Originally made by German immigrant gunsmiths in Lancaster, Pennsylvania, the rifle was popularized by frontiersmen and hunters in “Kentucky”—at the time, a general term for the western areas around the Ohio River. The rifle “‘fit the forest.’ Its long barrel gave the ample sighting radius needed for small targets. Its stock was slender and drooping for stand-up shooting. The slender-barrel and small caliber were adapted to the light load that a far-reaching foot traveler needed.”<sup>104</sup>

As the United States expanded westward, needs changed. West of the Appalachians, “the frontiersman’s path crossed more level prairies. He rode a horse; he shot bison and elk.”<sup>105</sup> Thus, calibers

began to increase for the man from the West. Barrels became heavier and shorter. Sun-catching ornaments and figured wood were less popular. The man on the prairie wanted more of the purchase price put into range and power and less of it into thin patch boxes and curly wood which couldn’t survive a fall from a pitching mustang.<sup>106</sup>

The result was the Plains Rifle, also known as the Hawken Rifle for its leading manufacturer.<sup>107</sup> The Plains Rifle was well-suited to carrying on a horse and was powerful enough to take a grizzly bear or a buffalo.<sup>108</sup> The manufacturing center was St. Louis, the Gateway to the West.<sup>109</sup> Its “[a]ccuracy was good, killing power was great, and the recoil . . . was hardly noticeable.”<sup>110</sup>

A typical example of a Plains Rifle may be found in the Tenth Circuit Courthouse in Denver. In the hallway outside Courtroom 1, the museum

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102. For example, Frémont’s second expedition (1843) “was armed with a really superior weapon, the Hall breech-loading rifled carbine, a piece fired by flintlock, but using ready-fixed ball-and-powder cartridges, and susceptible of rapid reloading.” *Id.* at 130. For the third expedition (1845), Frémont “purchased a dozen of the finest rifles on the market, and offered them to his corps as prizes for the best marksmanship.” *Id.* at 207.

103. I here use “Americans” in the sense of persons who considered themselves to be part of the United States of America, or of its predecessor English colonies.

104. CHARLES E. HANSON, JR., *THE PLAINS RIFLE* 1 (1960).

105. *Id.*

106. *Id.*

107. *See id.* at 2.

108. *Id.*

109. *See id.*

110. RUSSELL, *supra* note 66, at 88.

display includes the Plains Rifle owned by Justice White's grandfather, an early settler of Iowa.

While the missions of exploration were passing through Colorado, the first long-term presence of U.S. citizens in Colorado was that of the mountain men, beginning in the early nineteenth century. Many of these rugged men made their living as intermediaries in the trade between Indians and the citizens of the United States of America or the United States of Mexico.<sup>111</sup>

Some mountain men brought the goods they had acquired from the Indians (e.g., beaver pelts) to forts that were also trading posts. The most important of these was Bent's Fort, in southeastern Colorado.<sup>112</sup> An adobe trading post that operated 1833–1849, it was for most of that time the only significant white settlement on the Santa Fe Trail (connecting Independence, Missouri, to Santa Fe, New Mexico).<sup>113</sup> Located near present-day La Junta, Bent's Fort managed a thriving trade business with the Cheyenne and Arapaho Indians.<sup>114</sup> Other mountain men would meet up with commercial traders at a periodic "rendezvous," such as those held in southern Colorado with the cooperation of the Utes.<sup>115</sup>

In the early decades, the primary economic activity of the mountain men was collection of beaver pelts, for hats and other clothing.<sup>116</sup> The

111. Some mountain men were employees or contractors for fur companies. Others were "free trappers," who owned their equipment, and traded as they pleased. DOLIN, *supra* note 40, at 227. In the classic period of the Rocky Mountain fur trade, up to 1840, there were probably no more than 3,000 mountain men all together. *Id.*

112. See LAVENDER, *supra* note 44, at 15.

113. See *id.* Bent's "Adobe Empire" of trade stretched into all the (future) states adjacent to Colorado, plus far northern Texas. See *id.* at inside cover (map). Bent's Fort was a partnership of brothers William and Charles Bent, plus Ceran St. Vrain. See RONALD K. WETHERINGTON, CERAN ST. VRAIN: AMERICAN FRONTIER ENTREPRENEUR 10 (2012). The latter was a former trapper. *Id.* He built another trading post, Fort St. Vrain, near the northern Front Range. See *id.*

114. The Santa Fe Trail opened in 1821. AFTON ET AL., *supra* note 2, at xiii. In 1825, thirteen Cheyenne leaders concluded a peace treaty with the United States, allowing travel along the Santa Fe Trail. Treaty with the Cheyenne Tribe, 1825, art. 4, Cheyenne-U.S., July 6, 1825, 7 Stat. 255, reprinted in 2 INDIAN AFFAIRS, *supra* note 2, at 234 ("[N]or will they, whilst on their distant excursions, molest or interrupt any American citizen or citizens, who may be passing, from the United States to New Mexico, or returning from thence to the United States.").

Charles J. Kappler was the clerk for the Senate Committee on Indian Affairs, and his compilation is "the standard reference work for treaty texts." PRUCHA, *supra* note 2, at 444–45.

William and Charles Bent are the namesakes of Bent County, Colorado, where a rebuilt version of their fort is located. See *Bent County*, COLO. ENCYCLOPEDIA, <https://coloradoencyclopedia.org/article/bent-county> (last visited Nov. 26, 2017).

115. SIMMONS, *supra* note 2, at 51. A rendezvous in the San Luis Valley took place in 1825, and perhaps other years. *Id.* However, the site was abandoned for rendezvous because the nearest town was Taos, where the Mexicans imposed high tariffs on trade. *Id.* Western Wyoming and nearby areas were the most common rendezvous cites. See RUSSELL, *supra* note 66, at 12–14. Perhaps the major white-Indian meeting for trade took place in 1816, on the banks of the Cherry Creek, near the future site of Denver. See TRENHOLM, *supra* note 20, at 41. Cheyenne and Arapaho held the grand encampment, where they met with forty-five employees of the St. Louis traders A.P. Chouteau and Julius de Mun. *Id.*

116. See DOLIN, *supra* note 40, at 223–54.

beaver trade had been going on since the early colonial days.<sup>117</sup> As eastern beaver were overhunted, traders had to range further and further west.<sup>118</sup> Because beaver became harder to find in the 1830s, substitutes were developed. French fashion designers created the silk hat. Nutria pelts, from a South American relative of the beaver, were not as good as beaver pelts, but they were much cheaper and sufficient for many uses. By 1840, the Rocky Mountain beaver trade was pretty much finished.<sup>119</sup>

Thereafter, the mountain men generally shifted from beaver trapping to acting as middlemen in the buffalo hide trade, preferring buffalo harvested in the fall when their fur was thick.<sup>120</sup> Mountain men also served as guides for expeditions or as army scouts.

While mountain men were rugged individualists, they were not solitary. On beaver expeditions, eight men might travel and camp together.<sup>121</sup> From an established camp, each man would go off by himself in the morning to set traps, hunt for game thereafter, and then return to the traps in the evening.<sup>122</sup> Many mountain men married Indian wives, sometimes polygamously.<sup>123</sup> These marriages were usually with the daughters or sisters of high-ranking chiefs, and the biracial families helped bridge the Indian and white worlds.<sup>124</sup>

The risk of death from animals, hostile Indians, or bad weather was very high. At a rendezvous, there was plenty of drinking, gambling, and fighting—some of it fatal. Yet the code of the mountain man was that in the wilderness two men who had previously brawled at a rendezvous would always rescue and protect each other.<sup>125</sup>

In a sense, the mountain man lifestyle was very healthy. Kit Carson recalled that of the hundreds of mountain men he had known, not one had

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117. See *id.* at 3–116.

118. See *id.* at 282–88.

119. See *id.* at 281–89; see also M.M. Quaife, *Introduction* to WOOTTON, *supra* note 2, at 1, 2 (also noting competition from skins of fur seals). Wootton's autobiography was originally published in the late nineteenth century, "as told to" Howard L. Conrad, a scholar who interviewed Wootton and turned his reminiscences into book form. *Id.* at 4–7.

120. WEST, *supra* note 2, at 80 ("Mountain men became middlemen."); see also DOLIN, *supra* note 40, at 301 (stating that Bent's Fort shipped about 15,000 buffalo robes annually).

121. See WOOTTON, *supra* note 2, at 35; see also DOLIN, *supra* note 40, at 230 (stating that some expeditions were as large as sixty men).

122. See WOOTTON, *supra* note 2, at 35.

123. DOLIN, *supra* note 40, at 227–28 (stating that about a third of mountain men took Indian wives, with free trappers typically doing so).

124. See *id.*; see also WEST, *supra* note 2, at 80–82, 185 ("Virtually every trader in Denver had at least one Indian wife.").

125. JEROME CONSTANT SMILEY, *HISTORY OF DENVER: ITS EARLY FUR TRADING POSTS, HUNTERS, TRAPPERS, AND MOUNTAIN MEN* (1901).

died from sickness.<sup>126</sup> The air was pure, and the diet was mainly game, especially buffalo.<sup>127</sup>

The typical arms of a trapper were two pistols, two large knives, and a tomahawk hatchet, all worn on a belt.<sup>128</sup> “In addition to this, of course, every man carried his rifle and ammunition enough to meet any emergency likely to arise,” recalled “Uncle Dick” Wooten.<sup>129</sup> According to Wooten, “We always slept with our loaded guns at our side, in such a position that we could grab them instantly and in case of emergency shoot without getting on our feet.”<sup>130</sup> Besides personal arms, the men carried large supplies of arms and ammunition on pack animals for trade with the Indians.<sup>131</sup>

Although some mountain men journeyed west intending to make good money for a few years and then return home, many found the West irresistible and never left.

Among Colorado’s notable mountain men were:

*Mariana Modena.* From Taos, he first came to the mountains in 1833.<sup>132</sup> He was three-quarters Mexican and one-quarter Indian.<sup>133</sup> Educated by Spanish priests, he could, it was said, speak thirteen Old World languages and twelve Indian dialects.<sup>134</sup> He built Fort Namaqua over the Big Thompson River in Colorado, where he operated a toll bridge for travelers.<sup>135</sup> He had many Hawken Rifles, and his favorite, a finely engraved piece, is in the collection of the Colorado History Museum.<sup>136</sup>

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126.

Our ordinary fare consisted of fresh beaver and buffalo-meat without any salt, bread, or vegetables . . . During the winter, visiting our traps twice a day, we were often compelled to break the ice and wade in water up to our waists. Notwithstanding these hardships sickness was absolutely unknown among us. I lived ten years in the mountains with from one to three hundred trappers, and I cannot remember that a single one of them died from disease.

RICHARDSON, *supra* note 88, at 257–58 (1873) (quoting Kit Carson).

127. See WOOTTON, *supra* note 2, at 34–35 (listing buffalo, bear, venison, elk, antelope, wild turkey, rabbits, squirrels, pheasants, partridges, and beaver—all roasted over a campfire); see also DOLIN, *supra* note 40, at 245–46 (listing mountain lion, when lucky, plus snakes, lizards, and the men’s own horses and mules during hard times; diet could include “berries, corn, goose and crow eggs, and wild onions and lettuce”).

128. See WOOTTON, *supra* note 2, at 34.

129. *Id.*

130. *Id.* at 106.

131. See *id.* at 28 (discussing trade conversions: one butcher knife for a buffalo robe; for two robes, a pound of gunpowder, plus gun caps, and about 60 bullets; for a buckskin, three bullets and three charges of powder); *id.* at 65 (“I had about fifty guns in my stock of goods and plenty of ammunition.”). A particularly common knife for the mountain men was the Green River knife, sometimes called a “scalper,” which was handy for butchering and skinning, among other things. See RUSSELL, *supra* note 66, at 199–205, 228–31.

132. JOHN D. BAIRD, HAWKEN RIFLES: THE MOUNTAIN MAN’S CHOICE 6 (1968).

133. *Id.* at 29.

134. *Id.*

135. *Id.*

136. See *id.* at 5–6, 29–32.

*Jim Baker.* In 1858, after his itinerant days were over, he built a cabin and toll bridge north of Denver.<sup>137</sup> A painting in the collection of the Colorado History Museum shows Baker with his Hawken.<sup>138</sup>

*Jim Bridger.* A fur trader and guide, Bridger first came to Colorado in 1822. In 1840–1860, he “roamed the territory between Canada and southern Colorado . . . . He was the first white man known to have visited Great Salt Lake, and later was to guide a party of Mormons to this place.”<sup>139</sup> Along with Edward L. Berthoud, Bridger discovered Berthoud Pass as a usable wagon trail in 1861.<sup>140</sup> Bridger carried a Hawken and an over-and-under rifle made in Pennsylvania.<sup>141</sup> He was also a gunsmith.<sup>142</sup>

*Jimmy Hayes.* The first white inhabitant of El Paso County, he arrived in 1833.<sup>143</sup> The Indians eagerly traded with him.<sup>144</sup> When he was murdered by a gang of Mexicans, the Indians buried his body in his cabin, tracked down the eleven Mexican killers, and hanged them all.<sup>145</sup>

*Kit Carson.* Based in Taos, Colonel Carson “ranged the Great Plains, the Colorado Rockies, and the Uinta Basin.”<sup>146</sup> He guided John C. Frémont’s 1842–1846 expeditions.<sup>147</sup>

Carson fought alongside Colorado militia in New Mexico during the Civil War.<sup>148</sup> In addition to the Hawken, he carried Colt revolvers.<sup>149</sup> Some of his men had Hall carbines, a short rifle made by the federal armories.<sup>150</sup>

137. LEONARD & NOEL, *supra* note 2, at 29; WOOTTON, *supra* note 2, at 103 n.37.

138. BAIRD, *supra* note 132, at 5–6. *See generally* NOLIE MUMEY, THE LIFE OF JIM BAKER, 1818–1898: TRAPPER, SCOUT, GUIDE AND INDIAN FIGHTER (1931) (discussing the life of Jim Baker). One of Baker’s knives, forged from a common file, is in the collection of the Colorado State Historical Society. RUSSELL, *supra* note 66, at 187, 203, 205 (specimen no. 322F).

139. BAIRD, *supra* note 132, at 4–7; *see* VESTAL, *supra* note 92, at ix–x (discussing Jim Bridger’s achievements and advocating for a “new attempt” in biographing his life).

140. *See* BAIRD, *supra* note 132, at 208–09.

141. *Id.* at 5. Bridger established a trading post on the Oregon Trail in the Utah Territory (now, Fort Bridger Wyoming). *See* VESTAL, *supra* note 92, at 185. It was later burned by Mormons, after Brigham Young accurately accused Bridger of selling guns to Indians. SIMMONS, *supra* note 2, at 93; *see also* VESTAL, *supra* note 92, at 185, 189 (describing Mormon defeat by Snake Indians, whom Bridger had armed with modern rifles).

Bridger is portrayed in the movie *The Revenant*, about mountain man Hugh Glass. *See The Revenant*, IMDB, <http://www.imdb.com/title/tt1663202> (last visited Dec. 21, 2017). According to Glass, after he was mauled by a grizzly bear in South Dakota, he was abandoned by a party, including Bridger, which presumed he was fatally wounded. DOLIN, *supra* note 40, at 247–49. Nevertheless, Glass survived, and eventually made his way to a trading post. *Id.* at 248.

142. VESTAL, *supra* note 92, at 152.

143. 3 HALL, *supra* note 2, at 341.

144. *See id.* at 341–42.

145. *Id.*

146. BAIRD, *supra* note 132, at 7.

147. ESTERGREEN, *supra* note 2, at 89, 103, 106, 126.

148. *Id.* at 230–31.

149. BAIRD, *supra* note 132, at 8.

150. *See* ESTERGREEN, *supra* note 2, at 106. Carson passed away at Ft. Lyon, Colorado, in 1868. *Id.* at 275–78. Future Colorado Supreme Court Justice Wilbur Fiske Stone called Carson pre-eminent among the pathfinders . . . . [H]is long career, ennobled by hardship and danger, is unsullied by the record of a littleness or meanness. He was nature’s model of a

Carson's picture adorns the inner dome of the Colorado State Capitol, as one of sixteen in the "Colorado Hall of Fame."<sup>151</sup> In the Denver Civic Center, the Pioneer Monument marks the end of the Smoky Hill Trail, an Indian trail from Kansas that was used by pioneers in the Gold Rush and thereafter. At the top of the fountain, rising on horseback from the basin, is the bronze figure of Kit Carson wearing buckskin, carrying a rifle, and pointing westward. The monument also features a prospector, a trapper, and a pioneer mother. She cradles a baby in one arm and holds a rifle in the other.<sup>152</sup>

The Hawken Rifle of the mountain men and some pioneer women was made in St. Louis.<sup>153</sup> In 1859–1860, William S. Hawken sold the St. Louis shop and moved to Denver, opening a Denver store in January 1860.<sup>154</sup> Perhaps he hoped that Denver would be the new St. Louis, the Gateway to the West. Hawken appears to have been the first nationally known manufacturer to move to Colorado. Denver soon became the "emporium" of the West, the commercial hub of a vast region in which there was no other large city.<sup>155</sup>

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gentlemen, kindly of heart, tolerant to all men . . . leaving behind him a name and memory to be cherished by his countrymen so long as modesty, valor, unobtrusive worth, charity and true chivalry survive among men.

1 HALL, *supra* note 2, at 161 (quoting Wilbur Fiske Stone, *Death of Kit Carson*, COLO. CHIEFTAIN, June 1, 1868, at 1, <http://pcclddigitalcollection.contentdm.oclc.org/cdm/compoundobject/collection/p16620coll15/id/202>).

He is the namesake of Kit Carson County, Colorado, as well as Carson City, the capital city of Nevada. The Kit Carson Highway takes travelers through southeastern Colorado into New Mexico. ESTERGREEN, *supra* note 2, at 279.

151. *Id.* The members in the Colorado Hall of Fame who are mentioned in this article are: Jim Baker (mountain man; *see* text accompanying notes 92, 139–42, 177, 550, 705); Casimero Barela (Sheriff and State Senator, *see* text accompanying notes 832–33); William Byers (founder of the Rocky Mountain News, *see* text accompanying notes 630–31); James Denver (territorial governor of Kansas during the first phase of the Gold Rush; *see* text accompanying notes 233–34); John Evans (territorial governor, founder of the University of Denver; *see* text accompanying notes 376, 418–21, 441–42, 455–56, 480, 497); William Gilpin (territorial governor; *see* text accompanying notes 100, 278–81, 284–99); Nathaniel Hill (chemist who discovered how to efficiently extract gold ore from the rest of the rock; U.S. Senator 1879–85; *see* text accompanying note 591); Bela Metcalf Hughes (founder of Overland Stage Company, president of first Denver-Cheyenne railroad; *see* text accompanying note 495); Chief Ouray (a leader of the Southern Utes; *see* text accompanying notes 549, 562, 575–76, 580, 583). *See* DEREK R. EVERETT, *THE COLORADO STATE CAPITOL: HISTORY, POLITICS, PRESERVATION 195–96* (2005).

Others in the Colorado Hall of Fame are: Dr. Richard Buckingham (helped establish the School of Deaf and Blind); John Lewis Dyer (Methodist-Episcopal preacher in the mining camps, known for pointing his gun at drunks who tried to interrupt his services. JOHN L. DYER, *THE SNOW-SHOE ITINERANT: AN AUTOBIOGRAPHY OF THE REV. JOHN L. DYER* (Andesite Press 2015) (1890)); Benjamin Eaton (started irrigation near Greeley; Governor 1885–87); Frances Jacobs (organized help for the destitute, which later became Community Chest; started free kindergartens and the National Jewish Hospital); Alexander Majors (carried supplies to forts and stations in the West; helped start the Pony Express; note 459); William Jackson Palmer (founder of Colorado Springs, and of the Denver & Rio Grande Railroad). *See* EVERETT, *at* 195–96.

152. Another equestrian statue of Carson is in Kit Carson Park, in Trinidad, Colorado, next to a Santa Fe Trail route.

153. *See* HANSON, JR., *supra* note 104, at 2.

154. BAIRD, *supra* note 132, at xvi–xvii, 29.

155. *See* LAMAR, *supra* note 2, at 246 (calling Denver "the vaunted emporium of the West").

The settlement of Colorado by the men and women of the United States began in earnest with the discovery of gold in Colorado at 1858.<sup>156</sup> A few hundred argonauts immediately rushed to Colorado.<sup>157</sup> Tens of thousands poured into Colorado in 1859, starting in the spring. Although there were many discouraged “go-backers,” the migrants who stayed probably equaled or exceeded the Colorado Indian population east of the Continental Divide, whose various tribes had only several thousand members each.<sup>158</sup>

While the gold rush was underway, American firearms manufacture was in the midst of a great leap forward.

### *C. Firearms Improvements in Mid-Nineteenth Century*

The greatest advances ever in affordable firearms coincided with Colorado’s entry into the United States. Between the first large-scale Colorado settlements in the 1850s, and statehood in 1876, all Americans witnessed astonishing improvements in firearms.

The Plains and Hawken Rifles were single-shot.<sup>159</sup> After one shot was fired, the user had to reload the gun. Multishot arms—commonly known as “repeaters”—had been invented centuries before, but they were

156. The discovery was made by a group headed by Georgia miner Green Russell and including Cherokee Indians. Russell was married to a Cherokee. LUKE TIERNEY & WILLIAM B. PARSONS, PIKE’S PEAK GOLD RUSH GUIDEBOOKS OF 1859, at 34, 55 (LeRoy R. Hafen ed., 1941). For a memoir stating that Russell joined the expedition when it was underway, and was not the founder of the expedition, see Philander Simmons, *The Cherokee Expedition of 1858*, in TIERNEY & PARSONS, *supra*, at 299, 299–304. See also 1 HALL, *supra* note 2, at 177 (describing how the Cherokees discovered Colorado gold in 1849 during travels for the California gold rush, and later organized the 1858 Colorado expedition).

Indians in Colorado had known about the gold for a while, and kept the secret, since they correctly foresaw that whites would swarm into the Indian hunting grounds once they learned about the gold. GEO. S. BLANCHARD, PEARMAN’S MAP AND PARSON’S GUIDE TO THE NEBRASKA AND KANSAS GOLD REGIONS 56 (Cincinnati, Geo. Blanchard 2d ed. 1859) (quoting “Memorial of the St. Louis Chamber of Commerce to the Honorable the Senate and House of Representatives of the United States of America, in Congress assembled”) (emphasis omitted).

157. See WEST, *supra* note 2, at 107.

158. See BERWANGER, *supra* note 2, at 10 (1860 census population of 34,277 in the former Kansas region; plus 4,223 in the former Nebraska region, and about 5,000 in the former New Mexico region); LAMAR, *supra* note 2, at 208 (estimating the total Indian and white populations in Colorado were about equal); LEONARD & NOEL, *supra* note 2, at 15 (1851 Cheyenne and Arapaho population was about 10,000); MISHKIN, *supra* note 59, at 11, 25 (total Kiowa population of 1,500 in 1869; probably not more than 2,000 in 1832); TRENHOLM, *supra* note 20, at 98–99, 133 (estimated total Arapaho population of 3,600 in early 1830s, and about 3,000 around 1850); *id.* at 164 (The 1862 Census of the Arkansas River tribes found 1,500 Arapaho; 1,800 Comanche; 1,800 Kiowa, and 500 Apaches).

Between 1860 and 1861, many men, especially those born in the South, returned to the States to fight on one side or the other of the Civil War. BERWANGER, *supra* note 2, at 9–10.

Although this article refers to early waves of immigrants from the East as “whites,” there was a small free black population Colorado from 1858 onwards, principally in Denver. See WHITFORD, *supra* note 2, at 40, 111. The summer 1861 census of Colorado reported 25,331 non-Indian inhabitants, comprising 18,136 white males over 21; 2,622 white males under 21; 4,484 females; and 89 blacks. *Id.* By the 1870 census, the black population had risen to 457. *Id.* at 111 (stating that the black population totaled in 237 in Denver, 54 in Central City, and 17 in Georgetown). As of 1880, the black population was 2,435. *Id.*

159. See BAIRD, *supra* note 132, at 5; see also HANSON, JR., *supra* note 104, at 1, 147.



expensive.<sup>160</sup> Their parts had to fit together much more closely than did the parts of a single-shot gun. The only way to make repeating firearms that were affordable to the mass consumer market was to make guns with interchangeable parts. To make interchangeable parts, it was first necessary to invent machine tools (tools for making tools) that could produce firearms parts.<sup>161</sup> These machine-made parts had to have close tolerances.<sup>162</sup> For example, the wooden stock for a rifle needed to have a slot that was just the right size to hold the rifle barrel—without extensive hand fitting needed for either the stock or the barrel.<sup>163</sup>

Starting in 1815, the federal government put the federal armories at Springfield, Massachusetts, and Harpers Ferry, Virginia, to work on inventing machine tools to make interchangeable parts.<sup>164</sup> In the Connecticut River Valley of western New England, the Springfield Armory worked closely with private arms makers, who in turn networked with other nascent industries.<sup>165</sup> The objective was a low-cost rifle, ideally a repeater.

With abundant rivers and streams for power, plenty of iron nearby, and an entrepreneurial spirit of middle-class inventors, the “Gun Valley” of New England became the Silicon Valley of its era. Its networks of “retained knowledge” and “technical skills and innovations . . . became embedded in communities of practice.”<sup>166</sup> The job-hopping, sophisticated,

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160. See, e.g., M.L. BROWN, FIREARMS IN COLONIAL AMERICA: THE IMPACT ON HISTORY AND TECHNOLOGY 1492–1792, at 50, 105–08 (1980) (ten-shot repeater with revolving cylinder, from 1490–1530; four-barreled fifteen-shot gun from seventeenth century; thirty-shot Danish flintlocks from 1646); J.N. GEORGE, ENGLISH GUNS AND RIFLES 55–58 (1947) (English breech-loading lever-action repeater, and a revolver, made no later than the British Civil War, and perhaps earlier, by an English gun maker); W.W. GREENER, THE GUN AND ITS DEVELOPMENT 81–82 (9th ed. 1910) (Henry VIII’s gun with a revolving multi-shot cylinder); David B. Kopel, *The History of Firearms Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 852–53 (2015) (discussing the history of multishot arms, starting with the sixteen-shot gun from 1580 and continuing to Lewis and Clark’s twenty-two-shot Girandoni rifle); Samuel Niles, *A Summary Historical Narrative of the Wars in New-England with the French and Indians*, in 6 Collections of the Massachusetts Historical Society 1837, at 154, 154 (American Stationers’ Co. Ser. No. 3, 1837) (eleven-shot gun in Massachusetts in 1722); HAROLD L. PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA 1526–1783, at 217 (Dover Publications 2000) (eight-shot gun invented by Philadelphia’s Joseph Belton); CHARLES WINTHROP SAWYER, FIREARMS IN AMERICAN HISTORY: 1600 TO 1800, at 194–98, 215–16 (1910) (multi-shot pistols from the American Revolution).

161. JOHNSON ET AL., *supra* note 2, at 143–44, 395.

162. See FELICIA JOHNSON DEYRUP, ARMS MAKERS OF THE CONNECTICUT VALLEY: A REGIONAL STUDY OF THE ECONOMIC DEVELOPMENT OF THE SMALL ARMS INDUSTRY, 1798–1870, at 97–98 (1948); see also ROSS THOMSON, STRUCTURES OF CHANGE IN THE MECHANICAL AGE: TECHNOLOGICAL INNOVATION IN THE UNITED STATES, 1790–1865, at 54–57 (2009).

163. JOHNSON ET AL., *supra* note 2, at 395.

164. See THOMSON, *supra* note 162, at 54–57.

165. See DEYRUP, *supra* note 162, at vii, 3–5 (an exquisitely detailed study on gun manufacturing, still relied on by scholars today); DAVID R. MEYER, NETWORKED MACHINISTS: HIGH-TECHNOLOGY INDUSTRIES IN ANTEBELLUM AMERICA 1–8 (2006); MERRITT ROE SMITH, HARPERS FERRY ARMORY AND THE NEW TECHNOLOGY: THE CHALLENGE OF CHANGE 121–23 (1977); THOMSON, *supra* note 162, at xiii–xiv, 54–57.

166. MEYER, *supra* note 165, at 280.

and youthful “machinists in the antebellum East anticipated modern behavior by over one hundred and fifty years.”<sup>167</sup>

By the 1830s, the federal arms-making project had succeeded so well that arms makers for the consumer market were also using mass production—and also substantially improving the techniques first developed in the federal armories. Early leaders were Colonel Samuel Colt, with his state-of-the-art revolver factory near Hartford; Christian Sharps, a riflemaker with his own outstanding factory in Hartford; and Eliphalet Remington, founder of the Remington Arms Company in upstate New York. In the 1850s, two other enduring companies—Smith & Wesson, and Winchester Repeating Arms—would enter the market.<sup>168</sup>

The first very common repeating firearms in America were “pepperbox” handguns. Introduced in the mid-1830s, they had multiple barrels that would fire sequentially.<sup>169</sup> The most common configurations were four to eight shots, but some models had as many as twenty-four.<sup>170</sup> Pepperboxes were good enough for self-defense at close range, but not accurate enough for anything else.<sup>171</sup>

Pepperboxes came on the market several years before Colt’s revolvers.<sup>172</sup> Unlike a pepperbox, a revolver has only a single barrel.<sup>173</sup> It holds several rounds of ammunition in a rotating cylinder, behind the barrel.<sup>174</sup> Because pepperboxes were less expensive than revolvers, many people who joined the 1849 California Gold Rush carried pepperboxes.<sup>175</sup> About a third of the miners of the Colorado Gold Rush had been California miners,<sup>176</sup> so we may infer that some of them brought pepperboxes. But by 1858, when the Colorado Gold Rush began, revolvers had become more affordable, and the advertisements for Colorado gun stores (discussed below) indicate that people buying new guns wanted revolvers, not pepperboxes.

As for long guns, the Plains or Hawken rifles were muzzleloaders. They had to be loaded from the front of the gun. Today, breechloaders are common; they load from the back of the gun. This makes reloading much faster. For a muzzle-loader, an expert might be able to fire five shots per minute, although three per minute was more typical.

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167. *Id.*

168. Initially, the companies had different names.

169. See LEWIS WINANT, PEPPERBOX FIREARMS 7–10 (1952) (discussing the firing mechanics of a pepperbox and providing pictures of different pepperboxes).

170. See *id.*

171. See WINANT, *supra* note 169, at 7, 10. See generally JACK DUNLAP, AMERICAN BRITISH & CONTINENTAL PEPPERBOX FIREARMS (1964) (discussing the various types of pepperboxes).

172. See CHARLES EDWARD CHAPEL, GUNS OF THE OLD WEST 84–86 (1961).

173. *Id.* at 85.

174. *Id.*

175. *Id.*

176. See *infra* text accompanying note 547.

The Plains rifle was outstanding in many ways, but heavy rifles are difficult to fire accurately while on horseback. In combat with a mounted party of Indians, who could rapidly load and fire arrows, even the best single-shot rifle was at a disadvantage.<sup>177</sup>

The first consumer mass market breechloader was the Sharps rifle, introduced in 1850. Although it was a single-shot gun, the breech-loading mechanism was so simple that a novice could fire nine shots in a minute.<sup>178</sup> The Sharps were particularly popular with pioneer families heading West. A superb long-range gun, the Sharps remained in common use for decades afterward.<sup>179</sup>

The first common repeating rifle was the lever action. With a lever action, loading the next shot is simple. To eject the empty metallic case and then bring a fresh cartridge into the firing chamber, the user pulls down a lever and then pushes it back up. In a typical lever action rifle, the reserve ammunition is held in a tubular magazine underneath the barrel.<sup>180</sup> Although the lever action had been invented in the seventeenth century,<sup>181</sup> it was not until the 1850s that machine tools were sufficiently advanced so that lever actions could be produced for the mass market.<sup>182</sup>

Daniel Wesson and Oliver Winchester collaborated to produce the thirty-shot Volcanic Rifle.<sup>183</sup> It did not sell well because of reliability problems.<sup>184</sup> Thereafter, Wesson concentrated on other projects, especially handguns, for which Smith & Wesson became famous. Meanwhile, Winchester worked on the rifle. A much-improved Winchester was introduced in 1862, the Henry Rifle.<sup>185</sup> It could fire sixteen shots without reloading. The Henry was a big success.<sup>186</sup>

An even bigger success was an improved version of the Henry, the Winchester Model 1866, the first gun produced under the Winchester name.<sup>187</sup> It could fire up to eighteen shots without reloading.<sup>188</sup> Winchester

177. See VESTAL, *supra* note 92, at 270–71 (providing Jim Bridger’s observations on Indians’ combat prowess).

178. *Sharps’ Breech-Loading Patent Rifle*, 5 SCI. AM. 193, 193 (1850).

179. See TOWNSEND WHELAN, *THE AMERICAN RIFLE: A TREATISE, A TEXT BOOK, AND A BOOK OF PRACTICAL INSTRUCTION IN THE USE OF THE RIFLE* 9 (1918).

180. JOHNSON ET AL., *supra* note 2, at 403; ARTHUR PIRKLE, *WINCHESTER LEVER ACTION REPEATING FIREARMS: THE MODELS OF 1866, 1873 & 1876* (2010).

181. GEORGE, *supra* note 160, at 55–58 (1947) (English lever-action repeater).

182. JOHNSON ET AL., *supra* note 2, at 397–98, 403.

183. See NORM FLAYDERMAN, *FLAYDERMAN’S GUIDE TO ANTIQUE AMERICAN FIREARMS . . . AND THEIR VALUES* 300 (9th ed. 2007). Oliver Winchester had an ownership interest in Volcanic, and he acquired the company in 1857. *Id.*

184. See *id.*

185. WILEY SWORD, *THE HISTORIC HENRY RIFLE: OLIVER WINCHESTER’S FAMOUS CIVIL WAR REPEATER* 7 (2002).

186. Indeed, it is still in production today. See HENRY ARMS COMPANY, *THE RIFLES OF THE HENRY REPEATING ARMS COMPANY* (2009). Sales in 1860–1866 were about 14,000. FLAYDERMAN, *supra* note 183, at 305.

187. See HAROLD F. WILLIAMSON, *WINCHESTER: THE GUN THAT WON THE WEST* 49 (1952).

188. *Id.*

touted the Model 1866 (or M1866) for defense against “sudden attack either from robbers or Indians.”<sup>189</sup> According to advertising, the M1866 “can . . . be fired thirty times a minute.”<sup>190</sup> With seventeen in the magazine and one in the chamber, “eighteen charges, which can be fired in nine seconds.”<sup>191</sup> The gun was a major seller in the American West, including in Denver.<sup>192</sup> There were over 170,000 Model 1866s produced.<sup>193</sup>

The trends that had been established in the 1850s were accelerated by the Civil War in 1861–1865.<sup>194</sup> Breechloaders and repeaters “were exceptional at the beginning of the war but had become weapons of choice at the war’s end.”<sup>195</sup> The war happened to come at a time when the domestic industry had developed the ability to scale up massively.<sup>196</sup> That scaled-up industry is essentially the American firearms industry that has continued to the present.

Next came the Winchester M1873, “The Gun that Won the West.”<sup>197</sup> The Winchester M1873 and then the M1892 were lever actions; the former had a magazine capacity of six to twenty-five, depending on caliber and configuration, while the latter than ten or eleven rounds in tubular magazines.<sup>198</sup> There were over 720,000 Winchester 1873s made from 1873 to 1919.<sup>199</sup>

Manufactured in Maine, the Evans Repeating Rifle also came on the market in 1873.<sup>200</sup> The innovative rotary helical magazine in the buttstock held thirty-four rounds.<sup>201</sup> It was commercially successful for a while, although not at Winchester’s or Colt’s levels. Over 12,000 copies were produced.<sup>202</sup>

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189. R.L. WILSON, WINCHESTER: AN AMERICAN LEGEND 32 (1991) (emphasis omitted) (quoting a Winchester advertisement “of the late 1860s”).

190. WILLIAMSON, *supra* note 187, at 49.

191. GARAVAGLIA & WORMAN, *supra* note 2, at 124, 128. The Winchester Model 1866 was produced until 1898. FLAYDERMAN, *supra* note 183, at 306; PIRKLE, *supra* note 180, at 44.

192. WILSON, *supra* note 189, at 35.

193. FLAYDERMAN, *supra* note 183, at 306.

194. *See* THOMSON, *supra* note 162, at 307.

195. *Id.*

196. *See id.* at 307–08.

197. *Model 1873 Short Rifle*, WINCHESTER REPEATING ARMS, <http://winchesterguns.com/products/rifles/model-1873/model-1873-current-products/model-1873-short-rifle.html> (last visited Nov. 25, 2017).

198. PIRKLE, *supra* note 180, at 107; *Model 1892 Short Rifle*, WINCHESTER REPEATING ARMS, <http://www.winchesterguns.com/products/rifles/model-1892/model-1892-current-products/model-1892-short-rifle.html> (last visited Nov. 25, 2017).

199. FLAYDERMAN, *supra* note 183, at 307. The Model 1873 was Pa Cartwright’s gun on the 1959–73 television series *Bonanza*. JIM SUPICA ET AL., TREASURES OF THE NRA NATIONAL FIREARMS MUSEUM 108 (2013).

200. FLAYDERMAN, *supra* note 183, at 694.

201. DWIGHT B. DEMERITT, JR., MAINE MADE GUNS & THEIR MAKERS 293–95 (rev. ed. 1997); FLAYDERMAN, *supra* note 183, at 694. A later iteration of the rifle held twenty-five or twenty-eight rounds in the buttstock. *See* DEMERITT JR., *supra*, at 301.

202. FLAYDERMAN, *supra* note 183, at 694.

Meanwhile, Colt's and Smith & Wesson were doing a booming business with their revolvers. As patents expired, many other companies began making revolvers.

While five- or six-shot revolvers were taking over the handgun business, inventors were already at work on what would be the next major step in handgun development: a handgun with greater capacity. Pin-fire revolvers with capacities of up to twenty or twenty-one entered the market in the 1850s, but were more popular in Europe than America.<sup>203</sup> For revolvers with other firing mechanisms, some models held more than seventeen rounds.<sup>204</sup> The twenty-round Josselyn belt-fed chain pistol was introduced in 1866, and various other chain pistols had even greater capacity.<sup>205</sup> Chain pistols did not win much market share, perhaps in part because the large dangling chain was such an impediment to carrying the gun.<sup>206</sup>

Eventually, the ammunition capacity issue would be resolved by the use of a rectangular box magazine to store ammunition. It could have greater capacity than a revolving cylinder or a tube, and it was more reliable than the alternatives. The first handgun to use a detachable box magazine was the ten-round Jarre harmonica pistol, patented in 1862.<sup>207</sup> Starting in the 1890s, the box magazine would become common for handguns.

The muzzleloading musket of 1791 in expert hands could fire up to five shots per minute. With a Sharps rifle of the early 1850s, anyone could now fire nine shots per minute. With a revolver or a repeating rifle, that rate of fire could be doubled, tripled, or more. And the new guns had much greater range and accuracy than their predecessors. Invented in the early seventeenth century, breech-loading repeaters in the mid-nineteenth century became an ordinary consumer good. As far as the historical record indicates, no one asserted that better guns showed a need for more stringent gun control.

The combination of the new mass producers catering to consumers and the enormous federal government demand for firearms during the Civil War spurred innovation.<sup>208</sup> From 1856–1865, firearms accounted for 64.8% of all American patents.<sup>209</sup> During the eighteenth century, there had been five English patents for breech-loading firearms. The first American

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203. See SUPICA ET AL., *supra* note 199, at 48–49; see also WINANT, *supra* note 169, at 67–70 (discussing different firing methods and ammunition capacities of pepperboxes).

204. See, e.g., WINANT, *supra* note 169, at 104–07.

205. *Id.* at 204, 206.

206. See *id.* at 204.

207. *Id.* at 156–57. The Jarre magazine stuck out horizontally from the side of the firing chamber, making the handgun difficult to carry in a holster, which perhaps explains why the gun never had mass success. SUPICA ET AL., *supra* note 199, at 33.

208. THOMSON, *supra* note 162, at 95.

209. *Id.* at 69–70, 95.

breech-loading patent was awarded in 1811 to John H. Hall, a machine tool inventor. By 1860, there were over a hundred American breech-loading patents, and by 1871 over 700—four times the rest of the world, combined.<sup>210</sup>

## II. EARLY COLORADO: SURVIVAL AND SOVEREIGNTY

### A. *The Gold Rush*

“Although the conditions [the Colorado pioneers] encountered were frontier, their psychological state could be described as optimistic and entrepreneurial. The key to early Colorado history lay in the juxtaposition of this condition and this attitude.”<sup>211</sup>

In the towns that were embarkation points for the West, argonauts bought supplies for their journey to Pike’s Peak country.<sup>212</sup> Guidebooks detailed the routes, equipment, and practices that would be necessary for the trip, and for making a start in Colorado. Advertisements in the guidebooks tell us something about the arms that were available. An advertisement from a firearms manufacturer and retailer in Glenwood, Iowa, offered “The best GUNS and PISTOLS, BOWIE KNIVES, SCABBARDS, BELTS, FLASKS, &c., . . . . All kinds of ammunition constantly on hand.”<sup>213</sup> Some emigrants already had their own firearms, for whom the store offered, “[a]ll kinds of repairing done on the shortest notice.”<sup>214</sup> As the wholesale agent for a large Connecticut manufacturer, a store in Kansas City advertised “GUNPOWDER!”<sup>215</sup> The store promised “FUSE AND PERCUSSION CAPS ALWAYS ON HAND.”<sup>216</sup>

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210. CHARLES B. NORTON, *AMERICAN BREECH-LOADING SMALL ARMS: A DESCRIPTION OF LATE INVENTIONS, INCLUDING THE GATLING GUN, AND A CHAPTER ON CARTRIDGES* 11, 19 (New York, F.W. Christern 1872).

211. LAMAR, *supra* note 2, at 225.

212. Pike’s Peak was the best-known geographic feature of Colorado. See DUANE A. SMITH, *THE BIRTH OF COLORADO: A CIVIL WAR PERSPECTIVE* 6 (1989). It was a name for the entire area, even though the peak itself is near Colorado Springs, about 60 miles south of the gold finds near Denver. *Id.*

213. LUKE TIERNEY, *HISTORY OF THE GOLD DISCOVERIES ON THE SOUTH PLATTE RIVER* 33 (Pacific City, Smith & Oaks 1859). Tierney was better informed than most guidebook authors, since he had participated in the 1858 expeditions. WEST, *supra* note 2, at 125.

214. TIERNEY, *supra* note 213, at 33.

215. O.B. GUNN, *NEW MAP AND HAND-BOOK OF KANSAS & THE GOLD MINES* 65 (LeRoy R. Hafen ed., W.S. Haven 1952) (1859).

216. *Id.* Percussion caps were the primer to ignite the gunpowder. Today, the primer is part of a complete “round” of ammunition, which consists of the primer, gunpowder, shell casing, and lead bullet. Before that, the percussion cap primer was a separate item, and was loaded separately from the bullet and gunpowder. As noted above, modern ammunition was just entering the market in the late 1850s.

The Kansas City store was a wholesaler for Hazard Powder Company, based in Hazardville, Connecticut, near Enfield. At the time, the company was manufacturing 12 tons of “sporting powder” and 16 tons of blasting powder every day. EDWARD CHANNING ALLEN II, *COLONEL AUGUSTUS G. HAZARD AND THE HAZARD POWDER COMPANY* 7, 9 (2012). The fuses would presumably be for blasting in mining operations. The gunpowder could be used mining and for firearms.

For recommended supplies, one guidebook suggested the following for a group of four men for six months: “2,000 gun caps [ammunition primers] . . . 1 case [gun]powder,” plus a variety of knives.<sup>217</sup> Everyone would need a “good rifle and revolver—the first for game, and both for protection against marauders.”<sup>218</sup> On the trail, “small companies” should “join together for mutual interest and self-protection.”<sup>219</sup> Another guide, also for four persons for six months, recommended “2,000 gun and pistol caps (Eley’s water-proof)” plus assorted knives.<sup>220</sup> The model of rifle “depends in a great measure upon the taste of the individual. Light sporting rifles, with fancy stocks, are not suitable to withstand the rough usage of the plains—neither should too heavy rifles be taken.”<sup>221</sup> The author considered Hawken rifles to be “preferable to any other.”<sup>222</sup> “Revolvers can be obtained at prices varying according to the sharpness of the person trading for them.”<sup>223</sup>

On the trail, “[e]very person, excepting the officers, should be compelled to perform guard duty . . . . [I]t requires some self-control to crawl out of warm and dry blankets, shoulder a rifle, and walk four hours in the rain, without [sic] grumbling at the guard captain . . . .”<sup>224</sup> Guards were constantly necessary whenever the stock (mules and oxen were best) were detached from the wagons; the risk of a stampede caused by buffalo was greater than one incited by Indians.<sup>225</sup>

If Indians came upon some emigrants, the best approach was to feed a small group, or to feed the leading men of a large group. Trading with Indians for needed moccasins, robes, or belts was fine, “but keep your arms in good order, and always ready for use. Be kind, and yet cautious, and you will have no trouble with them.”<sup>226</sup> Of the emigrants, “[m]ost

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217. GUNN, *supra* note 215, at 44.

218. *Id.* at 45.

219. *Id.*

220. WILLIAM B. PARSONS, *THE NEW GOLD MINES OF WESTERN KANSAS* 21–22 (2d ed. 1859). Parsons had participated in the 1858 gold discovery expeditions, so he knew what he was writing about. WEST, *supra* note 2, at 125.

Eley is an English manufacturer, long renowned for superior quality. See C.W. HARDING, *ELEY CARTRIDGES: A HISTORY OF THE SILVERSMITHS AND AMMUNITION MANUFACTURERS* 5 (2006).

221. BLANCHARD, *supra* note 156, at 23.

222. *Id.*

223. *Id.* Another guidebook contained an advertisement for the Russell, Majors, and Waddell dry goods store in Leavenworth, Kansas, whose wares included “guns, pistols, knives, etc.” TIERNEY & PARSONS, *supra* note 156, at 234 (quoting L.J. EASTIN, *EMIGRANT’S GUIDE TO PIKE’S PEAK* 8 (Leavenworth, L.J. Eastin 1859)).

224. BLANCHARD, *supra* note 156, at 29–30. Similar advice is in TIERNEY & PARSONS, *supra* note 156, at 264 (summarizing the advice contained in NATHAN HOWE PARKER & D.H. HUYETT, *THE ILLUSTRATED MINERS’ HAND-BOOK AND GUIDE TO PIKE’S PEAK, WITH A NEW AND RELIABLE MAP, SHOWING ALL THE REGIONS OF WESTERN KANSAS AND NEBRASKA* 59–60 (St. Louis, Parker & Huyett 1859)).

225. BLANCHARD, *supra* note 156, at 30.

226. *Id.* at 33.

came well armed. No outfit was complete without a revolver, a diarist noted.<sup>227</sup>

With the Gold Rush came the establishment of towns such as Denver, Auraria, Golden, Georgetown, and Colorado City (now part of Colorado Springs). Besides miners, emigrants were merchants, farmers, or others who hoped to participate in the growth of a new territory.<sup>228</sup>

### *B. Making New Governments*

As of 1858, the land that would become the State of Colorado was part of four territories: Kansas (whose capital was Topeka), Utah (Salt Lake City), New Mexico (Santa Fe), and Nebraska (Omaha). The major area of settlement was within the Territory of Kansas, near or in the Front Range. The territorial legislature of Kansas in 1855 created Arapahoe County, and in 1859 divided Colorado into five counties.<sup>229</sup> But the territorial government of Kansas had little influence in Colorado. It was busy with a civil war in eastern Kansas, between pro-slavery and anti-slavery forces.<sup>230</sup> There was a Kansas judge for Colorado, but he never went to Colorado.<sup>231</sup> None of the territorial governments could do much to assist remote Colorado. The settlers were on their own.

Moreover, Colorado and the rest of western Kansas were still Indian country by treaty, so Kansas lacked authority even to attempt to organize county governments there.<sup>232</sup> Nevertheless, after the reports of the 1858 gold discovery, Kansas Governor James W. Denver commissioned several men to set up a county government; they included Arapahoe County

227. WEST, *supra* note 2, at 134–35 (also noting that the diarist doubted that most argonauts could hit a target twenty paces distant).

228. See, e.g., LAMM & SMITH, *supra* note 2, at 15; LEONARD & NOEL, *supra* note 2, at 9–10; WEST, *supra* note 2 at 250–54.

229. ERICKSON, *supra* note 2, at 3.

230. See JAY MONAGHAN, CIVIL WAR ON THE WESTERN BORDER: 1854–1865, at 12–14 (1955). The Kansas Territory was created in 1854 by the Kansas-Nebraska Act. Kansas-Nebraska Act, ch. 59, §§ 19, 37, 10 Stat. 277, 283–84, 290 (1854). The act left the slavery issue to a vote of the settlers, which led to much violence by “border ruffians” from the slave state of Missouri. *Id.* § 1, 10 Stat. at 277; MONAGHAN, *supra* note 230, at 12–14. Anti-slavery emigrants defended themselves with “Beecher’s Bibles,” Sharps rifles that were shipped from the Massachusetts Emigrant Aid Society, in boxes with Bibles to conceal the rifles underneath.

231. See ERICKSON, *supra* note 2, at 3.

232. See Treaty of Fort Laramie with Sioux etc., 1851, art. 5, Sept. 17, 1851, 11 Stat. 749, reprinted in 2 INDIAN AFFAIRS, *supra* note 2, at 594–96 (granting the Cheyenne and Arapahoe territory between the North Platte and the Arkansas Rivers, between the Rocky Mountains and the Smoky Hill area of Kansas); see also 1 HALL, *supra* note 2, at 209 (noting that the organic act for the Kansas Territory expressly excepted any areas where Indians had title). Indeed, in 1863, the U.S. government surveyor general refused to confirm Coloradans’ land titles until Indian claims to the area were extinguished. AFTON ET AL., *supra* note 2, at xv. Such claims were confirmed by Congress in 1864. See *infra* note 244 and accompanying text.

The Treaty of Fort Laramie was signed by three Arapaho chiefs and four Cheyenne ones. Treaty of Fort Laramie with Sioux etc., 1851, *supra*, at art. 8. Other signatories were Sioux, Crows, Assinaboines, Mandans and Gros Ventre, and Arickarees. *Id.* (quoting Treaty of Fort Laramie with Sioux etc., 1851, *supra*, at art. 8). Among the terms were that the signatory tribes not war against each other. *Id.* at 594 (Treaty of Fort Laramie with Sioux etc., 1851, *supra*, at art. 1).



Sheriff Edward W. Wynkoop and Treasurer John Larimer.<sup>233</sup> In November 1858, Larimer and others organized the Denver Town Company.<sup>234</sup> Separately, Arapahoe County officers were elected in March 1859.<sup>235</sup> (Denver was part of Arapahoe County until the adoption of the home rule constitutional amendment in 1902.<sup>236</sup>) The newly elected county officers did not wait for consent or orders from Kansas before taking office.<sup>237</sup>

Whatever role Kansas had in the government of the Colorado ended on January 29, 1861, when Kansas was admitted to the Union, with its present western boundary, the 102nd degree of western longitude.<sup>238</sup>

The first governments were created by the people themselves, as “miner’s districts” in the mining regions, as “claims clubs” in farming areas,<sup>239</sup> and as “town companies.”<sup>240</sup> These voluntary associations

233. ERICKSON, *supra* note 2, at 4. Both men are namesakes of streets in lower downtown Denver. Wynkoop’s obituary called him “one of the finest pistol shots in the world.” CAROL TURNER, FORGOTTEN HEROES & VILLAINS OF SAND CREEK 28 (2010) (quoting Wynkoop’s obituary published in the *Denver Republican*). For more on Wynkoop, see text accompanying notes 260, 378, 466, 618.

234. 1 HALL, *supra* note 2, at 182. The first whites to settle the site had dubbed it “St. Charles.” *See id.* But many of the town founders had gone east for the winter, and those who remained were cajoled or coerced into accepting the new organization of Denver. *See id.* James Denver was not terribly impressed by the honor of being the city’s namesake, and he only visited Denver once in his life. *Id.* Even if he had been flattered, he had no political benefit to confer; unbeknownst to the Denver settlers, he had resigned as Kansas Territorial Governor on Oct. 10, 1858. 2 HALL, *supra* note 2, at 327.

235. ERICKSON, *supra* note 2, at 5; 1 HALL, *supra* note 2, at 183.

236. COLO. CONST. art. XX, § 1.

237. 1 HALL, *supra* note 2, at 183.

238. Kansas disclaimed the portion of the Kansas Territory that lay in Colorado. The Kansans had debated between “Big Kansas” or “Little Kansas,” and the majority had decided on the latter, partly to keep the state capital in a more easterly location. *See* Francis H. Heller & Paul D. Schumaker, *The Kansas Constitution: Conservative Politics through Republican Dominance*, in THE CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 490, 496–97. The Little Kansas advocates also defeated efforts to claim part of what is now the State of Nebraska. *Id.* The citizens of eastern Kansas wanted to the state capital nearby, and feared that a state stretching all the way to Rocky Mountains would need a capital further west than they desired. *Id.*; Calvin W. Gower, *Kansas Territory and Its Boundary Question: “Big Kansas” or “Little Kansas,”* 33 KAN. HIST. Q. 1, 3, 8 (1967), <https://www.kshs.org/p/kansas-historical-quarterly-kansas-territory-and-its-boundary-question/13180>.

239. *See, e.g.,* JOLIE ANDERSON GALLAGHER, A WILD WEST HISTORY OF FRONTIER COLORADO: PIONEERS, GUNSLINGERS & CATTLE KINGS ON THE EASTERN PLAINS 37 (2011) (discussing the formation of the El Paso Claim Club, whose jurisdiction included Colorado City, which later became Colorado Springs).

240. The first miners’ court was created in the Gregory District of Gilpin County, in 1859. ERICKSON, *supra* note 2, at 9. Subsequent courts followed the Gregory model. *Id.*; 1 HALL, *supra* note 2, at 205 (discussing the Gregory meeting, followed by a July 9th meeting to elect local officers, including Richard Sopris as President and Charles Peck as Sheriff). The Gold Hill district was organized by a mass convention on July 23, 1859. 3 HALL, *supra* note 2, at 291. Boulder’s town company organized on February 10, 1859. *Id.* at 292.

For an example of early mining town law, see WILLIAM TRAIN MUIR, LAWS OF THE NEVADA MINING DISTRICT 1861 (1962). Nevadaville was 2.5 miles south of Central City, Colorado. Nolie Mumeay, *Nevadaville*, in *id.*, at 1 n.1. Its maximum population was about one thousand. *Id.* at 9.

The preamble to the Nevadaville laws explained that they were adopted by we the people in a mass meeting because we “have no civil government extended to us, by the Authorities of the United States, or of the Territory in which we now reside.” *Id.* at 26. The laws created the Office of Sheriff, with the same powers as a Kansas sheriff. *Id.* at 44. Likewise, civil or criminal laws would be based on Kansas, to the extent that they were not changed by the Nevadaville enactments. *Id.* at 50.

recorded and certified property ownership, provided courts for settling disputes, and organized vigilance committees for law enforcement.<sup>241</sup> Some towns elected their own legislatures.<sup>242</sup> They created “people’s courts” for criminal prosecutions.<sup>243</sup> The decisions of the miner’s districts were later ratified in the first session of the territorial legislature.<sup>244</sup> They were also approved by the Colorado Territorial Supreme Court.<sup>245</sup> By accepting and integrating the decisions of the *ad hoc* miners’ courts and other early bodies, the developing territorial courts provided continuity of law.<sup>246</sup>

Strictly speaking, the entire settlement of Colorado had been of questionable legality; whatever lands were ceded by Indian treaties belonged to the federal government, which had never enacted any law for transfer of title to settlers.<sup>247</sup> Congress recognized the *fait accompli* in 1864 and gave clear title to all Colorado settlers.<sup>248</sup>

In January 1859, U.S. Representative Alexander Stephens (D-Ga.) introduced a bill into the thirty-fifth Congress to create the Territory of Jefferson, which would comprise much of modern Colorado plus a great deal of land to the north.<sup>249</sup> Stephens (who would later become Vice President of the Confederate States of America) had been a leading advocate of bringing Kansas into the Union as a slave state, so anti-slavery representatives were wary, and the bill was not enacted.<sup>250</sup>

In response to the request of mass conventions in Denver and Auraria on September 24, 1859, a convention of eighty-eight delegates assembled

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A typical mining district provision punished “[a]ny person shooting or threatening to shooting another, or using or threatening to use any deadly weapons, except in self-defense . . .” ERICKSON, *supra* note 2, at 9–10 (quoting laws of the Spanish Bar District, in Clear Creek County). The language should not be read hyper-literally. A butcher’s knife is a deadly weapon; the law did not mean to forbid “use” of a butcher knife for cutting meat.

241. ERICKSON, *supra* note 2, at 9; GALLAGHER, *supra* note 239, at 37.

242. See, e.g., 1 HALL, *supra* note 2, at 205.

243. See, e.g., ERICKSON, *supra* note 2, at 9.

244. See Hensel, *supra* note 2, at 13–18.

245. Sullivan v. Hense, 2 Colo. 424, 429 (1874); GUICE, *supra* note 2, at 117 (“Hallett’s recognition of the validity of mining district rules was one of the earliest and most important by a state or territorial court. Since the Colorado miners entered the public domain with no legal authority, the validation of mining district rules was actually a departure from the English common law. Under the common law, some type of permission from the central government would have been prerequisite to valid claims.”). Similarly, in a water law case, Chief Judge Hallett explained that the common law must be modified to fit local conditions. See *infra* note 564 and accompanying text.

246. See LAMAR, *supra* note 2, at 257–58.

247. See LEONARD & NOEL, *supra* note 2, at 28.

248. *Id.*

249. H.R. 835 sec. 1, 35th Cong. (1859); see also CONG. GLOBE, 35th Cong., 2d Sess. 657 (1859) (noting that Committee on Territories had reported the bill to the full House, with a favorable recommendation).

A competing bill, to create a Territory of Colona, was introduced by anti-slavery Republican Schuyler Colfax, of Indiana. BERWANGER, *supra* note 2, at 3. It was not enacted. *Id.* As Speaker of the House (1863–1869) and Vice-President (1869–1873), Colfax always took a friendly interest in Colorado, and visited it twice. He is the namesake of Colfax Avenue, in Denver.

250. See H.R. 835 sec. 1, 35th Cong. (1859); see also MARK STEIN, HOW THE STATES GOT THEIR SHAPES TOO: THE PEOPLE BEHIND THE BORDERLINES 232 (2011).

in Denver on October 10, 1859, to draft a constitution for a provisional government for the “Territory of Jefferson.”<sup>251</sup> The territorial constitution was adopted by popular vote and officers elected on October 24.<sup>252</sup> The convention had been presented with a written protest that there was no legal authority to separate from Kansas, and that doing so “will abrogate all legal rights, and throw the country upon the results of a gigantic Vigilance Committee.”<sup>253</sup> The convention and the people did not agree.<sup>254</sup> When Kansas Territorial Governor Samuel Medrey found out about what Coloradans had done, he sent them an order instructing them to elect county officers under the laws of Kansas.<sup>255</sup> “This order being disapproved, it was wholly ignored.”<sup>256</sup>

Not putting all their eggs into the provisional basket, the citizens of Arapahoe County elected Richard Sopris as their delegate to the Kansas legislature on December 9, 1859.<sup>257</sup>

Provisional Governor Robert Steele addressed the opening of the Jefferson legislature on November 7, 1859. He explained that the people had been denied protection of life and property; being sovereign, they had taken measures for their security.<sup>258</sup>

The provisional legislature created the first legal code for Colorado. The code imposed additional punishment on burglars who carried a firearm, and left legitimate use of firearms entirely unimpaired.<sup>259</sup> The

251. Wharton, *supra* note 2, at 17. Auraria (southwest of Cherry Creek) and nearby Denver (northeast of Cherry Creek) had originally been rivals. 4 HALL, *supra* note 2, at 25. They were consolidated by a popular vote on Apr. 3, 1860. *Id.*

252. See Wharton, *supra* note 2, at 19. The vote was 1,852 in favor of the provisional government, and 280 against. *Id.*

253. ERICKSON, *supra* note 2, at 12–13 (quoting a written protest filed by H.P.A Smith); see also LEONARD & NOEL, *supra* note 2, at 23.

254. See 1 HALL, *supra* note 2, at 209 (“No attention whatsoever was paid to this remonstrance.”). “Note the dashing boldness of these resolute pioneers . . . taking measures without precedent, without authority of law, and without the slightest prospect for ratification, for the creation of an independent commonwealth.” *Id.* at 185.

255. *Id.* at 210.

256. *Id.*

257. *Id.* at 170.

258. Governor Steele continued:

A vigilance committee, the first resource of an isolated and exposed community, was organized, and certain offences occurring during the winter and spring were taken cognizance of. But a more perfect form of government than was afforded by a vigilance committee was needed . . . . The only resource left us was in the exercise of that inherent right of self-government which every community of American citizens is held to possess.

2 HALL, *supra* note 2, at 516 (quoting Governor R.W. Steele, Address at the House of Representatives of the Territory of Jefferson (Nov. 7, 1859)).

Steele was remembered in the nineteenth century as a “universally venerated pioneer . . . the first of the great historic figures in the history of Colorado.” 4 HALL, *supra* note 2, at 562.

259. Provisional Laws and Joint Resolutions, Passed at the First and Called Sessions of the General Assembly of Jefferson Territory, ch. 11 sec. 37 (1860).

Jefferson legislature also organized a territorial militia, comprising the Jefferson Rangers (from Auraria) and the Denver Guards.<sup>260</sup>

Jefferson Territory claimed to comprise not only what would later become Colorado, but also the Nebraska panhandle, southern Wyoming, and some of eastern Utah.<sup>261</sup> With no legal authorization—except from the self-governing people of Colorado—Jefferson Territory elected a territorial delegate to Congress. The provisional government did some good, and certainly does not seem to have caused a decline in law and order.

However, the provisional government was mostly disregarded outside of Denver, and even in the city “it was powerless to enforce its decrees. The chief reliance of the citizens lay in the Committee of Safety.”<sup>262</sup>

The Jefferson legislature granted Denver City a municipal charter, and the city’s officers were elected on December 19, 1859.<sup>263</sup> But the officers were desultory about setting up a functioning government, so in September 1860, a series of public meetings adopted a proposed structure of government for Denver; it was submitted to the voters in October 1860, and overwhelmingly adopted.<sup>264</sup> In that same election, city officers were chosen.<sup>265</sup>

As of 1860, Denver had five competing court systems.<sup>266</sup> Forum shopping was common.<sup>267</sup> Meanwhile, “the mountain counties stood by their Miner’s courts, and as much of the Provisional Government as suited them.”<sup>268</sup> Other Coloradans created judicial districts for what they called

260. WHITFORD, *supra* note 2, at 38–39. These units disbanded after Congress created the Territory of Colorado. *Id.* at 39. The Denver Guards were mounted and comprised one hundred men. Wharton, *supra* note 2, at 33. Their First Lieutenant was Edward Wynkoop. *Id.*

261. See STEIN, *supra* note 250, at 230. The provisional boundaries were 37° to 43° of northerly latitude, and 102° to 110° of westerly longitude. See H.R. 835 sec. 1, 35th Cong. (1859). The 1861 boundaries of the Colorado Territory (and later, the State) were 37° to 41° North, and 102°03' to 109°03' West. See COLO. CONST. art. I (expressing longitude in terms of degrees west of Washington). The sizes of most western states are based on Thomas Jefferson’s principle that states should be equals, so that states are approximately equal in height, breadth, or both. STEIN, *supra* note 250, 54–55.

The Jefferson provisional government, aware of its tenuous status, did not attempt to collect taxes. *Id.* at 232. The legislature did pass a one-dollar poll tax, which the miners resolved not to pay. LAMAR, *supra* note 2, at 187.

262. 1 HALL, *supra* note 2, at 247.

263. Wharton, *supra* note 2, at 20.

264. *Id.* at 65–66.

265. *Id.* at 66. Once a federally authorized territorial legislature was set up, it granted Denver a charter, effective November 8, 1861. *Id.* at 80.

266. ERICKSON, *supra* note 2, at 15. There were the courts of the Jefferson Territory, of Kansas, the Denver legislative council’s courts of common pleas and appeals (more influential than the Jefferson or Kansas courts), the people’s courts for criminal cases (organized ad hoc to hear capital cases brought by vigilance committees), plus the Arapahoe County Claim Club. 3 HALL, *supra* note 2, at 267, 269. “For two years or more the Territorial, county and city affairs were so intermingled it was difficult to draw the distinctions between them.” *Id.* at 267.

267. ERICKSON, *supra* note 2, at 15.

268. W.B. Vickers, *Territorial Organization*, in LEGISLATIVE, HISTORICAL AND BIOGRAPHICAL COMPENDIUM OF COLORADO 144, 145 (Denver, C.F. Coleman’s Publ’g House 1887).

“Idaho Territory.”<sup>269</sup> In short, there were multiple governments in Colorado with alleged jurisdiction, and in fact the people of Colorado entirely governed themselves:

Side by side sat the Idaho “central judicial” officers, the provisional government of Jefferson, the Kansas county officials, the Denver people’s government, scores of miners’ courts, and local governments and vigilante committees. Never had frontier democracy blossomed so vigorously. With popular sovereignty in the saddle, the northern part of Bent’s old empire was already a far cry from the tradition-bound and caste-conscious territory of New Mexico. A new kind of democratic, middle-class, commercial-minded frontier had arrived on the borders of the Spanish Southwest.<sup>270</sup>

Colorado was the periphery of the periphery. Very soon, “the people of Colorado had through necessity come to see themselves as a distinct people.”<sup>271</sup> As Territorial Secretary Frank Hall later wrote, they were “a free and radically independent people.”<sup>272</sup>

Bills to create a Colorado Territory were introduced in both houses of the thirty-sixth Congress in January 1860.<sup>273</sup> On February 2, 1861, the full Senate took up the bill.<sup>274</sup> The Senate changed the name from “Idaho” to “Colorado,” and transferred the northernmost part of New Mexico to the Colorado Territory.<sup>275</sup> In a compromise, the Organic Act said nothing

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269. See LAMAR, *supra* note 2, at 187 (crediting creation of these districts to a convention held in Central City in October 1860).

270. *Id.* at 187–88. The Colorado pioneers “were as well-versed in self-government as any people in world.” *Id.* at 185. The majority were from Kansas, Nebraska, Iowa, and Missouri, where “[d]uring the turbulent fifties they had learned much about local self-government, town founding, and territorial organization . . . [B]y 1859 they were all sophisticated practitioners of popular sovereignty.” *Id.*

271. Vicky Bollenbacher, *Two Sides of Colorado, Amplified Through Constitutional Redesign*, in THE CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 595, 596. Bollenbacher’s point is consistent with the observations of other historians. Bollenbacher is not, however, a reliable guide to the 1876 constitution. She claims that in the Constitution, Indians were not citizens, black people could not vote, and the voting age was 18. *Id.* at 595, 598. These claims are incorrect. The 1876 constitution says nothing about Indians. See generally COLO. CONST. (1876). The voting age was twenty-one and had no racial barrier. *Id.* art. VII § 1 (repealed 1988). Males could vote in all elections and women could vote in school board elections. See *id.* art. VII, §§ 1, 2 (repealed 1988) (empowering the legislature to hold a referendum on broader female suffrage).

272. 1 HALL, *supra* note 2, at 369.

273. *Id.* at 244–45. The name “Jefferson” was unacceptable to Republicans, since Jefferson had founded the Democratic Party. Among the other names considered were Tampa, Idaho, San Juan, Lula, Arapahoe, Weappollao, Tahosa (Dwellers on the Mountain Tops), Lafayette, Columbus, Franklin, Colona, Montana, and Centralia. *Id.* at 245, 246 n.\*.

274. *Id.* at 258.

275. *Id.* at 258–59.

about slavery.<sup>276</sup> The House ratified the Senate bill.<sup>277</sup> It became law with President Buchanan's signature on the last day of the same month.<sup>278</sup>

President Lincoln was inaugurated on March 4, 1861. He appointed William Gilpin the territorial governor, and Gilpin arrived in May.<sup>279</sup> Gilpin was already familiar with Colorado, having been part of John C. Frémont's second expedition.<sup>280</sup> He loved Colorado and believed the future of civilization lay in the great lands from the Mississippi Valley to the Rocky Mountains.<sup>281</sup>

In 1861, the settlers voted on whether to seek statehood. The vote was 2,007 for territory and 1,649 for statehood. Nebraska in 1860 had also voted to be a territory and not a state, "thereby providing the first indication of a strong desire to limit the cost of government, a theme that reemerged in later constitutional debates."<sup>282</sup> Another Colorado vote in 1864 had the same result.<sup>283</sup> In Nebraska and Colorado, territorial government might not be ideal, but the federal government would bear the expense; this was considered acceptable until territorial government became unbearably corrupt during the Grant Administration, as will be described *infra* in Section II.D.2.

276. *Id.* at 259–63. There was no black slavery in Colorado, but in the 1860s, the Utes were running a slave trade in southern Colorado, selling captured members of other tribes. *See* text accompanying notes 558–60.

277. *Id.* at 263.

278. *Id.* at 263; Hensel, *supra* note 2, at 47, 51; LAMAR, *supra* note 2, at 189. The territory was named for the Colorado River. LEONARD & NOEL, *supra* note 2, at 23. Legally, what we call the Colorado River was the Grand River until Congress changed the name in 1921. BERWANGER, *supra* note 2, at 6 n.3. That is why the name for the county that contains the river's headwaters is Grand County. However, the settlers had called the river the "Colorado" since early days. *See id.* The far southwestern portion of the Nebraska Territory (i.e., Julesburg to Fort Morgan) was given to Colorado, since the economy there was tied to Denver and the mining towns. BERWANGER, *supra* note 2, at 5. Very few whites lived in the far eastern part of the Utah Territory. Congress, ever suspicious about Brigham Young's theocracy, transferred that region to Colorado. This was Utah Territory land from the Continental Divide to the 109th degree of western longitude.

The southern boundary line of the Utah Territory was used as Colorado's southern boundary. To keep the boundary line straight, a portion of northern New Mexico (east of the Continental Divide) was transferred to Colorado. *See* LAMAR, *supra* note 2, at 190. This gave Colorado a partly Spanish-speaking character, which endures to the present.

279. LAMAR, *supra* note 2, at 190.

280. *Id.* at 191.

281. *See generally* HUBERT HOWE BANCROFT, HISTORY OF THE LIFE OF WILLIAM GILPIN: A CHARACTER STUDY (San Francisco, The History Co. 1889) (providing a biographical account of William Gilpin). "Outside of William Clark [of Lewis & Clark; later, territorial governor of Missouri], Andrew Jackson, and Brigham Young, Gilpin is possibly the most remarkable man ever to be appointed territorial governor." LAMAR, *supra* note 2, at 190. Growing up in Philadelphia and England, he had received an outstanding education from private tutors. *Id.* Yet he sold his books to head west, where he accidentally ran into, and then joined the Frémont expedition. *Id.* at 191. He traveled as far as Oregon, served as Major in New Mexico during the Mexican War, and made the development of the West his life's mission. *Id.* at 191–92. He was the "John the Baptist of the West." *Id.* at 192.

282. Christopher W. Larimer, *A Self-Righteous and Self-Sufficient Method for Governing: How the Nebraska Constitution Preserves a Way of Life*, in THE CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 529, 531.

283. SMITH, *supra* note 212, at 205 (1,520 votes for statehood, and 4,672 against).

### C. The Civil War

Shortly before Gilpin's arrival, the American Civil War began in April 1861, when the Confederates attacked Fort Sumter, South Carolina. "With the federal government otherwise occupied, Colorado was left to save itself, with the governor's aid."<sup>284</sup> "There was, [Gilpin] warned, no place for Coloradans to retreat; they would be compelled to stand and fight."<sup>285</sup> Yet the new territorial government of Colorado was broke. On August 26, 1861, Gilpin "wrote a desperate but futile letter to Secretary of War Cameron, asking for arms to be sent to the territory." Gilpin stated that the people "are utterly destitute of arms, ammunition, or any weapons for self-preservation."<sup>286</sup> They would fight, if they had the means, for "[e]nergy, loyalty, and bravery preeminently belong to the mountain people. To conquer their enemies appears to them more glorious than to perish."<sup>287</sup>

The first session of the territorial legislature convened on September 9, 1861.<sup>288</sup> Governor Gilpin's address urged prompt creation of a territorial militia.<sup>289</sup> "The citizen must be also a soldier, and armed."<sup>290</sup> An effective military and judiciary, Gilpin told Coloradans, were the "bulwark of their liberties."<sup>291</sup>

Gilpin's August letter about the complete absence of arms had been hyperbole. There were arms to be had, and Gilpin meant to have them. Based on his own authority, which was not entirely clear, he issued warrants that were used to buy guns.<sup>292</sup> "Gilpin's obsession with weapons had resulted in an 'arms race' that summer, as he attempted to purchase as many as possible, lest they fall into the hands of southerners. Inflated prices, if nothing else, were the result."<sup>293</sup> With neither men nor weapons

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284. LAMM & SMITH, *supra* note 2, at 20.

285. *Id.*

286. *Id.* (quoting Gilpin's letter to Secretary of War Simon Cameron dated August 26, 1861).

287. *Id.* (quoting Gilpin's letter to Secretary of War Simon Cameron dated August 26, 1861).

288. *See id.* at 16.

289. *Id.* at 17.

290. *Id.* (quoting William Gilpin, Governor of Colorado, Address at the First Session of the Colorado Territorial Legislature (Sept. 9, 1861)).

291. COLTON, *supra* note 2, at 173.

292. *See* LAMM & SMITH, *supra* note 2, at 19–22; *see also* 1 HALL, *supra* note 2, at 272.

293. LAMM & SMITH, *supra* note 2, at 20. "As most of the men in the country had either a rifle or a heavy shot gun, a comparatively large number of such arms was soon collected, but as scarcely any two were alike they were poorly adapted for use by organized troops." WHITFORD, *supra* note 2, at 40. Gilpin's team would buy "anything from double-barreled shotguns to ladies' pocket derringers." GALLAGHER, *supra* note 239, at 55.

In 1861, Confederate sympathizers were also attempting to purchase arms and ammunition. They posted notices near Denver City and the mining camps, offering to pay top dollar for firearms, gunpowder, and percussion caps. 1 HALL, *supra* note 2, at 275. A pro-confederate wagon train of guns and other supplies being taken to Indian country was intercepted by Coloradans, who turned the Confederates over to federal authorities at Fort Wise. LAMAR, *supra* note 2, at 199.

Pro-"secesh" sentiment was greatest in southern Colorado, where many of the new immigrants were from Georgia, a state "with an important mining heritage." GUICE, *supra* note 2, at 27. Southern

coming from Washington, Gilpin had to raise a military force on his own. The First, Second, and Third Colorado Volunteers were embodied. “[P]atriotic Coloradans eagerly rallied to the colors. Locating sources of revenue was another matter.”<sup>294</sup>

The Colorado Volunteers’ guns had been supplied by Colorado’s civilian firearms businesses, as well as the businesses in the states from whence Coloradans had come. If there had been no gun businesses, Colorado would have been defenseless.<sup>295</sup>

Gilpin issued drafts for \$375,000.<sup>296</sup> When the U.S. Treasury refused to honor them, there was great consternation in Colorado.<sup>297</sup> Eventually, in the spring of 1862, the Treasury agreed to pay the drafts.<sup>298</sup> In the meantime, relentless attacks from the *Rocky Mountain News* and the *Colorado Republican* had made Gilpin so unpopular that President Lincoln had to appoint a new governor in May 1862.<sup>299</sup>

The Third Colorado Volunteers were summoned to “the States” in February 1862, leaving Colorado’s defenses weaker.<sup>300</sup> The First Colorado Volunteers might be called out of the territory at any moment. Accordingly, local defense units were created. Denver had its Governors Guards, Blackhawk had the Elbert Guards, and Montgomery (in Park County) had the Home Guards.<sup>301</sup>

In March 1861, New Mexican secessionists had declared that the portion of the New Mexico Territory below the 34th parallel was now part

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Colorado also had a good number of immigrants from Tennessee and Kentucky. For a Southerner, the closest trailhead for Colorado was the Santa Fe trail. It led to southern Colorado.

Early in the Civil War, on April 24, 1861, some men raised a Confederate flag above the downtown Denver merchandise store Wallingford & Murphy. WHITFORD, *supra* note 2, at 39. A crowd quickly gathered, with Union men in the majority. *See id.* Samuel P. Logan mounted the roof and tore down the flag. *Id.* Logan would later serve as a Captain in the Colorado Volunteers, First Regiment. *Id.* No such flag was raised again in Colorado. *Id.*

294. LAMM & SMITH, *supra* note 2, at 20.

295. The first federal arms supplied to the Colorado Volunteers were “few in number and inferior in quality.” COLTON, *supra* note 2, at 44. As of 1862, the Colorado Volunteers’ primary arms were Sharps rifles. *See* OVANDO J. HOLLISTER, COLORADO VOLUNTEERS IN NEW MEXICO 1862, at 112 (Richard Harwell ed., The Lakeside Press 1962) (1863). Hollister’s book provides the whole story, from enlistment and the long dull days in a camp in Denver, though the fighting in New Mexico and the return to Colorado. *See* Richard Harwell, *Introduction* to HOLLISTER, *supra*, at xiii, xix–xxiii. The book was first published in 1863 as HISTORY OF THE FIRST REGIMENT OF COLORADO VOLUNTEERS, and republished in 1949 as BOLDLY THEY RODE: A HISTORY OF THE FIRST COLORADO REGIMENT OF VOLUNTEERS (The Golden Press 1949) (1863). Hollister had a long career as a journalist and married the sister of Vice President Schuyler Colfax. *Id.* at xiii, xx–xxi. He also served a U.S. Collector of Internal Revenue for Utah. *Id.* at xxi–xxii.

296. LAMM & SMITH, *supra* note 2, at 21.

297. *See id.*

298. *Id.* at 23. The federal government paid only the drafts that were still in the hands of their original holders. WHITFORD, *supra* note 2, at 55. Anyone who had bought a draft was out of luck, unless the original holder could be persuaded to submit a claim. *Id.*

299. LAMM & SMITH, *supra* note 2, at 21–22.

300. SMITH, *supra* note 2, at 111.

301. *Id.*; *see also* WHITFORD, *supra* note 2, at 44.



of “Confederate Territory of Arizona.”<sup>302</sup> Confederate Lieutenant Colonel John Baylor was appointed Confederate Territorial Governor.<sup>303</sup>

Texans, led by General Henry Hopkins Sibley, invaded New Mexico in January 1862.<sup>304</sup> His plan was to capture Fort Craig (in southern New Mexico) and Fort Union (farther north), and then march into Colorado.<sup>305</sup> There, he would raise Confederate volunteers from the quarter or third of the sympathetic Colorado population, and capture the gold fields.<sup>306</sup> Once Colorado was secured, the next step would be to head west.<sup>307</sup> Utah was expected to be neutral, or perhaps even sympathetic to the Confederacy.<sup>308</sup> Sibley aimed to take Nevada, southern California (where there was plenty of Confederate sympathy), and maybe northern California.<sup>309</sup> From there, the objective was the northern Mexican states of Chihuahua, Sonora, and Baja California.<sup>310</sup> Mexico was busy fighting a French invasion that had begun in 1861, so there was hope that it might yield its lightly populated north, which was semiautonomous.<sup>311</sup>

Even partial success for Sibley’s Army of New Mexico would have been a catastrophe for the Union.<sup>312</sup> First of all, Colorado and California gold bullion were absolutely essential for the federal government being able to borrow money to finance the war. President Lincoln called the gold “the life-blood of our financial credit.”<sup>313</sup> Besides obtaining the gold, the Confederacy would also impede the federal government’s communications with the Pacific West.

Even worse, Sibley’s success could change the attitude of neutral powers, who might overtly support the Confederacy if the secessionists could prove they were winning. Near Colorado, in present-day Oklahoma, were the Five Civilized Tribes, who had been removed from the Southeast

302. JOHN TAYLOR, *BLOODY VALVERDE: A CIVIL WAR BATTLE ON THE RIO GRANDE*, FEBRUARY 21, 1862, at 5 (1st ed. 1995). At the time, Arizona was part of the New Mexico Territory. The 34th parallel is just below Socorro, New Mexico, so the Confederate Territory was about forty percent of the modern states of New Mexico and Arizona.

303. WHITFORD, *supra* note 2, at 30. He proclaimed the Confederate government on August 1, 1861, and later claimed most of the rest of the New Mexico Territory for the Confederacy. *Id.*

304. See ROBERT LEE KERBY, *THE CONFEDERATE INVASION OF NEW MEXICO AND ARIZONA 1861–1862*, at 63 (1958).

305. See COLTON, *supra* note 2, at 40–41.

306. See *id.* at 9, 41.

307. TAYLOR, *supra* note 302, at 12.

308. *Id.*

309. Jerome C. Smiley, *Preface* to WHITFORD, *supra* note 2, at 10, 13; TAYLOR, *supra* note 302, at 12. Most American settlers in the Southwest had come from the South, so there was some reason for the Confederacy to expect sympathy for a Confederate conquest. KERBY, *supra* note 304, at 50.

310. See Smiley, *supra* note 309, at 11–12 (reporting plans that were disclosed after the war by Major Trevanian T. Teel, one of Sibley’s officers).

311. See generally ALFRED JACKSON HANNA & KATHRYN ABBEY HANNA, *NAPOLEON III AND MEXICO: AMERICAN TRIUMPH OVER MONARCHY* (1971); STUART F. VOSS, *ON THE PERIPHERY OF NINETEENTH-CENTURY MEXICO: SONORA AND SINALOA, 1810–1877* (1982).

312. See WHITFORD, *supra* note 2, at 33. It was also known as Sibley’s Brigade. *Id.* “No volunteers more hardy, courageous and efficient ever entered the service of the Confederacy.” *Id.*

313. Smiley, *supra* note 309, at 12.

in the 1830s.<sup>314</sup> They formally allied with the Confederacy, which had offered them very favorable terms, including perpetual control of their lands and affirmation of their right to own slaves.<sup>315</sup> Soon, other tribes in Oklahoma joined the Confederacy.<sup>316</sup> The Comanche and Wichita did not promise to fight the Union, but they did sign a treaty recognizing the Confederacy, not the Union, as sovereign where they lived.<sup>317</sup>

Confederate diplomats were attempting to woo other tribes who were remaining neutral for the time being. But even if the tribes stayed neutral, the Civil War might be a good time to drive out the whites.<sup>318</sup> Indeed, in August through December 1862, the massive Santee Uprising of Sioux in Minnesota would force 40,000 white settlers to flee.<sup>319</sup> In Texas, Indians took advantage of the Civil War to push back the frontier of white settlement by 150 miles to the southeast.<sup>320</sup>

To the west, Brigham Young's theocracy in Utah, which the Mormons called "Deseret," was almost entirely free of federal influence.<sup>321</sup> Young offered some platitudes in support of the Union, but the Latter-Day Saints were keeping a keen eye on the possibility of their own secession.<sup>322</sup>

314. In the view of whites, the Five Civilized Tribes were the Cherokee, Chickasaw, Choctaw, Creek, and Seminole. The white view that other Indians were savages was disputed by Benjamin Franklin. "Savages we call them, because their manners differ from ours, which we think the Perfection of Civility; they think the same of theirs." BENJAMIN FRANKLIN, REMARKS CONCERNING THE SAVAGES OF NORTH AMERICA (Passy 1784), <http://founders.archives.gov/documents/Franklin/01-41-02-0280>.

315. PRUCHA, *supra* note 2, at 261.

316. *See id.* at 261-62.

317. *See id.* at 262-63.

318. *See* GRINNELL, *supra* note 2, at 129.

319. FEHRENBACH, *supra* note 2, at 458-59. "In Colorado, then the greatest center of population of all the plains country, a like fear was felt that the Indians generally would follow the example of the Minnesota Sioux." GRINNELL, *supra* note 2, at 129. "Intelligent Indians saw in the Civil War the opportunity, while the whites were killing one another, to drive the intruders out of the land of their fathers or exterminate them." COLTON, *supra* note 2, at 121. Governor Gilpin reported in October 1861 that the Indian population west of the Arkansas were supportive of the Georgians in southern Colorado who favored secession. *Id.* at 148. However, some Indians from there enlisted in the Union army. *Id.* In May 1862, it was learned that the Confederates were negotiating with the Comanche and other tribes to gain Indian support (or at least neutrality) for Confederate attacks on Union forts on the Arkansas River: Fort Wise (in southeastern Colorado) and Fort Larned (in Kansas). GRINNELL, *supra* note 2, at 127-28.

320. HALEY, *supra* note 26, at 85.

321. In Mormon scripture, "deseret" is said to be an ancient name for the honeybee. *See Ether* 2:3 (Book of Mormon) ("And they did also carry with them deseret, which, by interpretation, is a honey bee . . ."); Kevin L. Barney, *On the Etymology of Deseret*, BY COMMON CONSENT (Nov. 3, 2006), <http://www.bycommonconsent.com/2006/11/bcc-papers-1-2-barney>. It represents the cooperative and hardworking spirit of the Mormon pioneers. *Id.* The official symbol of Utah is the beehive. *Id.*

322. *See* LAMAR, *supra* note 2, at 285-302. Indeed, in 1862, the Mormons proclaimed statehood, and warned that they were prepared to remove "the federal yoke" and forcefully to assert their rights of self-government. JOHN ALTON PETERSON, UTAH'S BLACK HAWK WAR 32 (1998). Although the Utah Territory was nominally governed by federal appointees, the Mormons set up a "Ghost State" government, with Brigham Young as Governor, and this ghost government had far more effective power than did the federal territorial government. *See id.* at 13, 32.

Most dangerous of all, the news that vast western territories had been taken by the Confederacy might affect the attitudes of neutral France and Great Britain.<sup>323</sup> Both nations saw strategic interests in weakening the United States, and they inherently had a more economically harmonious relation with the South, whose economy was based on agriculture exports and manufactured goods imports. The core Confederate strategy was based on winning diplomatic recognition from at least one of these great powers.<sup>324</sup> French recognition of the independent United States in 1778 had been a *sine qua non* for the success of the American War of Independence;<sup>325</sup> the Confederate States of America aimed to emulate that example. Governor Gilpin had plenty to worry about.<sup>326</sup>

More broadly, both sides of the 1860 federal election had agreed that if Southern slavery could not expand, it would inevitably die for economic reasons. Accordingly, the Confederacy viewed New Mexico as essential to its long-term viability if the secessionists prevailed in the war.<sup>327</sup>

Marching north from El Paso along the Rio Grande, General Sibley's Texans met Union forces on Feb. 21, 1862, at Valverde, New Mexico, near Fort Craig. The federals included the regular army, the New Mexico militia, New Mexico volunteers (some of them commanded by Kit Carson), and part of the Second Colorado Infantry, who had marched south in December 1861, from Cañon City.<sup>328</sup>

The Coloradans were responsible for the far-left side of the Union line. Their first taste of battle was a cavalry charge by Texas lancers, who carried nine-foot poles with one-foot blades.<sup>329</sup> When the Texan horsemen

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The 1847 Mormon Migration to the Great Salt Lake had intentionally moved the Mormons outside the United States, into Mexican territory over which the government in Mexico City exerted very little influence. Because of the U.S. 1848 victory in the Mexican War, Utah and much of the rest of the southwest was sold by Mexico to the United States, in the Treaty of Guadalupe-Hidalgo.

323. Smiley, *supra* note 309, at 13; SMITH, *supra* note 212, at 25.

324. See generally AMANDA FOREMAN, *A WORLD ON FIRE: BRITAIN'S CRUCIAL ROLE IN THE AMERICAN CIVIL WAR* (2d ed. 2012); HOWARD JONES, *BLUE & GRAY DIPLOMACY: A HISTORY OF UNION AND CONFEDERATE FOREIGN RELATIONS* (Gary W. Gallagher & T. Michael Parrish eds., 2010).

325. See generally TOM SHACHTMAN, *HOW THE FRENCH SAVED AMERICA: SOLDIERS, SAILORS, DIPLOMATS, LOUIS XVI, AND THE SUCCESS OF A REVOLUTION* (2017).

326. See GUICE, *supra* note 2, at 28.

327. MARTIN HARDWICK HALL, *SIBLEY'S NEW MEXICO CAMPAIGN* 151 (Univ. N.M. Press 2000) (1960) (noting Southern concern that if the Confederate States of America were hemmed in by free Union territory, then slavery would "sting itself to death"); JONES, *supra* note 324 (Republicans and Democrats agreed with Lincoln's view that preventing the territorial expansion of slavery would lead to its "ultimate extinction," because cotton depletes the soil of nitrogen).

328. See TAYLOR, *supra* note 302, at 26; WHITFORD, *supra* note 2, at 35, 43. After the Confederate threat was removed, Carson served as a federal army commander in 1864, forcing the Navajo in southern New Mexico to move to a miserable reservation at Bosque Redondo, in eastern New Mexico. See PETERSON, *supra* note 322, at 3, 212.

329. See TAYLOR, *supra* note 302, at 67.

closed within 100 feet, the Coloradans opened fire.<sup>330</sup> The Texans took heavy casualties and fell back.<sup>331</sup>

But the day belonged to the Texans and the Union army was forced to retreat.<sup>332</sup> The seventy-one Colorado Volunteers suffered a fifty-six percent casualty rate of dead, wounded, or missing.<sup>333</sup> The Confederates then waltzed into Albuquerque and Santa Fe without opposition.<sup>334</sup>

The Union commander, Colonel Edward Canby, knew that without reinforcements, Sibley's Texans would soon take Fort Union, and New Mexico would be lost. He dispatched a message to Governor Gilpin asking for aid. The message reached Denver on March 1.<sup>335</sup>

As soon as permission was obtained from the federal commander at Fort Leavenworth, Kansas, the Coloradans hurried south. The First Regiment of Colorado Volunteers left from Camp Weld in Denver, where they had spent a dull winter with poor rations.<sup>336</sup> They were soon joined by other forces from Fort Wise in southeastern Colorado.<sup>337</sup> They completed a 400-mile forced march from Denver in just thirteen days, including a thirty-six-hour march covering ninety-two miles.<sup>338</sup>

330. *Id.* at 68.

331. *Id.* at 68–70.

332. *See id.* at 85–96 (chronicling the ending of the Battle of Valverde); COLTON, *supra* note 2, at 33–34. The New Mexicans did not fight well because of their “traditional fear of Texans.” HALL, *supra* note 327, at 87. They surrendered quickly, giving the Texans their arms in exchange for being allowed to go home. *Id.*

The Texans brought their own arms, supplemented by what Sibley bought for them in the open market. *Id.* at 27. So they were “armed with practically every type of small arm in existence: squirrel guns, bear guns, sportsman’s guns, single and double-barreled shotguns, navy revolvers, six-shooters, Minié muskets, common rifles, and many others.” *Id.* Plus several howitzers. *Id.* at 27–28. These were augmented with about 250 firearms, mainly rifles, captured after the victory at Valverde. *See id.* at 77.

333. TAYLOR, *supra* note 302, at 104.

334. LAMAR, *supra* note 2, at 103.

335. TAYLOR, *supra* note 302, at 106.

336. *See* COLTON, *supra* note 2, at 42–44; LAMAR, *supra* note 2, at 200–01. Camp Weld was named for Lewis Ledyard Weld, the first Secretary of the Colorado Territory, appointed by President Lincoln. PROPST, *supra* note 2, at 43. Besides being the namesake of Weld County, he designed Colorado’s great seal, and used his family motto as the Colorado motto: *Nil Sine Numine* (Nothing Without Providence). *Id.*; Wharton, *supra* note 2, at 34. He was a nephew of Theodore Dwight Weld, a leading abolitionist. BERWANGER, *supra* note 2, at 9.

337. *See* COLTON, *supra* note 2, at 45. “Bent’s New Fort” had been turned into a military post, and named for Virginia Governor Henry A. Wise. Charles C. Post, *Diary*, in OVERLAND ROUTES TO THE GOLD FIELDS, 1859: FROM CONTEMPORARY DIARIES 25, 46 n.25 (LeRoy R. Hafen ed., 1942) [hereinafter OVERLAND ROUTES TO THE GOLD FIELDS]. Owing to Virginia’s 1861 secession, the name was changed in 1862 to “Fort Lyon,” for Major General Nathaniel Lyon, who gave his life fighting for the Union at Wilson’s Creek, Missouri, on August 10, 1861. *See* STEPHEN B. OATS, CONFEDERATE CAVALRY WEST OF THE RIVER 16–17 (1961); *see also* Post, *supra*, at 46 n.25. Because of floods, the fort was moved in 1867 to a location near Las Animas, Colorado. *Id.* The facility later became a state prison, and presently is a rehabilitation center for homeless people with substance abuse problems. *Fort Lyon*, COLO. DEP’T LOC. AFF., <https://www.colorado.gov/pacific/dola/fort-lyon> (last visited Dec. 24, 2017).

338. SMITH, *supra* note 212, at 26. In New Mexico, the Coloradans had to make their way through “a bitterly cold and furious windstorm, a mountain hurricane, which showered and blinded them with driven snow, dust, and sand.” WHITFORD, *supra* note 2, at 78.

Everyone reconnoitered at Fort Union by March 10.<sup>339</sup> There, they were finally given proper equipment, with standardized rifles, ammunition, and uniforms.<sup>340</sup> Soon, on March 26–28, 1862, the Battle of Glorieta Pass was fought in the Sangre de Cristo Mountains southeast of Santa Fe.<sup>341</sup>

Having cowed the Southern sympathizers in Denver and elsewhere and having chased off several Texas raiding parties, the Colorado volunteers were a far more formidable body than their New Mexico counterparts. Made up of miners and frontiersmen and a sprinkling of former Kansas free-soilers, the companies possessed officers who seemed not to know the meaning of caution or fear.<sup>342</sup>

“The men were uncommonly hardy and well seasoned, and not in the habit of being afraid.”<sup>343</sup>

The men of the Texas Mounted Rifles fought well. So did the New Mexico militia and the Colorado infantry. While the fighting on the front lines was mostly a draw, if one had to declare a winner, it would be Sibley and the Texans.

But the fighting in the rear changed everything. On the third day of battle, New Mexicans spotted the Confederate baggage train. Five companies of Colorado infantry and cavalry, plus two federal companies, descended steep mountainsides for a surprise attack on the supply train. “They crawled, slid and were lowered by ropes and leather straps while carrying their guns.”<sup>344</sup> They lit the supply wagons on fire, spiked the cannons, and killed or ran off hundreds of horses and mules.<sup>345</sup> “This was the irreparable blow that compelled the Texans to evacuate the Territory. Its audacity was the principle cause of its success.”<sup>346</sup> Without food or supplies, the Confederates limped to Santa Fe and eventually back to Texas.<sup>347</sup>

A Texan soldier morosely wrote to his wife, “Instead of Mexicans and regulars, [the Coloradans] were regular demons, that iron and lead had no effect upon, in the shape of Pike’s Peak’s from the Denver City Gold mines . . . . Had it not been for the devils from Pike’s Peak, this country

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339. WHITFORD, *supra* note 2, at 78–79.

340. *Id.* at 79.

341. See SMITH, *supra* note 212, at 26–27.

342. LAMAR, *supra* note 2, at 104.

343. WHITFORD, *supra* note 2, at 50.

344. COLTON, *supra* note 2, at 70.

345. *Id.* at 71–73; see also Leo Oliva, *Chivington and the Mules at Johnson’s Ranch*, WAGON TRACKS, Aug. 1992, at 16, 16–17 (stating that most mules were run off).

346. HOLLISTER, *supra* note 295, at 117.

347. See COLTON, *supra* note 2, at 75–76, 81–99.

would have been ours.”<sup>348</sup> The Battle of Glorieta Pass, “the Gettysburg of the West,” had saved Colorado and New Mexico for the Union.<sup>349</sup>

The Colorado Volunteers then consolidated with the federal army and harried the Texans back to Texas.<sup>350</sup> Along the way, they almost mutinied because the federal commander, Colonel Edward Canby was not as aggressive as they wanted to be.<sup>351</sup> The Colorado Volunteers spent the rest of the year in New Mexico fighting Indians. They arrived back in Denver for a victory parade in January 1863.<sup>352</sup> Some of them were demobilized, and others chose to be sent to the States, where they fought in Kansas, Missouri, and Arkansas, including against “bushwhackers” and “jayhawkers”—Confederate guerillas.<sup>353</sup>

These guerillas were turning into robbery gangs that would remain active even after the war ended.<sup>354</sup> One of these gangs preyed on the South Park in July 1864 and declared its intention to pillage Denver.<sup>355</sup> They were apprehended by a local *posse*.<sup>356</sup> Among the group that hunted down the marauders was Wilbur Fiske Stone, future justice of the Colorado Supreme Court.<sup>357</sup>

“Quite a number of small bands of guerillas and bandits were operating at this time in southern Colorado.”<sup>358</sup> Not all of them were affiliated with the Confederacy, the most notorious and cruel were the Espinosa brothers; racist serial killers who murdered over thirty victims in

348. HOLLISTER, *supra* note 295, at 262–65 (quoting Letter from George M. Brown to his wife (Apr. 30, 1862) (originally published in *Denver News*)). Brown had been captured and paroled (allowed his freedom, based on his promise not to fight any more). COLTON, *supra* note 2, at 54 n.10. While his letter was being carried through New Mexico, a Union officer discovered it, which led to its newspaper publication. *Id.*

349. See Robert McCoy, *Forward* to WHITFORD, *supra* note 2, at 1, 1; P.G. NAGLE, GLORIETA PASS inside front jacket (1999).

The Colorado Volunteers were nicknamed “Gilpin’s Pet Lambs.” See Harwell, *supra* note 295, at xxiv. The Texans were “Baylor’s Babes,” named for the Texan Lieutenant Colonel who had authorized Sibley to raise an army for a western offensive, and who claimed to rule as Confederate Governor over New Mexico and Arizona. See *id.* After three days of fighting at Glorieta Pass,

[n]ight fell upon the scene and the Babes and the Lambs each sought their own corner. The Lambs found theirs all right, but the Babes did not. It appeared that a part of the Lambs had been there during the fight and destroyed their commissary and transportation, totally. There being no grub in New Mexico in general way, there certainly was none now since armies had been sustained by her during the Winter, so the Babes had to go home to get something to eat. The Lambs accompanied them to the door, and wished them a safe journey. And so ended the war of the Babes and the Lambs in the Rocky Mountains.

*Id.* at xxiv–xxv.

350. ESTERGREEN, *supra* note 2, at 233.

351. LAMAR, *supra* note 2, at 105. Canby could have destroyed the retreating Confederates, but he would have taken major losses in his own forces, thus leaving New Mexico vulnerable to a second invasion. KERBY, *supra* note 304, at 114–16. Canby and Sibley were brothers-in-law. *Id.* at 52.

352. See HOLLISTER, *supra* note 295, at 256.

353. 1 HALL, *supra* note 2, at 295–99; see also SMITH, *supra* note 212, at 239.

354. See Wharton, *supra* note 2, at 54.

355. *Id.*

356. *Id.*; WHITFORD, *supra* note 2, at 141; see also GALLAGHER, *supra* note 239, at 68–73.

357. 1 HALL, *supra* note 2, at 315–16.

358. Wharton, *supra* note 2, at 54.

the area between Pueblo and Park Counties.<sup>359</sup> One brother was killed by a *posse*; the other escaped, but was later tracked and killed by a group of miners.<sup>360</sup>

#### D. Indian Wars

##### 1. Plains Indians

The Confederate danger was diminished by the summer of 1862, but the Indian problem was getting much worse. There were three trails leading to the Colorado settlements: in the southeast, a branch of the Santa Fe Trail; in the center, the Smoky Hill Trail, from Fort Leavenworth, Kansas, to Denver; and in the north, the South Platte Trail, which traversed Nebraska and then dropped down to Denver. Goods were transported in wagons drawn by oxen or mules.<sup>361</sup> The greatest share of immigrants, imported goods, and Colorado exports moved via the South Platte Trail.<sup>362</sup>

On February 18, 1861, the Treaty of Fort Wise granted the United States most of northeastern Colorado, including Denver.<sup>363</sup> But not all chiefs had signed it.<sup>364</sup> Neither side made much effort to obey it.<sup>365</sup>

The white settlers, clustered along the Front Range and in mining towns, could not survive a cutoff of their trade routes with the States. The territory was not self-sufficient in food, and imports were essential for

359. See *id.*; GALLAGHER, *supra* note 239, at 63–67; 1 HALL, *supra* note 2, at 378–81.

360. GALLAGHER, *supra* note 239, at 63–67; 1 HALL, *supra* note 2, at 380–81; see also Wharton, *supra* note 2, at 54.

361. 3 HISTORICAL COMPENDIUM, *supra* note 2, at 70.

362. See PROPST, *supra* note 2, at 34.

The Smoky Hill Trail was the shortest, but in the western portion, there was little water, and it was easy to get lost in the rolling hills.

The Arkansas River Trail was an extension of the Santa Fe Trail, and thus required traveling through Missouri and Kansas.

To get to the South Platte Trail, a person would follow the Overland Trail west from Ft. Kearney, Nebraska, and then branch off to the southwest when the person arrived at the South Platte River. The large majority of emigrants to Colorado came via the South Platte Trail. There was always water, and the trail was easy to follow. The main difficulty was the sandy stretches that made wagon movement arduous.

The Overland Trail was used by settlers traveling to California and Oregon in the late 1840s and early 1850s. See JOHN PHILLIP REID, *POLICING THE ELEPHANT: CRIME, PUNISHMENT, AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* 1, 21, 73–76, 91–93 (1997) (explaining how Overland Trail migrants successfully maintained law and order among themselves; homicides were few, but firearms accidents were common, as many of the migrants had just purchased firearms but had not taken the time to learn how to use them safely).

363. Treaty with the Arapaho and Cheyenne 1861 art. 1, Feb. 18, 1861, 12 Stat. 1163, *reprinted in* 2 INDIAN AFFAIRS, *supra* note 2, 807.

364. LEONARD & NOEL, *supra* note 2, at 16–17. Indeed, the Cheyenne signatories, such as Black Kettles, said that they were signing for themselves, and not on behalf of non-participating Cheyenne. AFTON ET AL., *supra* note 2, at xv. The Arapaho chief Little Raven did sign, but later said that he did not understand what the treaty meant. GRINNELL, *supra* note 2, at 126 n.6. The treaty had been signed in February 1861, but was not ratified by the U.S. Senate until August, nor proclaimed by the President until December. 2 INDIAN AFFAIRS, *supra* note 2, at 807. “So, for some time even after the treaty, the town lots carried titles that were maintained with guns.” BRENNEMAN, *supra* note 2, at 27. Which was similar to how things had been in Colorado before the whites arrived.

365. TURNER, *supra* note 233, at 107.

survival. Irrigation was just beginning to be developed in semi-arid Colorado, so nearly all agriculture was near the rivers.<sup>366</sup> This was not enough to feed the population. The mountain mining towns were even more precarious, since snow might close the wagon trails to the mines for extended periods. In January and February 1862, Gilpin County mining had to stop due to a shortage of gunpowder.<sup>367</sup>

Not long after the Civil War began, the Smoky Hill Trail and the Santa Fe Trail became too dangerous to use.<sup>368</sup> Federal troops there were sent east, leaving travelers vulnerable to Confederate guerillas and to Indians in the river valleys.<sup>369</sup> The South Platte Trail was the only lifeline connecting Denver to the States.

There had always been occasional Indian raids on wagon trains, stage coaches, station stops, homes, and farms.<sup>370</sup> By May 1862, “it became apparent that Arapaho, Cheyenne, and other Indian tribes were stealthily preparing for war.”<sup>371</sup> In June, a show of force by the Second Colorado Volunteers halted Indian raids along the South Platte River.<sup>372</sup>

An incidental cause of Indian attacks on whites was inter-Indian wars. War parties on their way to combat often harassed whites.<sup>373</sup> Whoever lost the battle would be straggling home, and inclined to replenish their loss of horses by taking some from the whites, and forcing whites to give them supplies.<sup>374</sup> For example, in 1862, 600 Arapahoe and Sioux, returning home after a battle against the Utes, took everything movable from a ranch at Hartsell Hot Springs.<sup>375</sup> Colorado territorial governor John Evans attempted, without much success, to stop the Ute versus Cheyenne/Arapaho wars.<sup>376</sup>

A more direct cause of increased bellicosity was a change in the Indian agent. Indian treaties typically provided for annual federal delivery

366. See HISTORICAL COMPENDIUM, *supra* note 2, at 105; Wharton, *supra* note 2, at 58 (in 1866, 136 miles of irrigating ditches were constructed, at a cost of \$1,000 per mile); see also *id.* at 60 (“There is no certainty in any crop without the land to be irrigated . . .”) BERWANGER, *supra* note 2, at 11 (stating that in the early days, irrigation extended no further than half a mile from watercourses).

According to the *Rocky Mountain News*, which was always a Colorado booster, the territory could have been self-sufficient in food by 1865, if a locust plague had not wiped out most of the crops that year and the year before. *Id.*; 1 HALL, *supra* note 2, at 449; 2 HALL, *supra* note 2, at 216 (locusts came Aug. 26, 1864, “destroying all late crops”).

367. SMITH, *supra* note 212, at 33 (also noting that the shortage ended in mid-March, when the trails re-opened).

368. See BERWANGER, *supra* note 2, at 12–13. So, even more traffic went via the South Platte Trail. See *id.*

369. *Id.* at 13.

370. See, e.g., SMITH, *supra* note 212, at 114 (discussing crimes in Boulder County during a “time of apparent peace”).

371. COLTON, *supra* note 212, at 149.

372. *Id.*

373. GRINNELL, *supra* note 2, at 130–31.

374. *Id.*

375. 4 HALL, *supra* note 2, at 464.

376. GRINNELL, *supra* note 2, at 131.



of goods and food to the signatory tribes. The tools, food, and other items were intended, in part, to provide a starting point for the Indians to be less dependent on hunting, and to take up agriculture. Albert Gallatin Boone (a grandson of Daniel) had treated the Indians fairly when he was agent, as had his predecessor, Acting Indian Agent Jim Beckwourth, a mountain man.<sup>377</sup> But Boone was replaced by Samuel Colley, who along with his wife stole much of the annuity, and sold it for their own profit, putting the Cheyenne and Arapaho close to starvation.<sup>378</sup> Even when Indian agents were honest, Congress sometimes cut the annuities from what the treaties had provided, or neglected to appropriate funds for the annuities.<sup>379</sup>

Yet as historian Elliott West explains, even if distribution of Indian annuities had been perfect, war was inevitable for environmental reasons. To begin with, the annuities provided only a modest amount of food.<sup>380</sup> More importantly, the acquisition of horses and firearms had dramatically changed the Cheyenne way of life in a manner that was ultimately unsustainable.<sup>381</sup>

Pre-horse and pre-gun, the Cheyenne has been agriculturalists in the upper Midwest. Their main service animal was the dog, which needed the same food resources that the Cheyenne did.<sup>382</sup> The horse, in contrast, fed on prairie grass.<sup>383</sup> Thus, the horse amounted to major new source of energy, and brought with it a tremendous increase in standard of living.<sup>384</sup> Instead of walking from place to place, with dogs pulling loads on travois,

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377. See GALLAGHER, *supra* note 34, at 104; see also ELINOR WILSON, *JIM BECKWOURTH: BLACK MOUNTAIN MAN AND CHIEF OF THE CROWS*, 167–68 (1972). Boone had first come to Colorado in 1824–25, as part of a hunting and trapping expedition in Middle Park. 2 HALL, *supra* note 2, at 249. He had “a pretty thorough knowledge of most of the Indian tongues,” founded the town of Booneville (twenty miles south of Pueblo), and passed away in Denver in 1884, “the last of a noble race, and a fit descendant of famous ancestors.” *Id.* at 250. Jim Baker visited him on the last day of his life. *Id.*

378. GALLAGHER, *supra* note 34, at 104–05. Theft by Indian agents was a constant problem in the nineteenth century. The honest agents, like Boone, were the minority. In 1865, Major Edward Wynkoop was appointed Indian agent for the Cheyenne and Arapaho, who respected him for fair dealing. See PROPST, *supra* note 2, at 100. He had previously tried to persuade Colonel Chivington not to perpetrate the Sand Creek Massacre. *See id.*

The enduring, fatal problem in white-Indian relations was racial generalizations on both sides:

The hostility that was thus growing up between Indians and white men was racial. To the white man an Indian was an Indian, and the white man who had been robbed or threatened by an Indian felt himself justified in taking vengeance on the next Indian he saw, without regard to whether he had been injured by that man or by men of that tribe. In the same way if an Indian had been killed by a white man the members of his tribes were ready to revenge the injury on the next white man that came along. Thus it came about that persons innocent of any fault were constantly punished for the harm done by one of their race. The guilty never suffered. As a result of this feeling neither the Indians nor white men felt they could trust one of the opposite race, and each held the other always in suspicion.

GRINNELL, *supra* note 2, at 100.

379. See, e.g., WEST, *supra* note 2, at 282 (discussing Indian complaints in 1861 about failure to deliver the annuities promised in the Treaty of Fort Laramie).

380. *See id.* at 279.

381. *See id.* at 49–52.

382. *See id.* at 50–51.

383. *See id.*

384. *See id.* at 49–52.

Indians with horses for personal transportation and for pack animals were much more mobile.<sup>385</sup>

However, once the Cheyenne adopted a full-time life of hunting and warfare, they needed a minimum of six horses per person, and ten per person was preferable.<sup>386</sup> From 1800 to 1830, when the plains enjoyed unusually good rainfall, this was no problem. The Indian population on the high plains skyrocketed from the late eighteenth century to 1850.<sup>387</sup> But the late 1840s and thereafter had less rain and several droughts.<sup>388</sup> In the summer, when grass was abundant, this was not a problem, but it was in the winter.<sup>389</sup> Winter survival on the open plains was impossible, so in the cold months the Cheyenne would break into small groups, and spend the winters in river valleys, cliff sides, and other areas with natural shelters and trees.<sup>390</sup> At the end of the winter, the Indian horses that had survived the winter would be scrawny and near starvation.<sup>391</sup> In the spring, there would again be enough food for them, and they would be ready for hunting in the summer.<sup>392</sup>

By the 1850s, the once-abundant cottonwood trees in the winter areas were being consumed for firewood faster than they could regrow, while the grass there was eaten so low it could not regrow.<sup>393</sup> Even before the whites started migrating, hunting pressure thinned the buffalo herds and made them ever more difficult to locate.<sup>394</sup> The problem was aggravated by the harvesting of buffalo robes for trade with the whites. White travelers made the problem even worse; river trails were denuded of trees, and grass was eaten up for a mile or more in both directions.<sup>395</sup> Heavy traffic along the trails frightened away the buffalo herds.<sup>396</sup> As of 1859, there were four U.S. Army forts on the high plains, but by 1865 there were fifteen—all of them located near critical rivers and all of them consuming the wood, grass, and other resources in the area on a permanent basis.<sup>397</sup>

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385. *See id.* at 50.

386. Indian horses, often called “ponies,” were smaller than the whites’ horses. Unlike the whites’ horses, the Indian ponies could survive on a diet solely of prairie grass. However, the hard demands of long-distance hunting, fast riding on a chase, and hauling villages from place to place was too much for any single pony on a continuous basis, so the ponies had to be rotated in service.

387. WEST, *supra* note 2, at 67–69.

388. *Id.* at 89–90.

389. *Id.* at 84.

390. *See id.* at 84, 87.

391. *See id.* at 87.

392. *See id.* at 86–87.

393. *See id.* at 229–30.

394. *See id.* at 193; *see also* AFTON ET AL., *supra* note 2, at xv (discussing Yellow Wolf’s observation of the declining buffalo population in 1846).

395. WEST, *supra* note 2, at 230, 233.

396. T.J. STILES, CUSTER’S TRIALS: A LIFE ON THE FRONTIER OF NEW AMERICA 271–72 (2016).

397. WEST, *supra* note 2, at 275, 291 (“Indians were furious precisely because the army sat in places that could support the soldiers and nobody else.”).

Ironically, the 1840 Plains Indian peace agreement made things even worse.<sup>398</sup> In the agreement, most of the plains tribes (but not the Pawnee nor the mountain-based Utes) agreed to make Colorado a noncombat zone for trade and hunting.<sup>399</sup> This resulted in so much buffalo hunting that, by the 1850s, it was difficult to find buffalo within a hundred miles of the Rocky Mountains.<sup>400</sup> This led to a decline in the Indian–white trade in buffalo robes that had been the main economic tie between them.<sup>401</sup>

Kansas was not covered by the peace agreement. This was good for the buffalo population there, some of which had fled Colorado.<sup>402</sup> But the wars were taking a toll on the Indians.<sup>403</sup> The intertribal warfare was fierce. Participants included many tribes with no connection to Colorado, some of whom came from further east after being forced out of their previous lands.<sup>404</sup> Of course the Cheyenne also continued to fight the Utes, whose main territory was the Rocky Mountains.<sup>405</sup>

By 1855, there were only two adult Arapaho, Southern Cheyenne, and Comanche males for every three adult females.<sup>406</sup> On a per-capita basis, the inter-Indian wars were three or four times deadlier than the U.S. Civil War, the deadliest war, by far, in U.S. history.<sup>407</sup>

All of the Indian population was being devastated by epidemics resulting from contact with whites, and by the depletion of the food supply.<sup>408</sup> The whites urged them to take up agriculture, but this was not a viable option.<sup>409</sup> For Indian agriculture to succeed in Colorado, the whites would have had to give the Indians extensive lands near the rivers, and these were precisely the lands that the whites were taking for themselves.<sup>410</sup> Almost every major white–Indian battle in Colorado took place near one of the environmentally crucial river areas.<sup>411</sup>

Some Indians, such as the Cheyenne Chief Black Kettle or the Ute Chief Ouray, recognized that overwhelming white numerical superiority made the whites unstoppable in the long run. The only thing to do was to

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398. See *supra* notes 58–65 and accompanying text.

399. See WEST, *supra* note 2, at 77.

400. *Id.* at 192.

401. See *id.* at 260.

402. See *id.* at 192.

403. *Id.* at 78.

404. See *id.* at 255 (including Sac and Fox, Osages, Potawatomes).

405. *Id.* at 286. The Utes also lived in northwestern New Mexico, far northeastern Arizona, a little bit of southern Wyoming, and, of course, in Utah, which is named for them.

406. *Id.* at 256. Southern Cheyenne were those below the Platte River. JABLOW, *supra* note 20, at 63. Most of the Cheyenne activity in this Article involves the Southern Cheyenne. The division of the Cheyenne took place around 1830. *Id.* at 60–65.

407. WEST, *supra* note 2, at 256.

408. *Id.* at 87–91.

409. *Id.* at 260–62.

410. *Id.* at 261–62.

411. See *id.* at 274 (providing a map with the battle locations between Indians and whites).

try to survive on the basis of whatever unequal terms the whites would impose.

Yet many Indians wanted something better. As Stiles writes:

Armed resistance was a rational policy option . . . . Their existence was based on war. They had won their lands in fierce aggression against other peoples . . . . Signing treaties had only brought more pressure on the critical river valleys. It was natural to think that force—a familiar tool—might work where diplomacy has failed.<sup>412</sup>

Many of the fighters agreed with Black Kettle's assessment of the situation, that in the long run, no amount of military success against the whites would permanently drive them out of the plains or stop their growing encroachments. Still, many Indians decided that it was better to die fighting than to submit.<sup>413</sup> "Live free or die" is the New Hampshire state motto.<sup>414</sup> It expresses a widely shared attitude of many Americans of all races, certainly including many Plains Indians.

Raiding increased in 1863, apparently for obtaining arms.<sup>415</sup> Additionally, "[m]any of the Indians in Colorado obtained firearms and ammunition from Mexican traders of New Mexico and from corrupt, mercenary Americans, and probably encouragement and material aid from Confederate officials."<sup>416</sup> Indians raids on freighting, combined with a drought in the summer of 1863, drove food and provision prices in the mountain towns "to famine prices, and it was but little better in Denver."<sup>417</sup>

Governor John Evans tried to arrange a September meeting with the Cheyenne, Arapaho, and Sioux to buy peace by supplying provisions, but no one came.<sup>418</sup> There was a meeting between Elbridge Gerry (an emissary from Evans) and Bull Bear, a Cheyenne.<sup>419</sup> When Gerry acknowledged that the whites wanted Indians to live like whites (that is, as farmers), Bull Bear replied, "Well, you can just go back to the Governor and tell him we are not reduced that low yet."<sup>420</sup> In November, Governor Evans ordered a halt in firearms and ammunition sales to Indians; since the order was

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412. STILES, *supra* note 396, at 285.

413. BERWANGER, *supra* note 2, at 27.

414. N.H. REV. STAT. § 3:8 (2017).

415. COLTON, *supra* note 2, at 150; 1 HALL, *supra* note 2, at 324–26.

416. COLTON, *supra* note 2, at 150.

417. 1 HALL, *supra* note 2, at 306.

418. COLTON, *supra* note 2, at 151; LEONARD & NOEL, *supra* note 2, at 17.

419. PROPST, *supra* note 2, at 50; *see* COLTON, *supra* note 2, at 151. Gerry was a relative of the famous Founder of the same name (signer of the Declaration of Independence; U.S. Vice-President under James Madison). Augusta Hauck Block, *Lower Boulder and St. Vrain Valley Home Guards and Fort Junction*, 16 COLO. MAG. 186, 188 (1939). He was married to an Indian woman, the sister of Chief Red Cloud. *Id.*; *see also* PROPST, *supra* note 2, at 63–64 (discussing Gerry's prior marriages).

420. LEONARD & NOEL, *supra* note 2, at 17. Bull Bear would continue fighting until 1874, only surrendering in Texas when he and his warriors were surrounded and ran out of ammunition. HALEY, *supra* note 26, at 193.

indiscriminate, even friendly Indians had a harder time obtaining food that winter.<sup>421</sup>

The Colorado War began on April 12, 1864, with a clash between federal troops and Cheyenne Dog Soldiers who were accused of stealing mules.<sup>422</sup> The Dog Soldiers were the leading Cheyenne military society.<sup>423</sup> Large-scale attacks by the Cheyenne and Arapaho soon followed.<sup>424</sup> Meanwhile, the small number of federal troops guarding the South Platte route were moved down to Fort Lyon (the new name for Fort Wise), on the Arkansas River in southeastern Colorado, because of fears of imminent Confederate attack.<sup>425</sup> In May, much of Denver and Auraria were destroyed by a flood of the Cherry Creek, making Colorado's survival all the more precarious.<sup>426</sup>

For many young Indian men who were wondering whether to fight, an answer was soon provided by an incident in western Kansas. In 1863, Cheyenne Chief Starving Bear had been part of an Indian delegation that traveled to Washington and met with President Lincoln.<sup>427</sup> After amicable discussion, Lincoln had given Starving Bear a peace medal.<sup>428</sup> The next May, back in Kansas, Starving Bear's camp was approached by the U.S. Army.<sup>429</sup> Wearing his peace medal, Starving Bear and a companion slowly rode out to parlay with the soldiers.<sup>430</sup> The army opened fire and killed both of them.<sup>431</sup> Both sides claimed victory in the ensuing battle.<sup>432</sup>

At a nearby camp was Starving Bear's brother Bull Bear, a leader of the Dog Soldiers.<sup>433</sup> The death of his brother convinced Bull Bear that it

421. PROPST, *supra* note 2, at 50–51.

422. WEST, *supra* note 2, at 287.

423. See STILES, *supra* note 396, at 271. The other Cheyenne warrior societies were the Kit Foxes, Crazy Dogs, Elk Scrapers, Red Shields, and Wolf Soldiers. *Id.*

The Dog Soldiers lived separately from other Cheyenne, favoring the Kansas area between the Republican and Smoky Hill Rivers; they developed a close friendship with the Sioux. BERWANGER, *supra* note 2, at 27; WEST, *supra* note 2, at 198. The Dog Soldiers were so named because during battle, their best fighters might tie themselves to a rope that attached to a stake in the ground. See JOHN H. MONNETT, THE BATTLE OF BEECHER ISLAND AND THE INDIAN WAR OF 1867–1869, at 41 (1992). Immobile, the warrior provided a fixed spot to which other warriors could rally—to stand and fight, or die trying. See *id.* George A. Custer wrote that they were “fine-looking braves of magnificent physique, and in appearance and demeanor more nearly conformed to the ideal warrior than those of any other tribe.” GEORGE ARMSTRONG CUSTER, MY LIFE ON THE PLAINS OR, PERSONAL EXPERIENCES WITH INDIANS 125 (Univ. of Okla. Press 1962) (1874).

Although the Dog Soldiers were originally a group of warriors, they later became a band, including families. AFTON ET AL., *supra* note 2, at xvii. The Arapaho had a similar warrior society, the Dog Men, who also staked themselves to a fixed spot on the battlefield, from which they could not retreat unless released by another warrior. See TRENHOLM, *supra* note 20, at 79.

424. See COLTON, *supra* note 2, at 151–52; see also MONAHAN, *supra* note 2, at 147–65.

425. LAMAR, *supra* note 2, at 211.

426. See 1 HALL, *supra* note 2, at 309.

427. WEST, *supra* note 2, at 289.

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

was time for all-out war with the whites, and many young men agreed, joining the Dog Soldiers.<sup>434</sup> “At least the Dog Soldiers were independent for the moment. And if death waited on everyone, there were better ways to find it than Starving Bear’s.”<sup>435</sup>

On June 11, 1864, the young Hungate family, who had a ranch near the future town of Elizabeth near Denver, was attacked, raped, murdered, and brutally mutilated, including the small children.<sup>436</sup> A general panic in the Denver area ensued.<sup>437</sup> In July, the stage stops along the South Platte were hit hard.<sup>438</sup> On the South Platte Trail, “[f]or the next four years it would not be safe to travel in groups of less than fifty to one hundred.”<sup>439</sup> The Santa Fe trail was also hit.<sup>440</sup>

On August 11, 1864, Territorial Governor John Evans issued a proclamation: “All citizens of Colorado, whether organized or individually, [were] empowered to go in pursuit of the hostiles . . . and kill and destroy them wherever found, and to capture and hold to their own private use and benefit all the property they could take.”<sup>441</sup> Declaring martial law, the Governor initiated recruiting for the Third Colorado, with an enlistment term of 100 days.<sup>442</sup> In Denver, the entire militia—every able-bodied male of at least sixteen years—was called into service; many were put to work building a chain of block houses on the city’s perimeter.<sup>443</sup> Likewise in Boulder, the townspeople dug defensive trenches and constructed the adobe Fort Chambers near Boulder Creek.<sup>444</sup> Citizens also erected forts in Huntsville (today, Larkspur), Pueblo, and Colorado City (now, Colorado Springs).<sup>445</sup> In the St. Vrain area, the settlers built Fort Junction, organized the Lower Boulder and St. Vrain Valley Home Guard, and were given handguns and rifles by the federal government.<sup>446</sup> Pueblans temporarily safeguarded their women and children in a former saloon while the men constructed an adobe fort.<sup>447</sup>

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434. *See id.*

435. *Id.* at 289–90.

436. COLTON, *supra* note 2, at 153.

437. *See id.*

438. *Id.* One author suggests that the perpetrators were four Arapaho, one of whom was angry at having been required to return some stolen animals. TRENHOLM, *supra* note 20, at 180.

439. PROPST, *supra* note 2, at 60.

440. COLTON, *supra* note 2, at 145.

441. 1 HALL, *supra* note 2, at 326–27. “The conflict is upon us,” said Evans, “and all good citizens are called upon to do their duty for the defense of their homes and their families.” TRENHOLM, *supra* note 20, at 183. The Governor also emphasized the importance of *not* molesting friendly Indians. *See id.*; COLTON, *supra* note 2, at 154; 1 HALL, *supra* note 2, at 326–27.

442. SMITH, *supra* note 212, at 213. At least initially, their arms were “old guns that had been bought in Europe, and men were short of even such basics as blankets and food.” PROPST, *supra* note 2, at 67.

443. Wharton, *supra* note 2, at 54.

444. MONAHAN, *supra* note 2, at 171.

445. GALLAGHER, *supra* note 34, at 102–03.

446. Block, *supra* note 419, at 188.

447. *See* 3 HALL, *supra* note 2, at 453.

Elbridge Gerry brought news that massive and coordinated Indian attacks were planned.<sup>448</sup> But when the Indians found out that their plan had been discovered, the attacks were called off.<sup>449</sup>

Mail service from the States was blocked by the Indians on August 15, and could not be reopened until September 29.<sup>450</sup> More importantly, “[t]he halting of supply trains caused prices to soar, and starvation threatened.”<sup>451</sup> When the Governors of Kansas and Colorado asked for federal troops, they were told by the federal commander of the Trans-Mississippi Theater, General Samuel R. Curtis, “We have none to spare, you must protect yourselves.”<sup>452</sup>

As of August 1864, Indian raids on thoroughfares were in progress from Texas to British Columbia and from the Missouri River to the Rocky Mountains.<sup>453</sup>

Cheyenne Chief Black Kettle, who blamed the conflicts on a minority of bad men on both sides, traveled to Denver to attempt to arrange a truce in September 1864, but the Camp Weld Council accomplished nothing.<sup>454</sup> As Black Kettle admitted to Governor Evans, the chiefs who wanted peace could not control the many warriors who wanted to fight.<sup>455</sup> Evans told them to go to Fort Lyon, which they did; there, they received mixed signals about whether they were under U.S. Army protection.<sup>456</sup> According to some whites, the Cheyenne were playing a double game; while some of them fought, others feigned friendliness with the whites, the better to procure more arms and ammunition.<sup>457</sup>

Raids on the South Platte Trail and the Santa Fe Trail continued.<sup>458</sup> The telegraph line along the South Platte Trail—Colorado’s means of

448. Block, *supra* note 419, at 188.

449. *Id.* Gerry was therefore dubbed “the Paul Revere of Colorado.” PROPST, *supra* note 2, at 64.

450. TRENHOLM, *supra* note 20, at 184–85. During this period, outbound mail from Denver was sent to San Francisco by stage coach, and from thence by ship to Panama, and from Panama to New York City, for distribution to the States. *Id.* at 186.

451. COLTON, *supra* note 2, at 156.

452. 1 HALL, *supra* note 2, at 328. Likewise, Secretary of War Edwin M. Stanton told Colorado, “in effect, ‘Fight it out among ourselves; we are too busy with more weighty affairs to give you any attention or assistance.’” *Id.* at 330–31.

453. *Id.*

454. 1 HALL, *supra* note 2, at 339–40; *see also* MONAHAN, *supra* note 2, at 175–76.

455. MONAHAN, *supra* note 2, at 178–79; *see also* MONNETT, *supra* note 423, at 42 (Cheyenne chiefs had no authority to prevent warriors from fighting).

The problem was endemic during the Plains Wars. White negotiators suffered from the “fallacious but pervasive notion . . . that the signatory chiefs held strict command authority over the entirety of their tribes.” STAN HOIG, *WHITE MAN’S PAPER TRAIL: GRAND COUNCILS AND TREATY-MAKING ON THE CENTRAL PLAINS* 12 (2008). Likewise, “many times the federal government exercised little control over its citizens or military forces on the distant prairie.” *Id.*

456. 1 HALL, *supra* note 2, at 341–44.

457. *See id.* at 327–30; WOOTTON, *supra* note 2, at 265.

458. *See* MONAHAN, *supra* note 2, at 165.

communication to the outside—was sliced repeatedly.<sup>459</sup> “Cut off, the Colorado mining camps were almost starving.”<sup>460</sup> Colorado was not the only territory in deep trouble. “During 1864, virtually every wagon train proceeding down the Canadian River to New Mexico was attacked.”<sup>461</sup>

The Plains Indians custom was not to war during the winter because their ponies lacked sufficient grass. Some warriors took winter quarters at the Sand Creek camp, where Black Kettle had earlier led a group. On November 29, 1864, Sand Creek was attacked by the Third Colorado Volunteers. Most officers made no effort to discriminate between friendly Indians and hostiles. The commander, Colonel John Chivington, ordered the deliberate killing of women and children, which was contrary to U.S. Army practice and law. Anglo-Indian and inter-Indian warfare had often been characterized by the killing of noncombatant women and children, but even in this context, the scale of slaughter at Sand Creek was atrocious.<sup>462</sup> Among the victims was Left Hand, an Arapaho chief who had advocated peace with the whites.<sup>463</sup>

There is no doubt that the Sand Creek encampment included warriors who were taking a break.<sup>464</sup> White scalps—including those of children and the elderly—were discovered in some teepees and brought back to Denver.<sup>465</sup>

Militarily speaking, the Sand Creek Massacre was close to useless. Shortly before the massacre, Fort Lyon commander Edward Wynkoop, who had a very positive relationship with the Indians, had been replaced by the much harsher Major Scott Anthony.<sup>466</sup> Anthony had no objection to Sand Creek per se, but he thought that Chivington should have followed up by heading into western Kansas to fight the Dog Soldiers. In the winter, the Indians’ grass-fed ponies were malnourished at best, and so the Indian warriors were at their weakest. Meanwhile, Fort Lyon had been provided with plenty of larger, U.S. horses. These horses needed grain fodder, and

459. *Id.* The telegraph line to Denver had been opened in October 1863. 1 HALL, *supra* note 2, at 303. Starting in 1861, Denver had begun to receive overland mail deliveries, via the Pony Express. *Id.*

460. FEHRENBACH, *supra* note 2, at 460. Flour went from nine dollars per hundred pounds to forty-five. PROPST, *supra* note 2, at 62. “Sugar, tea, and many other items were simply unobtainable.” *Id.*

461. FEHRENBACH, *supra* note 2, at 463.

462. *See infra* note 466 and accompanying text. The U.S. government so admitted. *See infra* note 473 and accompanying text. “It will not do, as some have done, to fall back to the atrocities of the Indians upon our people as a justification.” 1 HALL, *supra* note 2, at 351. By such reasoning, President Lincoln would have been justified in mistreating Confederate prisoners of war, as the Confederates had done to Union prisoners at the notorious Andersonville camp. *Id.*

463. MARGARET COEL, CHIEF LEFT HAND: SOUTHERN ARAPAHO 292–93 (1st ed. 1981). Left Hand was wounded at Sand Creek, and later died from the wounds. *Id.*

464. WEST, *supra* note 2, at 296, 299.

465. 1 HALL, *supra* note 2, at 355; WOOTTON, *supra* note 2, at 266.

466. *See* WEST, *supra* note 2, at 297–99.



the army had brought in plentiful supplies, precisely so that American cavalry could advance deep into the plains.<sup>467</sup>

Instead of attempting a decisive stroke against the Dog Soldiers, Chivington led his Third Cavalry on a search for Little Raven's peaceful band of Arapaho.<sup>468</sup> Not finding them after a few days, he took the Colorado Third back to Denver, and proclaimed that he had won a great victory at Sand Creek. Immediately, several other officers of the Third Cavalry denounced the massacre. A U.S. Army investigation and congressional hearings soon followed. Captain Silas Soule, one of the officers who testified against Chivington, was assassinated on a dark street in Denver, and the perpetrator escaped.<sup>469</sup>

Sand Creek was the most counterproductive act in the history of the Colorado territorial government. The perpetrators had ignored warnings about radicalizing and uniting the Indians. Those warnings immediately came true. Some Cheyenne, led by Black Kettle, headed south of the Arkansas River, to live with the Kiowa and Comanche, and get away from the war.<sup>470</sup> But many others began planning a counterstrike. Messengers bearing war pipes were sent to the Sioux. At Solomon Fork, Kansas, "the Sioux smoked the war pipe."<sup>471</sup>

The old mountain man Jim Beckwourth visited the Indians to urge them to call off the war, because the whites were as "numerous as leaves on the trees." He later testified to Congress:

"We know it," was the general response of the council. But what do we want to live for? The white man has taken our country, killed all our game; was not satisfied with that, but killed our wives and children. Now no peace. We want to go and meet our families in the spirit land . . . . We have raised the battle-axe until death.<sup>472</sup>

The hundred-day enlistments of the Colorado volunteers from the past September expired in late December 1864.<sup>473</sup> The federal army, namely the Eleventh Kansas Volunteer Cavalry, was all that was left.<sup>474</sup>

467. *Id.* at 306–07.

468. *Id.* at 306.

469. TURNER, *supra* note 233, at 92–95.

470. MONAHAN, *supra* note 2, at 199; PROPST, *supra* note 2, at 74.

471. MONAHAN, *supra* note 2, at 198. "The tribes were united and committed as they had never been before, and it would not be long before the frontiersmen of the Platte would feel their wrath." PROPST, *supra* note 2, at 71.

472. WILSON, *supra* note 2, at 179–80 (quoting S. EXEC. DOC. NO. 39-26, at 68–74).

The mixed-race son of a Virginia white man and a slave, Beckwourth was the most famous non-Indian person of color in early Colorado. *Id.* at 5. He "was an expert shot and could handle dagger, lance, and bow." *Id.* As a fur trader, he lived with the Crow Indians for eight years, and his valor in battle made him one of their chiefs. Beckwourth served as a guide for the Third Colorado on the expedition that led to the Sand Creek Massacre. *Id.* at 175. He later testified under oath that he had done so only because Colonel Chivington had threatened to hang him if he refused. *Id.*

473. *See* MONAHAN, *supra* note 2, at 200.

474. *See id.*

Just days after Sand Creek, raids began along the Platte.<sup>475</sup> They massively escalated, starting January 6, 1865.<sup>476</sup> At Bulen's Ranch, a stagecoach station near Julesburg, a war party of at least 500 Indians attacked a stage coach, and sacked the station.<sup>477</sup> After the station had been restocked, they attacked it again on February 2, and this time burned it to the ground.<sup>478</sup> In January through February, large and coordinated war parties of Cheyenne, Arapaho, and Sioux ravaged the South Platte Trail. Most surviving whites in the area fled, and almost every building along the trail was burned to the ground. Two hundred miles of settlements were wiped out.<sup>479</sup>

While Governor John Evans was in Washington, acting Governor S.H. Elbert telegraphed him to urge him to send 5,000 federal troops, or else the whites would have to leave Colorado.<sup>480</sup>

With the supply trains halted, "the cost of several food items" soared "to almost starvation prices."<sup>481</sup> A huge convoy of 105 wagons and 300 men was able to leave Denver on January 14.<sup>482</sup> But a concentrated force like this could not protect all the supply stations.<sup>483</sup>

In the wake of Sand Creek, Coloradans had been reluctant to volunteer for the militia.<sup>484</sup> So the federal army commander, Colonel Thomas Moonlight, declared martial law on February 6.<sup>485</sup> One consequence was many new volunteers for territorial militia, some of whom did not want to be drafted by the U.S. Army.<sup>486</sup> Some were teenage boys.<sup>487</sup> So martial law was lifted on February 20.<sup>488</sup> The militia defended the South Platte Trail from February through April, and well-guarded commerce resumed.<sup>489</sup>

475. See WEST, *supra* note 2, at 307.

476. See MONAHAN, *supra* note 2, at 201-05.

477. *Id.*

478. AFTON ET AL., *supra* note 2, at 234.

479. See MONAHAN, *supra* note 2, at 208-22. The notable exception was the Godfrey Ranch. It has been built like a fortress and had loopholes in the walls through which the defenders could shoot rifles. GALLAGHER, *supra* note 34, at 113-14. It also had a well on the inside, so that flaming arrows from the Indians could be extinguished. *Id.*

480. COLTON, *supra* note 2, at 159 (telegram of Jan. 7, 1865).

481. *Id.*; see also Wharton, *supra* note 2, at 56 ("Supplies and provisions raised to famine prices, and the poor of Denver were reduced to such a strait, that an idea of a descent upon the provision stores of the city was seriously entertained.").

482. COLTON, *supra* note 2, at 160; see also GALLAGHER, *supra* note 34, at 112 ("With every man armed and seventy-five soldiers guarding them, the big train slowly crawled east").

483. COLTON, *supra* note 2, at 160.

484. 1 HALL, *supra* note 2, at 359-60.

485. MONAHAN, *supra* note 2, at 225.

486. *Id.* The volunteers "were poorly supplied with arms, ammunition and clothing, which articles, many were required to supply themselves with, in addition to the horses they rode." Wharton, *supra* note 2, at 56.

487. MONAHAN, *supra* note 2, at 227.

488. COLTON, *supra* note 2, at 160.

489. See MONAHAN, *supra* note 2, at 225-28.

Meanwhile, the Indian warriors headed north to fight the Crow.<sup>490</sup> They returned for another series of raids in April 1865. But this time, they encountered larger bodies of federal troops. Back in the States, the Civil War was coming to a close. Some Confederate prisoners were given their freedom in exchange for Western service in the U.S. Army.<sup>491</sup> There were enough of these “galvanized rebs” to deter major attacks; there were a few raids in the summer, although the telegraph line was cut most of the time.<sup>492</sup>

The U.S. Army had also learned the importance of Pawnee scouts, who were happy to help fight the Sioux and Cheyenne, having always been their mortal enemies.<sup>493</sup> In August, an entrepreneur opened up the Smoky Hill Trail from Denver east through central Kansas for reliable travel and commerce by digging wells for station stops.<sup>494</sup> But the new Butterfield Overland Despatch route cut through the heart of the remaining buffalo country and inflamed the Indians even further.<sup>495</sup> Indian activity drove freight prices so high “that it came near to bankrupting the country.”<sup>496</sup>

Governor Evans was ordered to resign in July 1865 by Secretary of State William Seward, due to Evans’s responsibility for the Sand Creek Massacre.<sup>497</sup>

Some Cheyenne and Arapaho signed the Treaty of Upper Arkansas on October 14, 1865. It included a U.S. government condemnation of the “gross and wanton outrages” at Sand Creek and also provided

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490. AFTON ET AL., *supra* note 2, at 246. They were joined in the anti-Crow campaign by Arapaho and Lakota Sioux. *Id.*

491. MONAHAN, *supra* note 2, at 228.

492. *See id.* at 228, 232–36.

493. *See* HYDE, *supra* note 20, at 269; PROPST, *supra* note 2, at 95. The first Pawnee scouts were recruited in 1864. AFTON ET AL., *supra* note 2, at 258. They initially used muzzleloading Springfield rifled muskets, and were issued Spencer repeating carbines in 1866. *Id.* Some of the displaced tribes from the east, such as the Delaware, also served as army scouts. *Id.* at 104. Other Indians who helped the Army fight the Cheyenne were the Osage and Kansas (Kaw). *Id.* at 55.

494. PROPST, *supra* note 2, at 96.

The Smoky Hill Trail was not new, but it had been hard to use because of its long western stretch with no water and difficult navigation. *See supra* note 363 and accompanying text.

495. WEST, *supra* note 2, at 308–09.

496. 1 HALL, *supra* note 2, at 305.

497. TURNER, *supra* note 233, at 36 (quoting Letter from William H. Seward, U.S. Sec’y of State, to John Evans, Governor of the Territory of Colo. (July 18, 1865)).

reparations.<sup>498</sup> Three days later, the Apache joined the treaty.<sup>499</sup> The next day, the Comanche and Kiowa signed a similar treaty.<sup>500</sup>

Yet while some Cheyenne were accepting the U.S. offer for new, smaller reservations, others were conducting more attacks along the South Platte. Because of imminent danger, federal soldiers trained the armed citizens of Julesburg.<sup>501</sup> The Colorado War is usually said to have ended in 1865; and 1866 was relatively quiet.<sup>502</sup> Still, attacks continued along the South Platte Trail, mostly the part east of Julesburg, in Nebraska.<sup>503</sup> In the 1866 Fetterman Fight, near Fort Kearney, Nebraska, all eighty-one U.S. soldiers present were killed.<sup>504</sup>

Starting in May 1867 and continuing all summer, Cheyenne, Arapahoe, Kiowa, and Sioux “struck hard both along the Smoky Hill route and the Platte River road.”<sup>505</sup> An October 19, 1867 treaty at Medicine Lodge, Kansas, provided for the Kiowa and Southern Cheyenne to give up their 1865 treaty right to a reservation in Kansas, to move to reservations in Indian Territory (today, the State of Oklahoma), and forbade them to hunt north of the Arkansas River.<sup>506</sup> But many Cheyenne did not accept another round of surrendering their homeland. There were more battles in Colorado with the Cheyenne (occasionally with Sioux allies) in 1867–

498. Treaty with the Cheyenne and Arapaho, 1865, art. 6, Oct. 17, 1865, 14 Stat. 703, *reprinted in* 2 INDIAN AFFAIRS, *supra* note 2, at 889–90 (“The United States being desirous to express its condemnation of, and, as far as may be, repudiate the gross and wanton outrages perpetrated against certain bands of Cheyenne and Arrapahoe Indians, on the twenty-ninth day of November, A.D. 1864, at Sand Creek, in the Colorado Territory.”). The treaty made various land grants, free of taxation, to named chiefs, widows, or persons who had lost a parent. *See id.* The October 14, 1865, treaty is known as the Treaty of the Little Arkansas. MONAHAN, *supra* note 2, at 239. Signed in Kansas, it provided for reservations. Treaty with the Cheyenne and Arapaho, *supra*, at arts. 2–3. However, the Kansas state government did not allow a reservation. PRUCHA, *supra* note 2, at 271.

499. Treaty with the Apache, Cheyenne, and Arapaho, 1865, Oct. 17, 1865, 14 Stat. 713, *reprinted in* 2 INDIAN AFFAIRS, *supra* note 2, at 891–92.

500. *See* Treaty with the Comanche and Kiowa, 1865, Oct. 18, 1865, 14 Stat. 717, *reprinted in* 2 INDIAN AFFAIRS, *supra* note 2, at 892–95. The terms included a reservation in Texas, but the federal government owned no Texas land, and the State of Texas declined to accept a reservation. PRUCHA, *supra* note 2, at 271.

501. *See* MONAHAN, *supra* note 2, at 239.

502. *See* AFTON ET AL., *supra* note 2, at 286–321 (listing all known Cheyenne military actions from April 1864 to July 1869).

503. *See* MONAHAN, *supra* note 2, at 239–40.

504. *Introduction to EYEWITNESS TO THE FETTERMAN FIGHT: INDIAN VIEWS* 3, 3–4 (John H. Monnet ed., 2017).

505. MONNETT, *supra* note 423, at 75.

506. *Id.* at 65. As a result, the buffalo tended to stay north of the Arkansas, so Indians who abided by the treaty were unable to hunt. *See id.* The white negotiators orally promised that guns and ammunition for winter hunting would be provided, but only a few defective revolvers were supplied. *See* HOIG, *supra* note 55, at 11.

1869.<sup>507</sup> “Hundreds of whites were killed in the post-Civil War years north of the Arkansas River.”<sup>508</sup>

While the Cheyenne Dog Soldiers were warring against the whites in the 1860s, they did not neglect enemy tribes.<sup>509</sup> They also fought the Pawnees, Kaws (Kansas), Osages, Shawnee, Delawares, Omahas, Poncas, Crows, Shoshoni, and (most relevantly for Colorado) the Utes.<sup>510</sup>

“[T]he years of 1868 and 1869 were, statistically, the worst two years, from the white man’s point of view, experienced on the plains.”<sup>511</sup> When Colorado hay was being harvested in 1868, Indians “began to be very active and sniped off white people here and there. This caused all homesteaders to keep their guns primed . . . .”<sup>512</sup>

In August 1868, Arapaho and Cheyenne raided up and down the Arkansas River and also in Larimer County.<sup>513</sup> U.S. House Speaker and Republican Vice Presidential nominee Schuyler Colfax was touring the Colorado mountains on the day that the attacks began.<sup>514</sup> A friendly group of Utes escorted Colfax and his party back to Colorado Springs safely.<sup>515</sup> In Colorado Springs, “the gunsmiths’ shops were jam-full. The Springs

507. See PROPST, *supra* note 2, at 102–25. Some of the Indian battles with whites in Colorado include Fisher’s Creek (Trinidad, June 4, 1854 involving Jicarilla Apaches), Pueblo (Dec. 25, 1854 involving Ute and Apache), Saguache Creek (March 19, 1855 involving Ute and Apache), Chicosa Arroyo (Trinidad, April 25, 1855 involving Ute and Apache), Poncha Pass (April 29, 1855 involving Ute), Blackwater Spring (Eads, July 11, 1860 involving Kiowa and Comanche), Fremont’s Orchard (Orchard, April 12, 1864 involving Cheyenne), Eayre’s Fight (Flagler, Apr. 15, 1864 involving Cheyenne), Cedar Canyon (Sterling, May 3, 1864 involving Cheyenne), Hungate Massacre (Parker, June 11, 1864 involving Arapaho), Sand Creek (August 11, 1864 involving Arapaho), White Butte Creek (Sterling, October 10, 1864 involving Cheyenne), Sand Creek Massacre (Chivington, November 29, 1864 involving Cheyenne and Arapaho), Julesburg (January 7, 1865 involving Cheyenne and Lakota Sioux), Valley Station (Sterling, January 7, 1865 involving Cheyenne and Lakota Sioux), American Ranch (Merino, January 14, 1865 involving Cheyenne and Lakota Sioux), Godfrey’s Ranch (Merino, January 14–15, 1865 involving Cheyenne and Lakota Sioux), Julesburg (February 2, 1865 involving Cheyenne and Lakota Sioux), Spring Canyon (Campo, June 14, 1865 involving Kiowa and Comanche), Big Timber (Arapahoe, June 11, 1867 likely involving Cheyenne), Rule Creek (Toonerville, September 10, 1868 involving Cheyenne), Big Sandy Creek (Aroya, September 15, 1868 involving Cheyenne), Beecher’s Island (Wray, Sept. 17–21, 1868 involving Cheyenne), Dog Creek (Laird, July 8, 1869 involving Cheyenne), Summit Springs (Sterling, July 11, 1869 involving Cheyenne and Lakota Sioux), Milk Creek (Meeker, September 29–October 5, 1879 involving Ute), and Meeker Massacre (September 29, 1879 involving Ute). See GREGORY F. MICHNO, *ENCYCLOPEDIA OF INDIAN WARS: WESTERN BATTLES AND SKIRMISHES 1850–1890*, at 26–27, 30, 32–33, 77–78, 134–37, 141–42, 149–50, 154, 157–65, 173–74, 197, 220, 222–24, 234–36, 327–28 (2003). This listing does not include inter-tribal battles, and it does not purport to be a complete list of Anglo-Indian battles. *Id.* at 1.

508. FEHRENBACH, *supra* note 2, at 483.

509. AFTON ET AL., *supra* note 2, at 200.

510. *Id.* Indeed, fighting Indians was preferable to the Cheyennes, for Indians readily engaged in hand-to-hand combat, which offered the greatest opportunity for individual valor, whereas whites preferred to fight behind fortified positions, or with long-range weapons. *Id.*

511. TRENHOLM, *supra* note 20, at 225.

512. Block, *supra* note 419, at 189.

513. See BERWANGER, *supra* note 2, at 31; 1 HALL, *supra* note 2, at 456–57.

514. See 1 HALL, *supra* note 2, at 457.

515. *Id.*

was arming itself in haste.”<sup>516</sup> Arapaho roamed through the town, but having “looked over the town’s military preparedness,” they “promptly announced that they were after their traditional enemies, the Utes.”<sup>517</sup> They took 150 horses when they left.<sup>518</sup> Near Bijou Basin in El Paso County, fifty white scouts were surrounded by 500 Indians.<sup>519</sup> After “Texas Bill” rode through Indian lines to escape and summon aid, the Indians departed, shortly before the arrival of a white force from Denver.<sup>520</sup>

Although difficult, the situation in Colorado was considerably milder than in western Kansas.<sup>521</sup> After seventy-nine Colorado settlers had been killed, acting Colorado Governor Frank Hall asked U.S. General Philip Sheridan for assistance.<sup>522</sup> Militias were embodied throughout Colorado.<sup>523</sup> Sheridan raised a special cavalry force of fifty Kansans, designating them as U.S. Army scouts.<sup>524</sup> In mid-September the scouts were ambushed at Beecher Island, a sandbar on the Arikaree River (near the modern town of Wray, Colorado), and nearly destroyed.<sup>525</sup>

During September, the Indians continued raids against isolated settlers in El Paso County, killing about twenty persons, taking scalps and driving off 500 head of cattle.<sup>526</sup> At the time, the Indians had long range rifles, giving them an advantage over many whites.<sup>527</sup>

To the southeast, U.S. Lieutenant Colonel George Armstrong Custer attacked the Cheyenne at Washita in Indian Territory in November 1868 and killed peaceful Indians, including Black Kettle, as well as warriors who were encamped with them.<sup>528</sup> But many Cheyenne kept fighting.<sup>529</sup>

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516. R.B. TOWNSHEND, *A TENDERFOOT IN COLORADO* 217 (Stephen J. Leonard & Thomas J. Noel eds., Univ. Press of Colo. 2008) (1923).

517. MONNETT, *supra* note 423, at 70.

518. BERWANGER, *supra* note 2, at 31.

519. 3 HALL, *supra* note 2, at 344.

520. *Id.*

521. *See* MONNETT, *supra* note 423, at 70.

522. *See* 1 HALL, *supra* note 2, at 457–58.

523. *See* MONNETT, *supra* note 423, at 70–71 (noting that Colorado lacked arms to supply the militias).

524. *Id.* at 72.

525. *Id.* at 1. The sandbar, which has since been washed away, was named “Beecher Island” in honor of the scouts’ second-in-command, who was killed in the battle. *Id.* at 2. He was a nephew of the abolitionist Massachusetts preacher Henry Ward Beecher. *Id.* at 81. The federal army also sent a “train of guns and ammunition” to Denver, “for use in arming the citizens.” 1 HALL, *supra* note 2, at 462. It arrived on October 29, 1868. *Id.*

526. 3 HALL, *supra* note 2, at 344–45.

527. *See id.* at 345 (“The settlers were not provided with long range rifles as were the Indians.”).

528. STILES, *supra* note 396, at 317–18. The battle was fought on November 27. *Id.* at 317. Custer’s forces killed all adult males. *Id.* at 318. Unlike at Sand Creek, the women and children were taken prisoner, rather than killed. *See id.* During the battle, the Cheyenne executed their two white prisoners: a woman and her child. MONNETT, *supra* note 423, at 61.

529. STILES, *supra* note 396, at 321 (the army estimated 1,400 Cheyenne at large after Washita). Black Kettle had been “instrumental in saving countless lives,” both Indian and white. THOM HATCH, *BLACK KETTLE: THE CHEYENNE CHIEF WHO SOUGHT PEACE BUT FOUND WAR* Kindle pos. 3362, Conclusion (2004). He is honored as the namesake of the Black Kettle National Grasslands, near Washita.

Guided by Pawnee scouts and also by a young tracker named William Cody, the U.S. Fifth Cavalry defeated Cheyenne led by Tall Bull at Summit Springs, Colorado, in July 1869.<sup>530</sup> The commander of the military Department of the Missouri wrote in his 1869 annual report that “[i]t is believed . . . that there are no hostile Indians on the Plains of Kansas or Colorado.”<sup>531</sup> Yet in 1870, as the Kansas Pacific railroad was laying tracks toward Denver, the construction crews were attacked at ten locations in far east-central Colorado, near the present town of Kit Carson.<sup>532</sup> Eleven workers were killed, nineteen wounded, and 400 head of livestock were taken.<sup>533</sup> U.S. General John Pope attempted, with limited success, to protect the construction crews, and the line was eventually completed.<sup>534</sup>

Douglas County, Colorado, originally extended to the Kansas border.<sup>535</sup> During the pre-statehood days, the pioneers of Douglas County had been the most “frequently exposed to Indian depredations, horse and cattle thieves.”<sup>536</sup> “Widely scattered, they became an easy prey to both.”<sup>537</sup> Yet they built forts and stockades to protect women and children, “and with trusty rifles themselves drove their enemies across the border. As for the white desperadoes, they were pursued and shot, or if captured, hanged to the nearest tree.”<sup>538</sup>

The removal of Colorado’s Plains Indians to reservations outside the state did not mean the end of their warfare in Colorado. The U.S. Army did nothing to stop hunters who, starting in 1873, were illegally shooting the buffalo to extermination in Indian lands in Oklahoma and Texas.<sup>539</sup> Combined with the typical federal government failure to supply adequate provisions, the destruction of the buffalo brought the Indians near starvation.<sup>540</sup> So in 1874, the Cheyenne, Comanche, Arapaho, and Kiowa rose up in the Red River War. The main theaters of battle were Texas, Oklahoma, and Kansas, but Cheyenne warriors also attacked southeastern

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530. JAMES T. KING, *WAR EAGLE: A LIFE OF GENERAL EUGENE A. CARR* 101–13 (1963); GALLAGHER, *supra* note 239, at 120–24; STILES, *supra* note 396, at 323. When Cody later became a professional entertainer in Buffalo Bill’s Wild West show, the Battle of Summit Springs was the climax of the spectacle. MONNETT, *supra* note 423, at 192. The Dog Soldiers may have been defeated, but they were not eliminated as a military force. For example, they were active in the Red River War of 1874–75. HALEY, *supra* note 26, at 96.

531. KING, *supra* note 530, at 118 (second alteration in original) (citing Maj. Gen. J.M. Schofield to Bvt. Maj. Gen. G.L. Hartsuff (Oct. 23, 1869), National Archives Records Service, Record Group 94, Adjutant General’s Office).

532. BRENNEMAN, *supra* note 2, at 53–54.

533. *Id.* at 54.

534. 1 HALL, *supra* note 2, at 490–91.

535. It thus included most of modern Elbert County, the northern part of Lincoln County, and all of Kit Carson County. NOEL, *supra* note 2, at 68–73.

536. 3 HALL, *supra* note 2, at 337.

537. *Id.*

538. *Id.*

539. HALEY, *supra* note 26, at 24–31.

540. Among their other grievances was that the federal government was not supplying them with enough firearms and ammunition. *Id.* at 10–11.

Colorado.<sup>541</sup> Among the notable incidents of the war were the Short Massacre (in Kansas) and the Hennessey Massacre (in Oklahoma).<sup>542</sup> The uprising was so serious that U.S. Army central command was moved from Washington to St. Louis.<sup>543</sup>

On June 25–26, 1876, a few days before Coloradans would vote on ratification of their proposed new constitution, General Custer attacked a camp of Sioux and Northern Cheyenne at Little Big Horn, in the future state of Montana. The federal forces were wiped out in one of the worst defeats in U.S. military history.<sup>544</sup> Then in 1878, Dull Knife and Little Wolf led Cheyenne who left the Oklahoma reservations and raided as far north as Nebraska, although not in Colorado.<sup>545</sup>

By the time that Coloradans were drafting and voting on their proposed constitution, including its right to arms, the Plains Indian wars had shown that firearms can be used for mass killing. Sand Creek was the most notorious example, perpetrated by whites, and there were many other examples, many perpetrated by Indians. So it might have been understandable for the Colorado Constitution to omit a right to arms, or to limit the types of firearms that might be possessed, or to exclude Indians, who (at the time) were not citizens. Yet Coloradans adopted a different approach, as will be described in Part IV.

## 2. The Utes

During the 1860s, the Utes were mostly at peace with the Colorado whites.<sup>546</sup> Instances of Utes killing or harassing whites were hardly unknown, but there was no general warfare. The Utes were, however, at

541. See *id.* at 78, 95. In response, Las Animas County summoned its posse comitatus. See text at note 832–33 *infra*. Arapaho participation in the war was small-scale, compared to the activities of the other tribes. TRENHOLM, *supra* note 20, at 248–49.

542. HALEY, *supra* note 26, at xx–xxi, 97–98, 139–46. One of the perpetrators of the Short Massacre (a/k/a Lone Tree Massacre) was Buffalo Calf Woman, whose family had been murdered at Sand Creek. *Id.* at 139.

543. See *id.* at 183.

544. In the Indian Wars, Custer's loss of 260 troops was eclipsed only by St. Clair's Defeat, in 1791 in western Ohio, with the loss of 600 soldiers—at the time, two-thirds of the U.S. Army.

545. See generally STAN HOIG, *PERILOUS PURSUIT: THE U.S. CAVALRY AND THE NORTHERN CHEYENNES* (2002). The 1878 raids were by Northern Cheyenne who hated living on the reservation on Oklahoma. The raids helped lead to the establishment of a separate Northern Cheyenne reservation in Montana in 1884. GALE ENCYCLOPEDIA, *supra* note 19, at 222.

In modern times, Colorado's most famous Cheyenne is former U.S. Senator Ben Nighthorse Campbell. See generally HERMAN J. VIOLA, *BEN NIGHTHORSE CAMPBELL: AN AMERICAN WARRIOR* (1993).

546. Some Utes had been in a usually friendly treaty relationship with the United States since the late 1840s, following defeats at the hands of federal soldiers led by Kit Carson. LAMAR, *supra* note 2, at 208–09; Treaty with the Utah, 1849, Dec. 30, 1849, 9 Stat. 984; 2 INDIAN AFFAIRS, *supra* note 2, at 585–87. As was typical of treaties at this time and in the subsequent two decades, the Indians agreed to stop being nomads, and to settle down. *Id.* at 586 (“[T]o cease the roving and rambling habits which have hitherto marked them as a people . . .”). The provision was completely ignored, and the U.S. made virtually no effort to enforce it. It was not until the 1870s that the U.S. government began a serious effort to confine the Utes to reservation land. See discussion *infra* Section II.D.2.



war with the Cheyenne, Sioux, and Arapaho in the 1860s and 1870s.<sup>547</sup> Indeed, after 1873 victories against the Arapaho, and in 1874 against the Cheyenne and Sioux, the returning Ute warriors celebrated with Scalp Dances in Denver.<sup>548</sup>

In the 1863 Treaty of Conejos, a thousand Utes led by Chief Ouray agreed to leave the lower San Luis Valley, in favor of the Uncompahgre region, in exchange for annuities.<sup>549</sup> The standard Indian treaties of the era promised annual deliveries of supplies to the signing tribe and also promised certain tradesman to live with the tribe. Usually this included a blacksmith, who at the time often had some gunsmithing skills.<sup>550</sup> The Ute treaty specifically provided that the blacksmith must repair guns.<sup>551</sup> This was similar to an 1857 treaty with the Pawnee.<sup>552</sup>

Tensions increased in 1864–1865. The rations promised by the treaty didn't come, and game was scarce in the winter. Some Utes went to southern Colorado homes and intimidated settlers into giving them food.<sup>553</sup>

Then in April 1865, the Black Hawk War had commenced in the Utah Territory, pitting the Utes against Mormon settlers.<sup>554</sup> The most intense part of the war ended in 1867, but fighting continued until 1872.<sup>555</sup> The

547. SIMMONS, *supra* note 2, at 120–21 (1868 war with Cheyenne and Arapaho); *id.* at 139 (1870 war with Sioux in the Upper Arkansas Valley).

548. *Id.* at 141.

549. Treaty with the Utah–Tabeguache Band, 1863, Oct. 7, 1863, 13 Stat. 673; 2 INDIAN AFFAIRS, *supra* note 2, at 856–59; MONAHAN, *supra* note 2, at 132 (number of Utes); COLTON, *supra* note 2, at 151; SIMMONS, *supra* note 2, at 117. As was common in the nineteenth century, the Ute annuity was not fully and regularly delivered. GALLAGHER, *supra* note 34, at 120.

550. VESTAL, *supra* note 92, at 152 (describing the blacksmithing skills of mountain man Jim Bridger).

551. 2 INDIAN AFFAIRS, *supra* note 2, at 858 (“The Government also agrees to establish and maintain a blacksmith-shop, and employ a competent blacksmith, for the purpose of repairing the guns and agricultural implements which may be used by said band of Indians.”). The Ute in turn agreed not to furnish arms to any tribe “not in amity with the United States.” *Id.* at 857.

552. Treaty with the Pawnee, 1857, art. 4, Sept. 24, 1857, 11 Stat. 729; 2 INDIAN AFFAIRS, *supra* note 2, at 765 (“[T]wo complete sets of blacksmith, gunsmith, and tinsmith tools . . . [T]wo blacksmiths, one of whom shall be a gunsmith and tinsmith; but the Pawnees agree to furnish one or two young men of their tribe to work constantly in each shop as strikers or apprentices, who shall be paid a fair compensation . . .”). For a list of gunsmiths employed by the War Department in 1832 to aid friendly Indians, see RUSSELL, *supra* note 66, at 365–66.

553. SIMMONS, *supra* note 2, at 120–21; PETERSON, *supra* note 273, at 211 (1863 Conejos Treaty mostly ignored by whites). This happened again in the winter of 1866–67. SIMMONS, *supra* note 2, at 125.

554. See PETERSON, *supra* note 322, at 121–22.

555. See *id.* at 340–42, 368–71. As the Utes well knew, the Mormons were fearful of calling for federal military assistance, because once the troops had dispatched the Indians, they might crack down on the Mormon theocracy, and impose effective federal control. To prevent federal intervention, deceptive Mormon reports to Washington downplayed the intensity of the Black Hawk War. The federal government did not appear to mind leaving the Mormons to fight alone. *Id.* at 3–5. The Mormon militia that was raised for the war was known as the Nauvoo Legion. *Id.* at 13–14. Finally, in 1872, the federal army did intervene. The army not only suppressed the Indians, it outlawed the Nauvoo Legion. *Id.* at 374.

Previously, Indian relations with Mormons had been much better than with any other group of whites, *id.* at 5–7, partly because of Mormon scripture that Indians (the Lamanites) were descendants of a lost tribe of Israel, and would eventually become Latter Day Saints, *id.* at 22–23.

Black Hawk War made the Utes of southwestern Colorado much more hostile to whites, and the area was a fertile recruiting ground for Utes to join the Black Hawk War; southwestern Colorado was also a transit zone for the enormous quantities of livestock that the Utes captured during the war, to be sold in Santa Fe.<sup>556</sup> One side effect of the war was greatly increased Ute raids of Colorado livestock.<sup>557</sup>

The Utes were also unhappy with an 1865 proclamation by President Johnson shortly after the end of the Civil War that outlawed Indian slavery and the Indian slave trade.<sup>558</sup> This was a serious economic blow to the Utes, who had long been selling captives from other tribes as slaves.<sup>559</sup> Until the ratification of the Thirteenth Amendment in December 1865, slavery was legal in the New Mexico Territory, and the Ute's slave trade continued in the San Luis Valley after 1861, when northern New Mexico became part of the new Colorado Territory.<sup>560</sup>

Overt hostilities broke out in 1866 when Chief Kaneatche led Ute raids in Las Animas County in 1866, until forced to retreat by a U.S. Cavalry force.<sup>561</sup> Farther west, Kit Carson reported that the Utes in the Four Corners area were "a powder magazine" ready for "a spark."<sup>562</sup>

In 1868, Territorial Governor Alexander Cameron Hunt and Kit Carson negotiated a new agreement with the Utes that was "the most generous treaty ever made between the U.S. government and any Native

Black Hawk, a Ute, assembled a large pan-Indian coalition for the war. *Id.* at 10–11. The main theater of operations was Sanpete and Sevier Counties, in central and eastern Utah, where Utes were angry at their treatment by Mormon settlers; the Black Hawk warriors did not consider themselves to be at war with the Mormons as a whole. *Id.* at 12.

556. *Id.* at 184–87, 198–200. Some of the livestock captured in Utah were brought to southern Colorado. SIMMONS, *supra* note 2, at 128. Arms and ammunition sales by Colorado whites were an important supply for the Black Hawk warriors. PETERSON, *supra* note 322, at 187, 193–94. So were Mexican traders in the San Luis Valley. *Id.* at 198. All such trade was contrary to federal law prohibiting unlicensed trading with Indians. *Id.*

557. PETERSON, *supra* note 322, at 198–99.

558. SIMMONS, *supra* note 2, at 121.

559. *Id.* at 33, 121.

560. *Id.* The territory had hardly any black slaves, but several thousand Indian ones. MARTIN HARDWICK HALL, SIBLEY'S NEW MEXICO CAMPAIGN 6 (Univ. of N.M. Press 2000) (1960); PETERSON, *supra* note 322, at 65 (estimating about 4,000 slaves in New Mexico as of the mid-1860s). The Jan. 1, 1863, Emancipation Proclamation did not by its terms apply to either the Colorado or New Mexico Territories, because neither were in rebellion against the United States. The Thirteenth Amendment was ratified on Dec. 6, 1865, outlawing all slavery throughout the U.S.

The Apaches were also active slave traders. WEST, *supra* note 2, at 45. Farther south, the Comanche Empire, which dominated the region from Arizona to Louisiana until about 1850, also carried on a thriving slave trade. PEKKA HÄMÄLÄINEN, THE COMANCHE EMPIRE 2 (2008). However, neither the Apache nor the Comanche slave trade appears to have been very active in Colorado.

561. 4 HALL, *supra* note 2, at 93.

562. PETERSON, *supra* note 322, at 211. An attempt was made in 1866 to get the Utes to agree to settle down and take up ranching and agriculture, which they had first promised to do in the 1849 treaty. 2 INDIAN AFFAIRS, *supra* note 2, at 586. But the Utes explained that if they were sedentary, their enemies would know where they were and be able to find them and kill them. The Utes would not consent to stop roaming until their enemy tribes were on reservations. P. DAVID SMITH, OURAY: CHIEF OF THE UTES 68 (1986).

American group.”<sup>563</sup> The Hunt Treaty was generous partly because the Governor wanted to keep the Utes from allying with the Arapaho and Cheyenne, leaving Colorado completely surrounded by hostiles.<sup>564</sup>

The new Consolidated Ute Reservation was for Utes in Colorado and New Mexico. It encompassed the western thirty percent of Colorado.<sup>565</sup> However, the Indian agents appointed to deliver annuities to the Utes were especially bad, and much of what the Utes had been promised was filched before delivery.<sup>566</sup> The problem was even worse because Governor Hunt, who was much respected by the Utes, had been replaced by Edward M. McCook, whose main interest in the governorship was stealing the annuities. Territorial Secretary Frank Hall later described McCook’s annuity thefts as “a scheme of rascality and plunder without a parallel in our annals.”<sup>567</sup>

McCook’s terrible governance eventually convinced many Coloradans that territorial government had become a problem and statehood was the solution. “It is interesting to note that virtually every new state that had undergone the territorial experience had reacted in a similar way by clipping gubernatorial wings.”<sup>568</sup> Thus, article IV of the 1876 Colorado Constitution would divide executive power among seven elected officers,<sup>569</sup> require biannual reports from executive departments on expenditures,<sup>570</sup> forbid pay raises during a constitutional officer’s term,<sup>571</sup> and mandate legislative participation in executive pardons.<sup>572</sup>

The boundaries of the reservation, based on straight lines of latitude and longitude, were incomprehensible to the Ute. Many refused to move

563. BERWANGER, *supra* note 2, at 38–39; ESTERGREEN, *supra* note 2, at 272–73; Treaty with the Ute, 1868, Mar. 2, 1868, 15 Stat. 619; 2 INDIAN AFFAIRS, *supra* note 2, at 990–96. Hunt served as Governor from May 1867 to June 1869. He had come to Colorado in 1858. BERWANGER, *supra* note 2, at 55–56.

564. BERWANGER, *supra* note 2, at 38–39.

565. Not including land fifteen miles or farther north of the fortieth parallel. In other words, the northern border was mostly in-between the Yampa and White Rivers. The eastern border was about ten miles west of Aspen. SIMMONS, *supra* note 2, at 131–33. The Utes gave up claims to North Park, Middle Park, the San Luis Valley, and the Yampa River Valley, all of which had mostly been taken by the whites already. SMITH, *supra* note 562, at 72–73.

566. SIMMONS, *supra* note 2, at 137–38.

567. 3 HALL, *supra* note 2, at 18; *see also* LAMAR, *supra* note 2, at 247–48; 2 HALL, *supra* note 2, at 166–69. McCook complained that the Hunt Treaty treated Indians better than whites. Under the federal Homestead Act, a settler could acquire 160 acres of land (which was fine in eastern Kansas, but insufficient to make a living in semi-arid Colorado). In contrast, Ute Reservation amounted to over 2,000 acres per Ute, who at the time numbered no more than 6,000. SMITH, *supra* note 562, at 85, 91, 108 (noting the reservation was over fourteen million acres).

Ulysses Grant was personally an honest man, but he was willfully blind to the thievery of his friends. 3 VERNON LOUIS PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT: THE BEGINNINGS OF CRITICAL REALISM IN AMERICA, 1860–1920, at 30 (Univ. of Okla. Press 1987) (1930). The vast corruption that Grant tolerated was described as “The Great Barbecue.” *See id.* at 23–31.

568. LAMAR, *supra* note 2, at 254.

569. COLO. CONST. art. IV, § 1 (amended 1956).

570. *Id.* art. IV, § 16.

571. *Id.* art. IV, § 19.

572. *Id.* art. IV, § 7.

to the reservation. The Utes who were already inside the reservation had no compunction about leaving—sometimes for hunting and sometimes for raids on isolated white settlements.<sup>573</sup> Nor did the whites have much respect for reservation boundaries, whose borders they violated by settling or prospecting.<sup>574</sup>

After the discovery of silver and gold in the San Juan Mountains in 1871, whites began to flood in. During 1872 negotiations, Chief Ouray and other Utes refused to cede more territory. The federal government even issued orders that the U.S. Army remove illegal white immigrants in the San Juans, but the orders were quickly rescinded.<sup>575</sup>

The Utes did sign the 1873 Brunot Agreement, ceding the mining regions, about a quarter of the reservation, while reserving hunting rights in the ceded areas.<sup>576</sup> But the illegal immigration into the remaining reservation could not be contained. Nor could Utes be contained to the reservation; for example, in 1878, a large band of hunters led by Chief Shawano killed Joseph McClane, a resident of Cheyenne County, on the far eastern plains.<sup>577</sup>

In the September 29, 1879 Meeker Massacre, White River Utes killed Indian agent Nathan Meeker and nine other men, and took their wives and children hostage.<sup>578</sup> Governor Pitkin called out the state militia, who joined federal forces from Wyoming in war against the Utes.<sup>579</sup> The ultimate result was congressional passage of the 1880 Ute Removal Act, drastically

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573. SIMMONS, *supra* note 2, at 140–42; *see also* 3 HALL, *supra* note 2, at 345 (noting the 1878 Ute summer encampment at Garden of the Gods).

574. SIMMONS, *supra* note 2, at 138.

575. SMITH, *supra* note 562, at 91–92, 104–06.

576. Brunot Agreement with the Ute Indians, ch. 136, art. 1–2, 18 Stat. 36, 37 (1874); BERWANGER, *supra* note 2, at 39; 2 HALL, *supra* note 2, at 189–92. The ceded area was most of the modern counties of Archuleta, Hinsdale, Dolores, La Plata, Montezuma, Ouray, San Juan, and San Miguel. SMITH, *supra* note 562, at 114. Initial white attempts to settle in the Animas River and San Juan region had begun in 1860, but had ended in failure, as no valuable finds of minerals were made, and the settlers were forced out by the Utes. 2 HALL, *supra* note 2, at 192–97.

The 1873 document was styled as an “agreement” rather than a “treaty” due to an 1871 federal statute that forbade treating Indian nations as sovereigns. Indian Appropriations Act of 1871, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71) (“No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .”). Perhaps surprisingly, courts in the twentieth century were unwilling to cast aside the pre-1871 treaties; instead, they remain an important component of the rule of law, by which the United States defines itself. *See* PRUCHA, *supra* note 2, at 386–88 (a key motive for the statute was the desire of the House of Representatives to be able to vote on agreements with Indians, since treaties need ratification only from the Senate). The fight between the House and Senate over this issue delayed the passage of appropriations for Indian annuities until the final days of the forty-first Congress and prevented the passage of any Indian appropriation bill in the fortieth Congress (1867–69). *Id.* at 295–305.

577. 4 HALL, *supra* note 2, at 89.

578. SIMMONS, *supra* note 2, at 186–87.

579. *Id.* at 188–89. “Like most difficulties with this and other Indian nations, it was directly ascribable to the neglect and indifference of the Indian Bureau at Washington.” 2 HALL, *supra* note 2, at 494. *See generally* ROBERT SILBERNAGEL, TROUBLED TRAILS: THE MEEKER AFFAIR AND THE EXPULSION OF UTES FROM COLORADO (2011) (providing a detailed account of the events of 1879–1881).

reducing the Colorado reservation and ordering many Utes to go to the Uintah Reservation in Utah.<sup>580</sup> Through the 1910s, some Utes, including those led by Chief Colorow, ventured off the reservation to hunt in Colorado, which sometimes resulted in violent skirmishes with whites.<sup>581</sup> Indeed by 1895, off-reservation hunting by Utes was so extensive as to raise concerns about the extermination of elk, deer, and other game.<sup>582</sup>

Like the Cheyenne's Black Kettle, the Ute Chief Ouray had been a great warrior in earlier days. Like Black Kettle, he recognized the whites' overwhelming demographic advantage and pragmatically tried to make the best deals possible for his people, although he knew he was dealing from a position of weakness.<sup>583</sup> But among the Utes, like the Cheyenne, the authority of a single chief, or even several chiefs, was limited to whoever chose to follow them, and many young men chose to stand and fight.<sup>584</sup>

The Ute reservations in Colorado were greatly reduced by the 1880 Removal Act, and then whittled thereafter.<sup>585</sup> What remains today are the Ute Mountain Ute Reservation and the Southern Ute Indian Reservation, both in far southwestern Colorado.<sup>586</sup>

In the twenty-first century, Utes have asserted their Brunot hunting rights, which provided that "[t]he United States shall permit the Ute Indians to hunt upon said lands so long as the game lasts and the Indians are at peace with the white people."<sup>587</sup> The Colorado Department of Parks and Wildlife has negotiated agreements with Utes allowing them to hunt in Brunot areas outside the normal hunting seasons, at levels consistent with wildlife sustainability.<sup>588</sup>

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580. SIMMONS, *supra* note 2, at 191.

Ouray died in 1880, at age 47. *Id.* at 192. He is the namesake of Ouray County. The Uintah Reservation, in Utah, is now the Uintah and Ouray Reservation.

Ouray's widow, Chipeta, outlived him by half a century. Although the Utes were ill-treated in the late nineteenth century, Chipeta was celebrated in southern Colorado during the early twentieth century. See CYNTHIA S. BECKER & P. DAVID SMITH, *CHIPETA: QUEEN OF THE UTES* 202–03 (2003) (noting Chipeta met with President Taft). Today, she is remembered by several place names in Colorado and Utah. *Id.* at 253–54.

581. SIMMONS, *supra* note 2, at 204–06. In a 1914 incident, about a hundred Utes hunting off-reservation near Rangely were rounded up by civilians and returned to Utah. *Id.* at 228.

582. 4 HALL, *supra* note 2, at 66. Until 1914, the federal Commissioner of Indian Affairs was willing to ignore Ute off-reservation hunting. The crackdown in 1914 seems to have been provoked by the Utah Utes asking for more rations during a particularly hungry time. BECKER & SMITH, *supra* note 580, at 221–22.

583. See SIMMONS, *supra* note 2, at 193.

584. See *id.* at 179 (discussing White River Utes in 1875–1878).

585. Act of June 15, 1880, ch. 223, 21 Stat. 199; SIMMONS, *supra* note 2, at 217 (discussing the 1895 Hunter Act).

586. See generally RICHARD K. YOUNG, *THE UTE INDIANS OF COLORADO IN THE TWENTIETH CENTURY* (1997) (describing the development of differing cultural and political views between the two reservations, starting in the 1890s).

587. Brunot Agreement with the Ute Indians, ch. 136, art. 2, 18 Stat. 36, 37 (1874).

588. MEMORANDUM OF UNDERSTANDING BETWEEN UTE MOUNTAIN UTE TRIBE AND THE STATE OF COLORADO CONCERNING WILDLIFE MANAGEMENT AND ENFORCEMENT IN THE BRUNOT

*E. Law and Order*

Meanwhile in the towns, law and order issues had to be addressed. Although Colorado would later become a great agriculture and ranching state, we should not think of gold rush Colorado as rural. Except for Indians, the large majority of people lived in towns that were either base camps for miners (e.g., Gold Hill, in Boulder County) or commercial centers for supplying the miners and other inhabitants (e.g., Denver, Golden). The core criminal problem was that among the people who had moved to Colorado were “roughs” from Kansas, Missouri and elsewhere, leaving areas where they already had a criminal record and seeking new opportunities for predation.<sup>589</sup>

Individual self-defense was a necessity. In 1859, “[a]ll carried deadly weapons, to protect themselves from the lawless.”<sup>590</sup> One new arrival in June 1864 wrote, “I do not enjoy living in a country where every man you meet, thinks it is safe to carry a loaded pistol. The practice is universal in all parts of Colorado.”<sup>591</sup>

Although individual self-defense was necessary, it was not sufficient in the eyes of Coloradans. Communities had to organize for collective self-defense. As described in Section I.B., this collective community organization had to be ad hoc, by the pioneers themselves. Neither the federal government, the Kansas territorial government, nor any other external organization had more than a minor capacity to construct functioning government in Colorado.

Early Colorado never devolved into the anarchy that had characterized California in its own early gold rush years, a decade before. Because about thirty percent of Colorado’s miners had experience in California, they understood the importance of creating effective local self-government immediately.<sup>592</sup> Thus, the miners’ districts were quickly

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AREA (2013); BRAD WEINMEISTER, COLO. PARKS & WILDLIFE, BIGHORN SHEEP MANAGEMENT PLAN, DATA ANALYSIS UNIT RBS-20 18 (2012); SOUTHERN UTE INDIAN TRIBE, 2017–2018 BRUNOT AREA HUNTING & FISHING PROCLAMATION FOR BRUNOT AREA HUNTING & FISHING BY SOUTHERN UTE TRIBAL MEMBERS (stating tribal hunting regulations for Southern Utes in Brunot area).

During the latter decades of the twentieth century, Indian tribes had success in reasserting treaty right for hunting and fishing. PRUCHA, *supra* note 2, at 385; *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979); *Puyallup Tribe v. Dep’t of Game of Wash.*, 391 U.S. 392 (1968) (generating two follow-up cases of the same name).

589. HISTORICAL COMPENDIUM, *supra* note 2, at 144; LAMAR, *supra* note 2, at 184.

590. 1 HALL, *supra* note 2, at 207; *see also* RICHARDSON, *supra* note 88, at 305 (“[F]ully half the citizens wore sixshooters . . .”).

591. SMITH, *supra* note 212, at 234; LEONARD & NOEL, *supra* note 2, at 27. The man was Nathaniel Hill, who had been a professor of chemistry at Brown University. He discovered an improved method of smelting, which made him rich and contributed greatly to Colorado’s prosperity. He was later elected to the U.S. Senate. SMITH, *supra* note 212, at 201, 249.

592. LAMAR, *supra* note 2, at 186.

established.<sup>593</sup> Experienced code writers traveled from town to town, helping to create local law.<sup>594</sup>

The early informal courts were not contrary to law and order. Instead, they were the foundation of the Colorado judiciary. Gilpin County's first sheriff recalled how the first judge of the Miners' Court was selected:

[A young prospector] was in partnership with a bunch of the boys that were sluicing some ground up in Russell Gulch. He never did take kindly to the hard work around the sluice boxes, so the boys told him off to be the camp cook. Now that didn't work out very well, either, for [he] was always reading Blackstone or some law book, and forgetting about his cooking, and there was many a dish of beans scorched because he was too much interested in a book.<sup>595</sup>

Well, as I say, he wasn't much of a cook, and completely no good as a placer miner, so the boys made him into a Judge. (Here the Old Sheriff chuckled). I must say that as the years have piled up, he has made a damn good one.<sup>596</sup>

The Miner's Court Judge was Moses Hallett.<sup>597</sup> He later served in the Territorial Council (the legislature) 1863–1866,<sup>598</sup> as Denver City Attorney,<sup>599</sup> and as Chief Judge of the federal Territorial Court 1866–1877.<sup>600</sup> There, he created the foundation of Colorado water law.<sup>601</sup> In 1877, he was appointed U.S. District Judge for the District of Colorado and served until 1906.<sup>602</sup>

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593. *Id.*

594. *Id.*

595. LAFAYETTE HANCHETT, *THE OLD SHERIFF AND OTHER TRUE TALES* 8–9 (1937).

596. *Id.* at 9.

Placer gold is the gold that has eroded from the mountains, and can be found in streams. "Placer" is the Spanish word for "pleasure." WEST, *supra* note 2, at 106.

597. HANCHETT, *supra* note 595, at 8.

598. He served on the Council (the upper house) of the third Territorial Assembly in 1864 and in the fourth Assembly in 1865. 2 HALL, *supra* note 2, at 537, 539.

599. As City Attorney: April 1, 1863 to April 1, 1864, and April 1, 1865 to April 1, 1866. *Id.* at 524.

600. *Hallett, Moses*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/hallett-moses> (last visited Dec. 20, 2017).

601. Judge Hallett explained that the common law doctrine in favor of riparian rights, which had developed in Great Britain and the eastern U.S., where water is plentiful, could not be applied in arid Colorado, where beneficial use of water is essential to the survival of the community:

[R]ules respecting the tenure of property must yield to the physical laws of nature, whenever such laws exert a controlling influence.

.....

When the lands of this territory were derived from the general government, they were subject to the law of nature, which holds them barren until awakened to fertility by nourishing streams of water, and the purchasers could have no benefit from the grant without the right to irrigate them.

*Yunker v. Nichols*, 1 Colo. 551, 553, 555 (1871).

602. The court was created by the Act of June 26, 1876, ch. 147, 19 Stat. 61. During and after his service on the District Court, Judge Hallett taught at the University of Colorado Law School and became Dean Emeritus. *Hallett, Moses*, *supra* note 600. He is the namesake of Hallett Hall at the University.

Wilbur Fiske Stone came to Colorado as a miner in 1860.<sup>603</sup> An early photograph of Stone shows him with a lever action rifle and a large knife in a belt sheath.<sup>604</sup> He was elected to the territorial legislature in 1862 and 1864<sup>605</sup> and was an assistant U.S. attorney in 1862–1866.<sup>606</sup> In 1877, he became a justice of the Colorado Supreme Court.<sup>607</sup> During the early days of Cañon City, he helped organize the people’s court there.<sup>608</sup> Fremont County in 1860–1863 was beset by “a gang of horse and cattle thieves.”<sup>609</sup> Because of danger from these “roughs,” people usually wore pistols and bowie knives.<sup>610</sup> Justice Stone later recalled, “As to the character and results of these people’s courts I can sum it all up by declaring that, if their administration was not always strictly law, it was rarely ever anything else than acknowledged justice.”<sup>611</sup>

On the whole, the mining districts were successfully self-sufficient in criminal justice. The miner’s courts and people’s courts hanged murderers; lesser criminals were whipped, had half their heads shaved, and were banished.<sup>612</sup> The result was public safety: “No miner locked the doors to his cabin, though there might be hundreds or thousands of gold dust within, and wholly unguarded.”<sup>613</sup> The mining districts did not feel much need for additional government.

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The 1876 Republican State Convention was about to nominate Hallett as its candidate for Colorado Supreme Court, until it was pointed out that Hallett would likely be named to the federal bench. 2 HALL, *supra* note 2, at 331. He was appointed on Jan. 9, 1877, by President Grant. *Id.* at 361. Unlike most judges, Hallett did not allow “smoking, card playing, hats, or guns” in his courtroom. ERICKSON, *supra* note 2, at 48.

603. ERICKSON, *supra* note 2, at 86.

604. *Id.* at 12 (reprinting Colorado Historical Society photo no. 10036730).

605. 2 HALL, *supra* note 2, at 539–40 (Representative from Park County); 4 HALL, *supra* note 2, at 565–66.

606. 4 HALL, *supra* note 2, at 566.

607. Stone had been a Democratic nominee for the Supreme Court in 1876 but had lost in what was a mostly Republican year statewide. *Id.* One of the winners, Justice E.T. Wells, resigned after serving for one year. A special meeting of Colorado lawyers nominated Stone for the vacancy, and both political parties acceded to the result. Stone served as a Justice until 1886. *Id.* In 1891, President Benjamin Harrison appointed Stone to a commission to investigate the Spanish land grants in the southwest, which had wrapped up huge amounts of land in continuing disputes over title. Stone spoke Spanish, French, and German, and he went to Madrid to investigate the origin of claims to 12 million acres, the 1748 Peralta grant from the King of Spain. Stone’s investigation revealed that the Peralta claim was a fraud. ERICKSON, *supra* note 2, at 86–87. Towards the end of his life, Stone edited a four-volume *History of Colorado*, published in 1918. *Id.* at 88.

608. ERICKSON, *supra* note 2, at 86. Stone’s co-author of the code for the People’s Court was George Hinsdale. 4 HALL, *supra* note 2, at 566. In 1868, Hinsdale and Stone co-founded the *Colorado Chieftain* newspaper, now known as the *Pueblo Chieftain* newspaper. *Id.*; 1 HALL, *supra* note 2, at 477.

609. ERICKSON, *supra* note 2, at 10.

610. *Id.*

611. *Id.*

Stone was personally aware that firearms could be misused. In 1876, when he was serving as a Territorial Judge, a body of armed men removed him from a train and detained him for several hours, while treating him respectfully. They were unsuccessfully attempting to prevent him from issuing a ruling in a railroad case that day. 2 HALL, *supra* note 2, at 418–19.

612. Townspeople were authorized to shoot the offender on sight if he returned. SMITH, *supra* note 212, at 74.

613. 1 HALL, *supra* note 2, at 481 (describing Spanish Bar mining settlement, near Clear Creek).



Denver, however, with its larger population, had a much worse crime problem, and it wanted a regular territorial government to be established.<sup>614</sup> During the city's first two years, it had fifteen murders.<sup>615</sup> The frequent shootings in saloons and gambling dens were usually ignored as a problem that voluntary combatants brought on themselves. But the bad men did not always confine themselves to fighting each other. For one thing, "the community was infested with horse thieves, whose depredations were of almost daily occurrence."<sup>616</sup> There were many "lawless characters" who "rejoiced in being denominated 'holy terrors.' . . . [T]hese desperadoes conceived the idea that they ought to and would run the town."<sup>617</sup> Vigilance committees, informal people's courts, and a formal People's Tribunal in Denver did their best to maintain public safety.<sup>618</sup>

"Uncle Dick" Wootton was an experienced mountain man who had been induced to open a merchandise store in Denver in exchange for a grant of 160 acres of land.<sup>619</sup>

It was the first Denver building constructed of hewn logs, and, for a time, was the only two-story building in Denver City.<sup>620</sup> Wootton recalled that "[t]he scoundrels and thieves came pretty near running the country until the vigilantes organized."<sup>621</sup> The first instance involved a Hungarian who murdered his brother-in-law to take his gold dust.<sup>622</sup> When the corpus delicti was discovered by some Mexican<sup>623</sup> boys, the man was apprehended, and confessed. A jury of twelve was quickly assembled; the defendant had good counsel, but the confession settled the matter, and the jury voted for him to be hanged that day.<sup>624</sup>

614. *Id.* at 219–21.

615. BRENNEMAN, *supra* note 2, at 15.

616. RONZIO, *supra* note 2, at 62.

617. 1 HALL, *supra* note 2, at 183.

618. Another problem arose on January 30, 1860, when some claim jumpers began erecting buildings on land that was owned (but unimproved) by others. Both sides were heavily armed, and some shots were fired, almost killing the Denver Sheriff. However, attorney Edward Wynkoop, representing the jumpers, worked out a compromise by which the jumpers would abandon their claims, in return for compensation for the expenses they had incurred. The "War against the Jumpers" ended peacefully. BRENNEMAN, *supra* note 2, at 17; RONZIO, *supra* note 2, at 21–23.

619. WOOTTON, *supra* note 2, at 244. Wootton lived in Denver for four years, moving to southern Colorado in 1862. *Id.* at 251–52. Mountain men tended to shorten the appellations of their fellows, so Richens Wootton was known as "Dick" to his fellow trappers, and as "Uncle Dick" to the younger generation. *Id.* at 17–18.

620. *Id.* at 244. The April 11, 1859, public assembly that began the effort to seek statehood was held in Wootton's second story. *Id.* at 249 n.103.

621. *Id.* at 247.

622. *Id.*

623. As described above, parts of early Colorado and all of New Mexico had once been part of the United States of Mexico. In the 1848 Treaty of Guadalupe-Hidalgo, the United States of America purchased New Mexico, part of Colorado, and other Southwestern land. The treaty allowed all Mexican inhabitants to remain, and offered them American citizenship, if they wanted it. Some but not all Mexicans accepted. Early Colorado writers used "Mexican" to encompass all persons of Mexican ancestry, regardless of whether they citizens of the U.S. or of Mexico. *See supra* note 88.

624. WOOTTON, *supra* note 2, at 247.

According to Wootton, the execution “was the first of a series which revolutionized Denver society.”<sup>625</sup> In the next few months several notorious criminals were hanged, and others decided to leave town.<sup>626</sup>

In next-door Auraria, the “Bummers”—a gang of thieves—had been stealing property in December 1859 and January 1860. Things came to a head when they filched a bunch of turkeys from a Mexican’s wagon. A citizens committee was appointed, and they gathered testimony that various Bummers, including William Todd (“Chuck-a-luck”) and William Karl (“Buckskin Bill”) were guilty. In response, the Bummers paraded in the streets with their arms and threatened to burn the city—no small threat for a city built of flimsy wood, which would in fact suffer a disastrous fire in 1863. They were faced down by the Jefferson Rangers, a militia unit that had embodied on January 18, 1860. After some nonlethal violence between the two sides, the Bummers decided to accept the offer to leave town within five hours, never to return, under penalty of hanging. “A few nights of vigilant guard was maintained, and thus ended the famous ‘Turkey War.’”<sup>627</sup>

The jurisdiction of the popular courts was questionable, but there was nobody else to exercise jurisdiction. Indeed, in one case a murder defendant had been transported to eastern Kansas at great expense, only to have the state judge declare that he had no jurisdiction over the defendant, and no other court did either. The case was eventually heard by a Colorado people’s court.<sup>628</sup> These courts were effective and fair:

The country was, in fact, peaceable and law-abiding, with the exception of that dangerous class common to the border . . . [T]hese roughs were kept in check by the fear of summary punishment. Miners’ courts in the mountains had been supplemented by people’s courts in the valleys. The proceeding of the latter were as open and orderly as those of the former; indeed, they approached the dignity of a regularly constituted tribunal.

They were always presided over by a magistrate, either a Probate Judge or a Justice of the Peace. The prisoner had counsel and could call witnesses, if the latter were within reach.<sup>629</sup>

According to William Byers, who moved to Denver in 1859 and founded the *Rocky Mountain News*, “We never hanged on circumstantial evidence. I have known a great many such executions, but I don’t believe

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625. *Id.* at 248.

626. *Id.*

627. RONZIO, *supra* note 2, at 23–24; 1 HALL, *supra* note 2, at 222.

628. STEPHEN J. LEONARD, LYNCHING IN COLORADO 1859–1919, at 24–25 (2002); RICHARDSON, *supra* note 88, at 292 (noting that defendant James Gordon’s Colorado custodians saved him from a lynch mob in Kansas).

629. HISTORICAL COMPENDIUM, *supra* note 2, at 146.

one of them was unjust.”<sup>630</sup> Byers and his employees, by the way, were always armed for defense against persons irate about their articles.<sup>631</sup> One of the most notable men to serve as a judge of a people’s court was Alexander C. Hunt, who later served as territorial governor.<sup>632</sup>

Outside of the popular courts, there were instances in which vigilantes took it upon themselves to inflict summary punishment (hanging, whipping, or banishment) with no legal process provided to the accused. One motive was that the people’s courts were supposedly too lenient.<sup>633</sup>

Pueblo County’s vigilantes were “a respectable and earnest body of men.”<sup>634</sup> In Colorado, as was typical in the West, vigilantes were not a spontaneous rabble, but were organized by the middle- and upper-class men of the area.

In an exhaustive study of lynching in Colorado, historian Stephen Leonard defines lynching very broadly; he includes the people’s courts and even *posses* (which by definition were led by sheriffs).<sup>635</sup> With this definition, he counts 175 “lynchings” in Colorado history.<sup>636</sup> Of these, he

630. ERICKSON, *supra* note 2, at 183. Frank Hall, who served as Territorial Secretary from 1866-74 and Acting Governor in 1868, concurred: “There is not an instance upon our records where an innocent person, nor one whose guilt was not clearly established, suffered injury at their [vigilante] hands.” 1 HALL, *supra* note 2, at 473; *see also id.* at 220 (there was not known “a single instance wherein any man was unfairly tried or punished”); 2 HALL, *supra* note 2, at 533, 541 (noting Hall’s service; also noting that he was a Black Hawk representative to the Territorial House, elected in 1865). Hall credited the 1868 vigilante executions of two notorious Denver outlaws with “a salutary and enduring effect. . . . [T]here was no more orderly community on the frontier than Denver in the succeeding two years.” 1 HALL, *supra* note 2, at 472-73.

631. *See* LAMAR, *supra* note 2, at 186-87. The *News* had criticized Charley Harrison for what it called the “cold-blooded murder” of a black man known as Professor Stark. Harrison’s friends kidnapped *News* publisher William Byers, but Harrison told them to let Byers go. Harrison advised Byers to “arm yourself for protection against those sonsofbitches.” BRENNEMAN, *supra* note 2, at 18. After Byers was released, two ruffians went back to the *News* building and started shooting at it. They were driven off by return fire from the *News*, and from a crowd of citizens, which captured them. WHARTON, *supra* note 2, at 179-80.

Thereafter, Byers and his staff were constantly armed at work. BRENNEMAN, *supra* note 2, at 18.

About the first question Byers asked of an employee in those days was whether he could handle a gun to good advantage, and a printer who was handy in this respect stood well with the proprietors of the paper, even though he had a multitude of shortcomings as a compositor.

WOOTTON, *supra* note 2, at 245. “The establishment was always in a state of armed neutrality. Printers and editors were moving arsenals, with revolvers at their belts and shot-guns standing beside their cases and desks.” RICHARDSON, *supra* note 88, at 293. The offending *News* article was printed on July 25, 1860, and the attack on the *News* took place on July 31. WHARTON, *supra* note 2, at 177-79. *See generally* GALLAGHER, *supra* note 239, at 46-50 (accounting the complete incident).

Denver soon had three daily newspapers, and their employees were also well-armed, for “no journalist who aims to tell the truth is wise to step into these streets without some display of fire-arms, unless partial to having his nose pulled or being made a target.” RICHARDSON, *supra* note 88, at 297.

632. He served a judge in Denver in 1860 and was later appointed Territorial Governor by President Grant. FORBES PARKHILL, *THE LAW GOES WEST* 17, 98, 139-40 (1956). Hunt had previously been a California gold miner. *Id.* at 139.

633. LEONARD, *supra* note 628, at 156.

634. 3 HALL, *supra* note 2, at 453.

635. *See id.* at 6, 15-29, 119-20.

636. *Id.* at 6.

finds only three lynchings based on “weak evidence” before the 1870s<sup>637</sup>—by which time the practice was on its way out, as will be explained below.

Leonard offers several reasons why lynching existed. First of all, he says it was legitimated by the people’s courts.<sup>638</sup> But this is questionable, as there is quite a difference between an immediate hanging and a process that involves trials, witnesses, cross-examination, juries, and sometimes acquittals. Second, the jails in Colorado were of poor quality.<sup>639</sup> Often, they were converted buildings from which escape was easy.<sup>640</sup> It was possible for lynch mobs to break into jails and extract their target.<sup>641</sup> Third, some law enforcement officers were in fact leaders of undercover criminal gangs.<sup>642</sup> Fourth, the formal court system in the early days was not very good. Unfortunately, this did not change when the Territory of Colorado was established in 1861, and three federal territorial judges were appointed. One was a Confederate sympathizer who fled the territory after his efforts to promote secession failed. Another did virtually no work, and the third was conscientious.<sup>643</sup>

The quality of the federal judiciary did improve after 1866 as Coloradans succeeded in pressuring Presidents to appoint well-qualified locals, such as Moses Hallett and E.T. Wells, rather than easterners in search of sinecures.<sup>644</sup> But the federal court had a huge backlog of cases, and the appeals process (to the three district judges, sitting en banc as territorial Supreme Court Justices) took many years.

The third judicial district comprised the southern half of the state, and it was something of a moveable feast with the judge, court officers, lawyers, parties, and witnesses traveling through the south, camping out along the way, and holding a mobile court in small adobe houses or whatever facility could be found.<sup>645</sup> Allen Brandford was its first judge and Moses Hallett the second.<sup>646</sup>

Colorado Supreme Court Justice Wilbur Fiske Stone later recalled that the traveling lawyers and judges had “more fun, legal and illegal, than the Bench and Bar have ever seen since in the effeminate days of

637. *Id.* at 165–72 tbl.A.1.

638. *Id.* at 28.

639. *Id.* at 106.

640. LEONARD, *supra* note 628, at 106. A secure territorial prison was opened in 1871. BERWANGER, *supra* note 2, at 124.

641. *See, e.g.*, LEONARD, *supra* note 628, at 118; TAYLOR, *supra* note 2, at 130, 134.

642. *See* LEONARD, *supra* note 628, at 107.

643. GUICE, *supra* note 2, at 27–32, 63–66, 79; PARKHILL, *supra* note 632, at 19–24; LEONARD, *supra* note 628, at 41–42 (all discussing the poor quality of territorial bench pre-Hallett).

644. President Andrew Johnson appointed Hallett in response to a memorial from the territorial legislature, which wanted Hallett because he was a local man who understood local issues, such as mining law, and because of “his eminence as a lawyer, and his identification with the higher interests of the people.” 4 HALL, *supra* note 2, at 463.

645. ERICKSON, *supra* note 2, at 43–44.

646. TAYLOR, *supra* note 2, at 78.

railroads and fine court houses.”<sup>647</sup> It may have been interesting, but one itinerant judge was hardly enough to bring law and order to southern Colorado. If effective justice was to be established, the people of Colorado would have to tax themselves to create a criminal justice system much larger than what the federal government was willing to provide. That would happen eventually, but not in the 1860s.

R.B. Townshend, a professor from England who lived in Colorado for a decade as a traveler and rancher, had a keen understanding of early vigilantism, and why it became a problem. In December 1869, Townshend was in the brand new small town of Evans in Weld County. The town had sprung up at the terminus of the first railroad line into Colorado.<sup>648</sup> Evans was dominated and terrorized by “toughs from Cheyenne.”<sup>649</sup> One day, a tough shot and killed in cold blood an old man who ran a boarding house.<sup>650</sup> The killer tried to flee on horseback, but was quickly apprehended by the townspeople, who had armed and organized themselves beforehand for such an occasion.<sup>651</sup> The murderer could not be held in the improvised jail, “for there was no building in the town that could resist a determined assault for five minutes[.]”<sup>652</sup> For the moment, the murderer was surrounded by ten men with cocked revolvers.<sup>653</sup> But what if the toughs attempted a rescue?

Richard Sopris had served as a judge in people’s courts in Denver.<sup>654</sup> In 1878, he would be elected Denver mayor, and re-elected in 1879.<sup>655</sup> He happened to be in Evans and was chosen by acclamation to convene a people’s court, starting with all the townspeople, who were now in the streets.<sup>656</sup> After receiving popular assent, he selected a jury.<sup>657</sup>

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647. ERICKSON, *supra* note 2, at 44 (quoting Wilbur F. Stone, *Pioneer Bench and Bar in Colorado*, REP., COLO. B. ASS’N, ELEVENTH ANN. MEETING AT FORT COLLINS, JULY 2 & 3, 1908, at 110).

648. The railroad to Evans was completed on Dec. 13, 1869. 1 HALL, *supra* note 2, at 436.

649. TOWNSHEND, *supra* note 516, at 110.

650. *Id.* at 112.

651. *Id.* at 110–11, 119–20.

652. *Id.* at 111.

653. *Id.* The murderer was being held by a deputy sheriff, but the townspeople knew that the county jail could not withstand an attack by the toughs. The deputy yielded custody when a vigilante pointed a handgun at him, thus providing a face-saving excuse for him to comply. *Id.* at 114–16.

654. *See id.* at 113.

655. 4 HALL, *supra* note 2, at 569. Sopris had also been elected as the first President of a Miner’s District in Gilpin County, and as Colorado’s delegate to the Kansas territorial legislature. *See supra* Section II.B, note 208 and p. 27. He had served as Captain in the First Colorado, the volunteer regiment that won the Battle of Glorieta Pass. WHITFORD, *supra* note 2, at 48, 123–24. Sopris was a leader in creating Denver city government during the pre-territorial days, and was later elected Sheriff of Arapahoe County in 1865 and 1867. 4 HALL, *supra* note 2, at 569. He “was one of the most conspicuous of the Colorado pioneers. His name appears at every stage of our early annals[.]” including the “organization of numerous mining camps, the formation of local governments, in Denver, Auraria, Central City, Gregory, Jackson, in the San Juan country, and in the gallant record made by the First Regiment of Colorado Volunteers” at Glorieta Pass. 1 HALL, *supra* note 2, at 523. He arrived in Colorado on March 15, 1859, age 45, from Indiana. 2 HALL, *supra* note 2, at 563.

656. TOWNSHEND, *supra* note 516, at 112–13.

657. *Id.* at 113–14.

A young lawyer was found, and he was ordered to represent the defendant.<sup>658</sup> Witnesses were summoned, sworn, and examined.<sup>659</sup> The perpetrator did not have much to say in his defense, except that he had not meant to hurt the decedent—which was not credible, since he had shot the decedent in the head at close range.<sup>660</sup> The jury convicted, and when Judge Sopris asked the crowd for the punishment, they chose hanging.<sup>661</sup> It was carried out immediately.<sup>662</sup> The leader of the vigilance committee gave a short speech urging the rest of the toughs to leave town.<sup>663</sup>

They did, “some in their haste walking all the way to Denver to get clear of a spot so ominous to them. The rowdyism, the displaying of revolvers and shooting at lamps out of bravado, stopped instanter.”<sup>664</sup> Evans immediately became a peaceful town.<sup>665</sup>

Townshend’s initial impression of actions like those in Evans was favorable, but after five years of living in the Colorado territory, he changed his mind.<sup>666</sup> “Whenever atrocious murderers are hanged as soon as caught, there arises at once a strong presumption that a manslayer, who is left to be dealt with by an ordinary jury, has probably much to excuse him. This feeling vastly increased the difficulty of getting juries to convict.”<sup>667</sup> Moreover, horse thieves and cattle thieves, knowing that if caught they would be hanged, “never hesitate to shoot, thinking they may as well be hanged for killing a man as for killing a calf. . . . The remedy is worse than the disease.”<sup>668</sup>

This was not universally true. Townshend wrote favorably about “a cowmen’s vigilance committee” that enforced laws against cattle thievery. This included upholding the law that unbranded stray cattle became the property of the trustees of the public school fund.<sup>669</sup>

Perhaps the remedy was for a time the only one available; but once the superior remedy of formal criminal courts had actually begun to function well, continuing resort to the first remedy harmed the second remedy. We can see the development in Wilbur Fiske Stone; at one time he was the well-armed creator of the people’s court in Canon City, which dispensed summary justice to the violent criminals of Fremont County. In 1877, he became Associate Justice of the Colorado Supreme Court. At all

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658. *Id.* at 116.

659. *Id.* at 116–19.

660. *Id.* at 119, 122.

661. *Id.* at 123.

662. *Id.* at 124–27.

663. *Id.* at 127–28.

664. *Id.* at 129.

665. *Id.*

666. *Id.*

667. *Id.* at 130.

668. *Id.*

669. *Id.* at 225–26.

times he was upholding law and public safety; the means of doing so had changed by 1877, because Colorado now had a good formal court system.

Stephen Leonard writes that people's courts or lynching (which he conflates) were abandoned in the larger and wealthier towns (starting with Denver) as those towns developed connections with the rest of the nation and sought to project a peaceable and respectable image.<sup>670</sup> Thus, in the 1870s lynching was mostly in small and isolated towns.<sup>671</sup> The exception was Leadville, which was new and booming in the 1870s thanks to silver and going through growing pains not unlike Denver two decades earlier.<sup>672</sup>

Everywhere in Colorado lynching was falling out of favor by the end of the decade; vigilantes had previously operated in daylight, with no effort to disguise themselves. By the end of the decade, they wore masks, and did their business in the dark.<sup>673</sup> Lynching was much rarer after 1880 and nearly extinct by the early twentieth century.<sup>674</sup> This was in great contrast to the American Southeast, where lynching soared in the latter two decades of the nineteenth century; while the Southeast had a long history of lynching, it was not until the 1886 that the majority of persons lynched there annually were black.<sup>675</sup>

While Colorado's formal court system had its early problems, it eventually overcame them. As the territory had grown, "Colorado's judicial system, unlike New Mexico's, was generally competent and professional."<sup>676</sup> This made vigilantism relatively uncommon, compared to the rest of the Southwest.<sup>677</sup>

For whatever reason, "every visitor after 1870 commented that Colorado was tame . . ."<sup>678</sup> By the early 1870s, Colorado Springs "was the most quiet, orderly little town in those days you ever saw, at least for anyone who didn't deliberately run his head into mischief."<sup>679</sup> Many people thought that Colorado had much less crime than in the early days; they attributed the improvement to the salutary effects of the early people's

670. LEONARD, *supra* note 628, at 70–71. Lynching "fell into disrepute" in Pueblo County after the construction of a solid new jail in the early 1870s. 3 HALL, *supra* note 2, at 458.

671. LEONARD, *supra* note 628, at 54.

672. *Id.* at 48 ("Leadville's skimpy police force was either unable or unwilling to protect citizens."). Leadville had been booming as a silver city, and the usual collection of ruffians had moved in, to the terror of the good citizens. A vigilance committee in 1879 hanged several of them and persuaded the rest to leave. 2 HALL, *supra* note 2, at 454–55. Atrociously, in 1875 a Leadville judge was murdered after he attempted to crack down on vigilante activities. LEONARD, *supra* note 628, at 54.

673. LEONARD, *supra* note 628, at 67.

674. *See id.* at 53.

675. *Lynchings: By Year and Race*, UMKC, <http://law2.umkc.edu/faculty/projects/FTrials/shipp/lynchingyear.html> (last visited Dec. 23, 2017).

676. LAMAR, *supra* note 2, at 257.

677. *Id.*

678. *Id.* at 246.

679. TOWNSHEND, *supra* note 516, at 215. Mischief-seekers went to the bars in the old part of town (Colorado City), where they "might easily come in for a shooting scrape." *Id.*

courts, and to the increasing numbers of women and children, who induced men to behave better.<sup>680</sup> Other than an oft-ignored law against carrying concealed weapons in towns (discussed below in Section VI.A), peaceful Colorado had little gun control.

As will be discussed below, the 1876 Colorado Constitution right to arms reflects the challenges of territorial days and the vision for the future: the right to arms for self-defense may not be questioned; there is a separate, second right to arms “in aid of the civil power *when thereto legally summoned* . . . .”<sup>681</sup> This means, as will also be discussed below, answering a summons to serve in the militia, or in a sheriff’s *posse*. The right to arms “in aid of the civil power” does *not* include participating in a lynching. Whatever the necessities of territorial and pre-territorial days had been, the new State of Colorado expected that exercise of the right to bear arms “in aid of the civil power” would be orderly and regularized. Perhaps the 1876 constitution’s implicit rebuke to lynching helped delegitimize the practice.

#### F. Early Colorado Arms Businesses

Firearms trade in Colorado was first conducted by the Indians, as described in Section I.A. Later, the mountain men became itinerant firearms vendors to the Indians. When trading posts, most notably Bent’s Fort, were established, they became locations for firearms commerce.<sup>682</sup> Much more firearms commerce came to Colorado along with the gold rush. The first major gold veins were found in the vicinity of Gregory’s Diggings, in the mountains of what would become Gilpin County. A diarist who arrived there in June 1859 found “itinerant gunsmiths” and “extempore blacksmith shops” among the many businesses.<sup>683</sup>

As noted above, the famous Hawken Shop from St. Louis opened in Denver in 1860.<sup>684</sup> Another early firearms maker in Colorado was Freund & Brother, which made a .48 caliber rifle with a 33-inch barrel.<sup>685</sup> Denver inventor Frank Freund was awarded seven patents for various

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680. BERWANGER, *supra* note 2, at 103–04.

681. COLO. CONST. art. II, § 13 (emphasis added).

682. *See supra* Section I.B.

683. *Diary of E.H.N. Patterson*, in *OVERLAND ROUTES TO THE GOLD FIELDS*, *supra* note 337, at 185. As noted, some blacksmiths could do gunsmithing.

684. Samuel Hawken opened a gun shop in Auraria in January 1860. BAIRD, *supra* note 132, at xvii. William S. Hawken took over the shop in 1861. *Id.* Samuel returned to St. Louis in 1861, after he had accomplished his purpose of restoring his health by breathing pure Colorado air. *Id.* at xvii, 29. William’s Denver shop was still in operation as of 1862, and the customers included Daniel W. Boone (a descendant of the famous pioneer). *Id.* at 38.

685. GARAVAGLIA & WORMAN, *supra* note 2, at 109.



improvements in firearms in 1873–1875.<sup>686</sup> Denver’s 1866 business directory listed at least seven firearms businesses.<sup>687</sup>

Among the firearms entrepreneurs in early Colorado were:

*Carlos Gove.* “Carlos Gove was probably the most famous Western gunsmith and rifleman.”<sup>688</sup> Born in New Hampshire, he apprenticed with a Boston gunsmith, served in the Seminole War in Florida, set up gunsmith businesses in Iowa and Missouri, and moved in Colorado in 1860.<sup>689</sup> His first gun shop was opened in 1862, at 16th & Larimer. By 1865, he had moved to 12 Blake Street.<sup>690</sup> Among his customers was Buffalo Bill.<sup>691</sup>

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686. See INVENTORS IN THE COLORADO TERRITORY AND THEIR U.S. PATENTS: AN ANNOTATED INDEX (Dina C. Carson ed., 2016) at 313 (Patent no. 153,432, improvement in breech-loading firearms); *id.* at 350–77 (no. 160,762, improvement in breech-loading fire-arms; no. 160,763, improvement in metallic-cartridges; no. 160,819, improvement in sights for fire-arms; no. 162,224, improvement in breech-loading fire-arms; no. 162,373, improvement in pistol-grip attachment for the stocks of fire-arms; no. 162,374, guard-lever and means for operating the breech-block of breech-loading fire-arms).

687. RONZIO, *supra* note 2, at 73 (four outfitting and second-hand stores: S.T Hawkins & Co, A.H. Boyd, D. Marsh, Wm. Turch & Co.); *id.* at 248–51 (listing gunsmiths C. Gove, J.M. Hamilton, P. Hand, J. Jordan, E. Pfisterer, all on Blake Street, or on a cross-street within a block of Blake; plus “Gun Store” M.L. Rood, on F Street between Blake and Wazee).

Not every store that sold guns specialized in guns. Tappan & Co. supplied “quartz mill furnishing,” which included “rubber belting, hose & packing” along with “gas fixtures and fire arms,” plus agricultural, mining, and mechanical tools. Wharton, *supra* note 2, at 56. Tappan was a Captain in the First Colorado regiment. *Id.* at 91.

688. HANSON, *supra* note 96, at 84.

689. *Id.* at 84–85.

690. GARAVAGLIA & WORMAN, *supra* note 2, at 102; HANSON, JR., *supra* note 104, at 85. Nearly all the business of the city was conducted on Blake Street. Wharton, *supra* note 2, at 79.

For a map showing the changes in downtown Denver street names and numbering from 1860 to 1985, see RONZIO, *supra* note 2, at 25. Before 1887, the downtown Denver blocks east of Cherry Creek were numbered based on their distance from the Creek. Since 1887, they have been numbered based on their distance east from Auraria (whose western border is the South Platte River). BRENNEMAN, *supra* note 2, at xi. So the old 340 Blake St. would now be 1540 Blake.

691. HANSON, JR., *supra* note 104, at 85.

R.B. Townshend, a professor from Wales who sojourned in Colorado, recalled an event at Gove’s shop. Townshend had “struck up quite a friendship with Gove, an elderly man very keen on guns of all sorts.” TOWNSHEND, *supra* note 516, at 50. Townshend has bought his .36 caliber Navy Colt revolver from Gove and practiced with it at a butt in Gove’s backyard. *Id.* at 50–51. One day, Gove was gunsmithing a Springfield rifle—made by the federal armory in Springfield, Massachusetts. Army deserters sometimes took their rifle with them, and then traded it to a rancher for a set of civilian clothes. The rancher might want to change the sights on the rifle and would bring it to a gunsmith. Townshend saw Territorial Governor McCook come into Gove’s store, and spot the Springfield that Gove was working on. Suspecting that the Springfield had come from a deserter, Gov. McCook announced that he would be making a claim on it. “Not by a jugful you won’t,” Gove fired back. “This was put into my hands by a ranchman, and back into his hands I’ll deliver it. You may be governor of this Territory all right, but you can’t seize the property of no private citizen through me.” *Id.* at 51–52. McCook desisted. *Id.* at 52. Townshend recalled:

What did amuse me was the gloriously independent position of the man of the shop, the gunsmith, to the man holding the highest office in the Territory, one appointed by President Grant himself. His standpoint was absolute equality as between man and man. Yes, as a stranger there had already told me: “Denver’s the capital of Colorado, and Colorado’s the freest country on God’s earth.”

And when I heard Gove talk so, I began to think it looked like it.

*Id.*

In 1865, Gove advertised “a fine lot of breechloading guns—the Henry and Spencer’s Rifles, Repeating Sixteen Shooters, Smith and Wesson Rifles, Colt’s Navy and Dragoon Revolvers, Remington’s Dragoon Revolvers: a lot of hunting knives . . . .”<sup>692</sup> Dragoon revolvers were large handguns, well-suited for use on horseback. Gove also manufactured single- and double-barreled rifles with telescopic sights, “which I warrant in point of power and accuracy second to none.”<sup>693</sup>

By 1874, Gove had moved to 340 Blake and advertised “all the latest improved Breech Loading Rifles, Shot Guns and Pistols, including Gove’s improved Remington, Sharp’s, Winchester’s, Maynard’s and Wesson’s Central Fire Sporting Rifles—Colt’s new improved Army and Pocket Cartridge Revolver[], Smith & Wesson’s and other Pistols, Union Metallic Cartridges,” a wide variety of other ammunition, plus “Rodgers and Westenhalm’s Hunting, Sportsmen’s and Pocket-Knives . . . . N.B. A Lot of new U.S. Breech Loading Needle Guns, 50 calibre, for Central Fire Cartridges.”<sup>694</sup>

Gove’s “improved Remington” was his own design, which made the lever action better able to extract an empty cartridge case from the firing chamber.<sup>695</sup> The “central fire” cartridges sold by Gove were what we today called “centerfire.” They were invented in 1867. With an improved ignition system, their shells had thicker walls. Stronger walls increased how much gunpowder could be used in a cartridge and resulted in bullets that flew much faster and farther than ever before.<sup>696</sup>

The .50 caliber rifle had come to Colorado before Gove received his 1874 lot. Frontiersman Richard Townsend called his .50 caliber Sharps “about the best rifle going in 1870.” He let a Ute Indian friend shoot it at a card nailed to a tree. The Ute hit the card with every shot. Townsend then fired and hit the nail holding the card.<sup>697</sup>

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692. GARAVAGLIA & WORMAN, *supra* note 2, at 102 (reprinting an advertisement in the *Rocky Mountain News* from May 10, 1865).

693. *Id.* at 107 (noting 1866 ad that repeated the 1865 text, and added language about telescopic rifles).

694. *Id.* at 137 (reprinting an ad published in the 1874 Denver City Directory).

695. *Id.* at 163.

696. ALEXANDER ROSE, *AMERICAN RIFLE: A BIOGRAPHY* 171 (2008). The first metallic cartridges, such as those used in Volcanic rifle, were rimfire. They contained a fulminate inside the rim of the cartridge base. When the firing pin struck the cartridge base, it detonated the fulminate. The fulminate in turn ignited the gunpowder. The expanding gas from the burning gunpowder pushed the bullet through the barrel and propelled it downrange. In the centerfire, the fulminate is contained in a short cylinder in the middle of the case’s base. *Id.* Centerfire and rimfire cartridges are both still in use today; generally, centerfire cartridges are more powerful.

697. TOWNSHEND, *supra* note 516, at 151–52.

*Morgan Rood.* Born in Michigan, Rood moved to Denver in the early 1860s. He manufactured and sold “all types of sporting equipment and fine single, double, and even three-barreled rifles.”<sup>698</sup>

*Le Cavalier.* Although we do not know his first name, we do know that he once worked for Rood. When he set up his own business, he was willing to sell guns to the Ute Indians, who were legally, and in practice mostly, at peace with the white settlers. Rood disapproved of Le Cavalier’s Indian sales.<sup>699</sup>

*Denver Arsenal.* We know that they were business in 1866 and sold carbines (smaller, lighter rifles) “at prices ranging from \$1.00 to \$4.60.”<sup>700</sup>

*John P. Lower.* Born in Philadelphia, he apprenticed for Joseph C. Grubb, a maker of fine pistols and rifles.<sup>701</sup> In 1858, he became a traveling sales representative for Grubb, and by 1868 he was selling in Colorado and Wyoming.<sup>702</sup> In 1872–1875, Carlos Gove and he were partners of the Gove & Co. store.<sup>703</sup> Thereafter, he opened his own business, John P. Lower’s Sportsmen’s Depot, at 381 Blake.<sup>704</sup> Among his customers were Jim Bridger, Jim Baker, and Grand Duke Alexis of Russia.<sup>705</sup> His store was a notable trading place for Ute Indians.<sup>706</sup> His sons eventually became partners in John P. Lower & Sons, which was “well known throughout the state.”<sup>707</sup>

The Sportsmen’s Depot was the largest Colt retailer in the region.<sup>708</sup> A photograph of part of Lower’s inventory shows “a Winchester lever

698. HANSON, JR., *supra* note 104, at 85; *see also* GARAVAGLIA & WORMAN, *supra* note 2, at 107; RONZIO, *supra* note 2, at 84 (photo of M.L. Rood store on 15th, between Blake and Wazee). Rood’s advertisement in the 1866 Denver business directory listed his location as “F Street below Blake.” The ad stated:

Manufacture Single Double and Three Barrel Gain Twist Rifles: also, Six-Shooting Rifles of my own patent. All kinds of repairing done with neatness and dispatch, and all work warranted. I have and keep constantly on hand an assortment of Breech-Loading Rifles, revolvers, Derringer’s, cartridges of all kinds, powder, lead, caps, knives, flasks, gun wads [for shotgun ammunition], game bags, etc. A fine lot of double-barreled shot guns, and everything kept in any gun store west of the Missouri river. Also, target and telescopes made to order and warranted. All orders will receive prompt attention. A liberal amount of patronage solicited.

Wharton, *supra* note 2, at 84.

699. HANSON, JR., *supra* note 104, at 85. Peace with the Utes had been partially secured in part by an 1863 treaty. *See* text accompanying notes 549–52.

700. GARAVAGLIA & WORMAN, *supra* note 2, at 111.

701. HANSON, JR., *supra* note 104, at 88.

702. 4 HALL, *supra* note 2, at 504; HANSON, JR., *supra* note 104, at 88.

703. *Id.*

704. GARAVAGLIA & WORMAN, *supra* note 2, at 156, 194; 4 HALL, *supra* note 2, at 504; HANSON, JR., *supra* note 104, at 88.

705. HANSON, JR., *supra* note 104, at 88.

706. *Id.* at 88, 164; 4 HALL, *supra* note 2, at 504.

707. 4 HALL, *supra* note 2, at 504. As of 1895, when Hall wrote his volume four, the store continued to be a successful business. *See id.*

708. According to a display of one of Lower’s guns at the National Sporting Arms Museum, in Springfield, Missouri. The displayed firearm is a finely engraved Colt 1873 Single Action Army

action, a Frank Wesson single shot, and a Sharps sporter.<sup>709</sup> Using a Sharps M1878 single-shot Borchardt rifle in an 1882 exhibition, Lower put fifty out of fifty shots into a target at 200 yards. The rifle was a big seller in Denver.<sup>710</sup>

Supplementing the local merchants, mail order businesses sold arms nationwide, including in Colorado.<sup>711</sup> For example, in the December 21 and 28, 1861, issues of *Harper's Weekly*, Coloradans perused Tiffany and Company's advertisement for swords "warranted to cut wrought iron."<sup>712</sup> Starting in 1894, the mail-order catalogue of Sears, Roebuck & Co. offered a wide variety of firearms.<sup>713</sup>

In 1875, a new gun arrived on the market, the Ballard rifle. According to one reviewer, even though the Ballard was a single shot, its loading mechanism was so simple and reliable that it could fire more shots faster than a Winchester or Henry.<sup>714</sup>

The 1877 *Colorado Business Directory* indicates a thriving statewide firearms business.<sup>715</sup>

revolver, which Lower gave to his business associate, part time Deputy Sheriff Henry J. Hernage, about 1888.

709. GARAVAGLIA & WORMAN, *supra* note 2, at 156 (reprinting photo from Denver Public Library, western history collection).

710. *Id.* at 157.

711. A 1927 federal statute forbade mail-order handguns, but even that only applies to the U.S. Postal Service, and not to other delivery services. Act of Feb. 8, 1927, ch. 75, 44 Stat. 1059 (codified at 18 U.S.C. § 1715 (2012)). The federal Gun Control Act of 1968, as amended, requires most retail firearms sales to be conducted in-person, at the licensed dealer's fixed place of business. 18 U.S.C. § 922(c) (2012) (stating the limited circumstances for delivery to remote buyers). 18 U.S.C. § 923(j) (2012) (a licensed dealer is also allowed to sell at gun shows, under the same terms as storefront sales, such as background checks and keeping records of buyers and of firearms).

712. SMITH, *supra* note 212, at 44–45.

713. *Chronology of the Sears Catalog*, SEARS ARCHIVES, <http://www.searsarchives.com/catalogs/chronology.htm> (last visited Dec. 23, 2017) (firearms added in 1894).

714. GARAVAGLIA & WORMAN, *supra* note 2, at 169–70. Introduced in 1875, and advertised, *inter alia* in the *Pueblo Chieftain* in June 1877. *Id.* at 168. At the time, the newspaper was known as the *Colorado Chieftain*. *Id.* at 170.

715. COLORADO BUSINESS DIRECTORY AND ANNUAL REGISTER FOR 1877, at 59–60 (1877) (Ouray, powder and fuse); *id.* at 80–81 (Boulder, four powder businesses, one sportsmen's goods business); *id.* at 84 (Canon City, gunsmith A.E. Rudolph); *id.* at 95 (Central City, five powder businesses); *id.* at 103 (Colorado Springs, gunsmith William Converse); *id.* at 108B (ad for Gove's store as agent for Oriental Powder Mills); *id.* at 112 (Del Norte, gunsmith S. Duprez); *id.* at 123 (Denver, ammunition from John P. Lower and M.L. Rood); *id.* at 132 (Denver, gunsmith Charles Kiessig); *id.* ("Guns, Rifles, and Pistols" from Gove, Lower, and Rood); *id.* at 139 (Denver, powder, F.J. Stanton); *id.* at 162 (Georgetown, powder); *id.* at 177 (Greeley, gunsmith Edward Lowndes); *id.* at 208 (Pueblo, gunsmith O.H. Viergut); *id.* at 225 (Trinidad, two gunsmiths: H. Kliemeken, E. Winterstein); *id.* at 227 (Walsenburg, gunsmith Louis Sporleder); *id.* at 229 (West Las Animas, gunsmith Charles Hardesty).

There were also a huge number of blacksmiths; at the time, many blacksmiths had gunsmithing skills. There were also many outfitting and mining supply stores, some of which presumably sold powder and/or arms. Second-hand guns were also available from pawnbrokers.

### III. THE COLORADO CONVENTION AND ITS SYSTEM OF GOVERNMENT

#### A. *The Colorado Convention*

Congress passed the Colorado Enabling Act on March 3, 1875, the final day of the congressional session.<sup>716</sup> President Grant immediately signed it, having called for Colorado's admission in his December 1873 written message to Congress.<sup>717</sup>

The Colorado Constitutional Convention ("Convention") convened on December 20, 1875, at the corner of 15th and Blake Streets in downtown Denver. They met in the Odd Fellows Hall, above the First National Bank.<sup>718</sup> The Convention finished its work by unanimously adopting a proposed constitution on March 14, 1876.<sup>719</sup> The Convention was a half-block from the Gove's and Lower's gun stores. Gove's store could hardly be missed, since it was advertised by a huge banner that was strung over the street.<sup>720</sup>

In 1875, a group of eighteen men had published a book proposing a state constitution based on the principles of utilitarian philosopher Jeremy Bentham.<sup>721</sup> The Convention was aware of the book but did not adopt its proposal.<sup>722</sup> Like many books of the time, it contained advertising on the final pages. The final page contained a large ad for Lower's gun store, with "all kinds of Latest Improved Breech Loading Guns, Rifles, PISTOLS, COLTS and SMITH & WESSON'S REVOLVERS, SHARP'S, WESSON'S, WINCHESTER AND REMINGTON RIFLES . . ." <sup>723</sup>

The thirty-nine delegates were twenty-four Republicans and fifteen Democrats. At the time, southern Colorado was more Democratic and Catholic, while the north was more Republican and Protestant. The dividing line was the Palmer Divide, an east-west ridgeline north of Colorado Springs.<sup>724</sup>

On most issues, including the Bill of Rights, partisan divisions were not important. Wilbur Fiske Stone—a Democrat, delegate, and future

716. Enabling Act, ch. 139, 18 Stat. 474 (1875).

717. Ulysses S. Grant, President of the U.S., Fifth Annual Message (Dec. 1, 1873) ("[Colorado] possesses all the elements of a prosperous State, agricultural and mineral, and, I believe, has a population now to justify such admission."). The Presidents from Jefferson to Taft delivered their State of the Union report in writing, not with a speech.

718. Hensel, *supra* note 2, at 102.

719. E.T. Wells, *State Constitutional Convention*, in HISTORICAL COMPENDIUM, *supra* note 2, at 147, 165–66.

720. GARAVAGLIA & WORMAN, *supra* note 2, at 110. Gove's store was at 340 Blake, and Lower's Sportsmen's Depot was at 381 Blake. In the street numbering of the time, these locations were between 14th and 15th Streets. See *supra* notes 624, 634 and accompanying text.

721. See DRAFT OF A CONSTITUTION PUBLISHED UNDER THE DIRECTION OF A COMMITTEE OF CITIZENS OF COLORADO, FOR CONSIDERATION AND DISCUSSION BY THE CITIZENS OF THE CENTENNIAL STATE iii–v (Univ. of Mich. 2006) (1875) [hereinafter DRAFT OF A CONSTITUTION].

722. Wells, *supra* note 719, 147, 152–53.

723. DRAFT OF A CONSTITUTION, *supra* note 721, at 60.

724. It divides the drainages of the South Platte and Arkansas Rivers.

Colorado Supreme Court justice—recalled “there was no politics in it at all.”<sup>725</sup> As Stone put it, the “lines between Democrat and Republican were very lightly drawn in those days.”<sup>726</sup> E.T. Wells, a Republican delegate and a territorial judge, wrote that on “no occasion whatever” did “personal acrimony or partisan feeling” impede the Convention.<sup>727</sup> On issues where there was controversy—such as votes for women or whether to acknowledge the deity in the preamble—the divisions did not break down along party lines.<sup>728</sup>

The fundamental problem for the Convention to solve was not a partisan one. Rather, it was the inherent tension in what the delegates wanted. They knew they did not want a “do nothing” government. To the contrary, their constitution ordered the creation of state institutions for higher education, for care for the insane, and for the blind, deaf, and mute.<sup>729</sup> The delegates required the establishment of “a thorough and uniform system of free public schools,” and that such schools not be racially segregated.<sup>730</sup> The Framers created a commissioner of mines, and ordered the general assembly to enact laws prohibiting child labor in mines, and to enact laws for safe working conditions in the state’s most important industry.<sup>731</sup> The Convention wrote the first American constitution to mention forests, instructing the general assembly to “enact laws in order to prevent the destruction of, and to keep in good preservation, the forests upon the lands of the state.”<sup>732</sup> This was an early manifestation of the Colorado ethos of conservation.<sup>733</sup> The conservation

725. Hensel, *supra* note 2, at 101 (citing an interview with Stone in the *Denver Post* from Oct. 22, 1911).

726. *Id.* Newspapers agreed that partisan politics had played no role in the Convention. *Id.* at 101 n.27 (citing DENV. TIMES (Mar. 8, 1976); DAILY ROCKY MOUNTAIN NEWS (Mar. 8, 1876); COLO. BANNER (Boulder) (Mar. 16, 1876); COLO. TRANSCRIPT (Golden) (May 24, 1876)). The *Daily Rocky Mountain News* was a Republican newspaper, while the Boulder and Golden newspapers were Democratic. *Id.*

727. HISTORICAL COMPENDIUM, *supra* note 2, at 166; *see also* 2 HALL, *supra* note 2, at 295 (after the Convention officers were elected, “no spectator could have supposed, from anything seen or heard in the assembly or in any outer room, that party politics had ever been so much as dreamed of in the loft of the mansard roof occupied by the convention.”); *id.* at 296 (the Convention heeded its President’s admonition against the “slightest semblance of partisanship or sectional spirit.” It has neither “time, opportunity, or inclination to rethresh the oft cudgeled sheaves of party politics”).

728. In a compromise, the Preamble begins, “We, the people of Colorado, with profound reverence for the Supreme Ruler of the Universe . . .” COLO. CONST. pmbl.

729. *Id.* art. VIII, §§ 1, 5.

730. *Id.* art. IX, §§ 2, 8.

731. *Id.* art. XVI, §§ 1–2. The General Assembly was also allowed (but not mandated) to enact laws for mine drainage, and to provide for the science of metallurgy and mining to be taught in state institutions of learning. *Id.* §§ 3–4.

732. *Id.* art. XVIII, § 6. Consistent with the environmental ethos expressed in 1876, the people of Colorado amended the Constitution in 1992 to provide that lottery revenues would be used for public lands. *Id.* art. XXVII, § 1 (“Great Outdoors Colorado”). Colorado is the only state to dedicate its lottery revenues to the outdoors. Most other states use the money for the general fund, or for education. Bollenbacher, *supra* note 271, at 602.

733. The first game laws were enacted in 1877 and 1883, setting seasons and bag limits for some animals. SIMMONS, *supra* note 2, at 205. Game wardens were appointed starting 1891. *Id.* at 206. Starting in 1903, the Colorado Fish and Game Commission began charging one dollar for hunting

imperative may have resulted in part from knowledge of how the Indians (and, later, the whites) had overused the woodlands along the rivers of the plains.<sup>734</sup>

The new constitution further provided that the general assembly “shall” enact “liberal homestead and exemption laws,”<sup>735</sup> “shall” pass arbitration laws,<sup>736</sup> and “shall” enact laws against “spurious, poisonous or drugged spirituous liquors.”<sup>737</sup>

Yet while the Convention had a list of things it mandated the legislature to do, at the same time, the Convention profoundly distrusted the legislature. In the words of one scholar, “The delegates created a legislature and then, as though they regretted their work, they took most discretionary authority from it.”<sup>738</sup>

The 1876 Convention was meeting in “the post-Civil War era, when popular distrust of legislatures was at its height.”<sup>739</sup> The early American state constitutions had been terse statements of principles, with only a broad outline for the structure of government—similar to the U.S. Constitution.<sup>740</sup> At the federal level, the short constitution seemed to be working well enough, since Congress could only exercise the enumerated powers that it had been granted. At the state level, where legislatures could legislate on almost any topic, special legislation for the benefit of powerful interests—especially, railroads—had been rampant. Starting in the 1830s, the new state constitutions and new constitutions adopted in older states were much more aggressive about constraining legislative discretion.<sup>741</sup>

The Colorado Constitution went especially far to hem in the government, with the longest state constitution up to that point in American history. (As amended, the Colorado Constitution remains the one of the longest, reflective to Coloradans’ inclination to instruct their government exactly what it should do and cannot do.) Article V, creating the Colorado House of Representatives and Senate, is much longer than Article I of the U.S. Constitution, which creates the Congress. Article V contains many procedural restrictions on the process of enacting legislation.<sup>742</sup> Legislative sessions were limited to forty days, with no

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licenses and using the revenue to promote hunting and to conserve species at sustainable levels. LEONARD & NOEL, *supra* note 2, at 153.

734. *See supra* text accompanying notes 381–411.

735. COLO. CONST. art. XVIII, § 1.

736. *Id.* art. XVIII, § 3.

737. *Id.* art. XVIII, § 5 (repealed 2008).

738. Hensel, *supra* note 2, at 133. One gets the sense that the Convention wished that it didn’t have to create a legislature. DALE A. OESTERLE & RICHARD B. COLLINS, THE COLORADO STATE CONSTITUTION 4 (2011).

The mistrust was well placed. *See infra* text accompanying note 933.

739. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 199 (1998).

740. *Id.* at 61–62, 66.

741. *Id.* at 118–21.

742. COLO. CONST. art. V, § 6 (General assembly may not fix its own compensation); *id.* art. V, § 8 (legislators may not hold other office); *id.* art. V, § 9 (no changes in salaries or per diem to be

legislative sessions in even-numbered years.<sup>743</sup> A variety of constitutional provisions outlaw taxing, spending, or borrowing on behalf of corporations or other private interests.<sup>744</sup> Later, the first constraints on the legislature would be bolstered by amendments, adopted by the people.<sup>745</sup>

As one historian summarized, the Convention believed “that permitting too much freedom to govern was a far greater threat than possibly clogging the government’s effectiveness in order to shield the people from their own rules. If the turnstiles blocked efficiency they also checked exploitation and rascality.”<sup>746</sup>

The people of the Colorado Territory adopted the Colorado Constitution on July 1, 1876: 15,443 in favor and 4,052 opposed. Voter turnout was low because opposition was almost nonexistent.<sup>747</sup> One can say the same thing about the Colorado Constitution that has been said about the 1870 Illinois Constitution, from which Colorado drew heavily: “strong public support was a result of negative public sentiment regarding the state government in general and support for the apparent spirit of bipartisanship under which the document was written.”<sup>748</sup>

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effective until a new legislature takes office) (repealed 1974); *id.* art. V, § 14 (sessions must be public); *id.* art. V, § 17 (no bill may be altered from its original purpose); *id.* art. V, § 19 (no bills except appropriations may be introduced after twenty-fifth day of session; no bill to take effect for ninety days, except for emergency legislation with supermajority approval) (amended 1950); *id.* art. V, § 20 (no bill may be passed unless heard by a committee); *id.* art. V, § 21 (bills, except general appropriations, may contain only a single subject, clearly expressed in the title); *id.* art. V, § 22 (bills must be read at length, on three separate days, in each house; amended to two separate days) (amended 1950); *id.* art. V, § 23 (no accepting of amendments or conference reports except by recorded vote, to be published in the house’s journal); *id.* art. V, § 24 (no amendment or revisions of laws by reference to title; full text must be published); *id.* art. V § 25 (no local or special laws on twenty-three specified subjects, including “protection of game and fish”); *id.* art. V, § 28 (no bill giving extra compensation to a public officer or contractor); *id.* art. V, § 29 (legislature and other government departments must use low bid for supplies; no public officer may have an interest in supply contracts); *id.* art. V, § 30 (no extending the terms of public officers) (repealed 1974); *id.* art. V, § 31 (revenue bills must originate in House); *id.* art. V, § 32 (general appropriations bill must contain only the ordinary expenses of the three branches; other appropriations may have only a single subject); *id.* art. V, § 33 (no money to be paid from State Treasury, except by appropriation); *id.* art. V, § 34 (no appropriations to organizations not under state control); *id.* art. V, § 35 (no delegation of power to supervise municipal functions); *id.* art. V, § 36 (no bill may authorize certain investments by trustees); *id.* art. V, § 38 (no obligation or liability of a person or corporation can be diminished by the General Assembly); *id.* art. V, § 40 (no vote-trading on bills); *id.* art. V, §§ 41–42 (no influence-selling) (§§ 41–42 repealed 1974); *id.* art. V, § 43 (legislators may not vote on matters in which they have a personal interest).

743. COLO. CONST. art. V, § 6 (1876) (“No session of the General Assembly, after the first, shall exceed forty days.”); *id.* art. V, § 7 (alternate year sessions only, except when the Governor calls a special session). The constitution exempted the first General Assembly from the forty-day limit. That assembly sat for 140 days. 2 HALL, *supra* note 2, at 362.

744. See, e.g., COLO. CONST. art. X, § 13; *id.* art. XI, § 1; *id.* art. XV, § 12.

745. Most importantly: Initiative and referendum, COLO. CONST. art. V, § 1; GAVEL (Give a Vote to Every Legislator), *id.* art. V (scattered sections of art. V), and the Taxpayer’s Bill of Rights, *id.* art. X, § 20.

746. Hensel, *supra* note 2, at 120.

747. 2 HALL, *supra* note 2, at 328 (noting that farmers and miners were in peak activity periods).

748. Jeremy Walling, *Understatement and Development of Illinois Constitutionalism*, in CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 411; see also JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS, 1818–1970, at 73, 83 (1972) (two main factors in overwhelming



Colorado's Fourth of July celebrations in 1876 may have been the most exuberant in the nation. A large parade in Denver was led by the Colorado militia, with officers on white horses and the troops on black ones. Each of the thirty-eight states was honored with its own float.<sup>749</sup> On August 1, 1876, President Ulysses Grant issued the proclamation making Colorado the thirty-eighth state.<sup>750</sup>

The right to arms provision is in the spirit of the 1876 Convention's attempt to hem in the legislature from every side. The Colorado right to arms is the most verbose, detailed, and strongly worded of any constitutional right to arms up to 1876. It attempts to leave little to implication. Before we examine the arms rights section in detail, let us first consider the structure and general interpretive principles of the constitution.

### *B. Rights Come First*

The 1876 Colorado Convention looked carefully at the constitutions of other states. Missouri's new 1875 constitution was closely studied, and it provided a model for several provisions, including the right to arms. When Missouri's original 1820 constitution was written, Missouri was entering the Union as a slave state. Perhaps not surprisingly, the Bill of Rights was the last article in the constitution. But when Missouri adopted a new constitution in 1875, rights came first: "Clearly, limiting government had taken precedence over establishing political institutions and distributing political power to those institutions."<sup>751</sup>

This approach is more consistent with the theory of government envisioned in the Declaration of Independence. As paragraph two of the Declaration explains, all people have inherent rights, "endowed by their Creator."<sup>752</sup> The purpose of government is to protect those rights. "First come rights and then comes government," as Randy Barnett summarizes.<sup>753</sup>

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approval of the 1870 Constitution were "dissatisfaction with the performance of the Illinois state government" and the proposed constitution being "a bipartisan document").

749. Hensel, *supra* note 2, at 230.

750. Ulysses S. Grant, Proclamation 230—Admission of Colorado Into the Union (Aug. 1, 1876), in Gerhard Peters & John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=70540>.

751. RONALD BRECKE & GREG PLUMB, *Missouri Constitutionalism: Meandering Toward Progress, 1820–2004*, in *THE CONSTITUTIONALISM OF AMERICAN STATES*, *supra* note 2, at 205. Similarly, when Ohio replaced its 1802 constitution in 1851, the Bill of Rights was moved to the beginning of the document. "[B]efitting the Jacksonian model, the bill of rights precedes both the letter and the spirit of the parts of the constitution granting power to the different branches." JAMES J. WALKER, *The Ohio Constitution: Normatively and Empirically Distinctive*, in *THE CONSTITUTIONALISM OF AMERICAN STATES*, *supra* note 2, at 455.

752. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

753. RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 63 (2016).

Colorado agreed. As in the 1875 Missouri Constitution, Colorado's article I defines the boundaries of the state.<sup>754</sup> Then article II declares the Bill of Rights.<sup>755</sup> Before specifying any structure for government, Colorado and Missouri gave priority to the inherent rights of the people. The structure of Colorado's constitution suggests that when there is a close question between the rights of Coloradans and the powers of their government, the former should prevail.

Unlike the federal Bill of Rights, the Colorado Bill of Rights does not begin by enumerating specific freedoms. Instead, the Bill of Rights first declares the principles of government.<sup>756</sup> These are meant to inform the understanding of everything that follows—namely the enumerated rights, and then the structure and operation of the government.

### *C. Rights and Duties*

Article II is the only article of the Colorado Constitution with a preamble, which begins: “In order to assert our rights, acknowledge our duties, and proclaim the principles upon which our government is founded, we declare . . . .”<sup>757</sup>

Rights and duties are closely linked. The right to a jury trial cannot exist if citizens fail to perform their duty of jury service. A good citizen has the duty to pay taxes. At the same time, citizens have the right not to be taxed in violation of the constitutional rules for taxation. The American Revolution began in part because Americans asserted their right not to be taxed without their consent;<sup>758</sup> the Colorado Constitution provides the system for obtaining consent for taxation.<sup>759</sup>

A governmental system that was all duties and no rights would have no liberty, and would be the antithesis of a legitimate government. A governmental system that was all rights and no duties would soon collapse, thus endangering the rights that every legitimate government is created to defend. The Colorado right to arms is for the personal right of defense, *and* for the performance of the duty to defend the civil power, as will be described below.

### *D. The Sovereign Right to Alter the Government*

After the preamble, article II, section 1 states:

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754. COLO. CONST. art. I; MO. CONST. of 1875, art. I.

755. COLO. CONST. art. II; MO. CONST. of 1875, art. II.

756. COLO. CONST. art. II, §§ 1–3.

757. COLO. CONST. art. II, pmb1.

758. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776) (“For imposing Taxes on us without our Consent[.]”).

759. *See* COLO. CONST. art. X, § 20.

All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.<sup>760</sup>

The people, not the government, possess the sovereignty. The government is the delegated agent of the sovereign people. This has been the bedrock principle of American government since 1776.<sup>761</sup> It is very different from the views in some other nations, where the government is considered to possess the ultimate sovereignty.<sup>762</sup>

Section 2 of the Bill of Rights affirms the sovereign people's right to alter or abolish the government:

The people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States.<sup>763</sup>

This is the universal human right asserted by paragraph two of the U.S. Declaration of Independence in 1776 and by the Texan Declaration of Independence of 1836.<sup>764</sup> Section 2 rejects the notion that government is prior to the people or that the government receives its authority from God. Instead, government exists only by the choice of the people, as their agent to carry out certain functions that they choose, and in the manner they, as sovereigns, specify.

760. COLO. CONST. art. II, § 1.

761. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[T]hat whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . .”); U.S. CONST. pmb. (“WE THE PEOPLE of the United States . . . do ordain and establish this CONSTITUTION for the United States of America.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (“The people, not the government, possess absolute sovereignty.”) (quoting James Madison’s report in support of the 1798 Virginia Resolution against the federal Sedition Act).

762. See, e.g., *N.Y. Times Co.*, 376 U.S. at 274 (“This form of government was ‘altogether different’ from the British form, under which the Crown was sovereign and the people were subjects.”); Noriho Urabe, *Rule of Law and Due Process: A Comparative View of the United States and Japan*, 53 L. & CONTEMP. PROBS. 61, 69 (1990) (noting in Japan, the “Rule of Law” refers to the people’s obligation to obey the government, and is thus “an ideology to legitimize domination”).

763. COLO. CONST. art. II, § 2.

764. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); THE TEXAS DECLARATION OF INDEPENDENCE para. 4 (Tex. 1836). Before the Republic of Texas joined the United States, southeastern and central Colorado were claimed by independent Texas. See CARL UBBELOHDE ET AL., A COLORADO HISTORY 52 (9th ed. 2006); see also note 95.

The principle of the power to alter government is expressed in many other state constitutions.<sup>765</sup> Colorado's language is similar to the 1875 Missouri Constitution.<sup>766</sup>

The Missouri and Colorado wording is distinctive because it provides guidance about what an entirely new government would be: the new government must be "not repugnant to the constitution of the United States."<sup>767</sup> This means that the new state government could not do things that the U.S. Constitution forbids states to do, such as coin money, enact ex post facto laws, or grant titles of nobility.<sup>768</sup>

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765. See, e.g., in order of statehood: DEL. CONST. pmb. ("[T]herefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness; and they may for this end, as circumstances require, from time to time, alter their Constitution of government."); N.J. CONST. art. I, ¶ 2 ("All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it."); S.C. CONST. art. I, § 1 ("All political power is vested in and derived from the people only, therefore, they have the right at all times to modify their form of government."); OHIO CONST. art. I, § 2 ("All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary . . ."); ARK. CONST. art. 2, § 1 ("All political power is inherent in the people and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish the same, in such manner as they may think proper."); IOWA CONST. art. I, § 2 ("All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it."); CAL. CONST. art. II, § 1 ("All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."); MINN. CONST. art. I, § 1 ("Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good."); ORE. CONST. art. I, § 1 ("[T]hat all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such a manner as they may think proper."); NEV. CONST. art. 1, § 2 ("All political power is inherent in the people[.] Government is instituted for the protection, security and benefit of the people; and they have the right to alter or reform the same whenever the public good may require it."); N.D. CONST. art. I, § 2 ("All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have a right to alter or reform the same whenever the public good may require."); MONT. CONST. art. II, § 2 ("The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary."); IDAHO CONST. art. I, § 2 ("All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary . . ."); WYO. CONST. art. 1, § 1; ("All power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; for the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish the government in such manner as they may think proper."); UTAH CONST. art. I, § 2 ("All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.")

766. MO. CONST., art. II, § 2 (1875) ("That the people of this state have the inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the Constitution of the United States.")

767. COLO. CONST. art. II, § 2; MO. CONST., art. 1, § 3.

768. See, e.g., U.S. CONST. art. I, § 10.

Most fundamentally, the U.S. Constitution requires that all states have a “Republican Form of Government.”<sup>769</sup> Thus, Colorado’s section 2 affirms that any new Colorado government would be republican in nature. The 1890 Mississippi Constitution and the 1907 Oklahoma Constitution would contain similar language.<sup>770</sup> With different language, the Texas Constitution of 1873 also affirmed that any new government would be republican.<sup>771</sup>

Contrast Colorado’s section 2 with the “No Alteration Oath” that had been required in Great Britain, by which the swearer abjured “taking arms” against the king’s government and swore “that I will not at any time endeavour any alteration of the government either in church or state.”<sup>772</sup> Similarly, the mandatory “Non-Resistance Oath” stated “I A.B. do declare and believe that it is not lawful upon any pretence whatsoever to take arms against the king . . . .”<sup>773</sup> The American Founders were familiar with the Church of England’s teaching that people must always submit to government, and that active resistance (such as armed revolution) was immoral, and so was passive resistance (nonviolent disobedience, such as practiced by Quakers).<sup>774</sup>

Thus, only a year after the British had signed the treaty conceding American victory in the American Revolution, New Hampshire’s constitution (1784) felt the need to argue the point about nonresistance. New Hampshire specifically denounced the “doctrine of nonresistance” as

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769. U.S. CONST. art. IV, § 4.

770. MISS. CONST. art. III, § 6 (“Provided, Such change be not repugnant to the constitution of the United States.”); OKLA. CONST. art. II, § 1 (same).

771. TEX. CONST. art. I, § 2 (“All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.”).

772. 1 MARK GOLDIE, ROGER MORRICE AND THE PURITAN WHIGS: THE ENTRING BOOK OF ROGER MORRICE 1677–1691, at 520 (2007). The oath was imposed on Dissenting ministers (non-Anglican Protestants) starting in 1665. *Id.*

773. *Id.* at 519; *see also* 13 Car. 2 stat. 2, c. 1 (1661) (Gr. Brit.) (imposed on borough officeholders); 14 Car. 2 c. 3 (1662) (Gr. Brit.) (imposed on militia); 14 Car. 2 c. 4 (1662) (Gr. Brit.) (imposed on clergy); 17 Car. 2 c. 2 (1665) (Gr. Brit.) (imposed on former members of Dissenting clergy).

774. *See, e.g.,* JOHNSON ET AL., *supra* note 2, at 206–19 (discussing rejection of nonresistance by American Revolutionaries; and influential ministers such as Jonathan Mayhew and Simeon Howard, who explicated the religious expression of duty to resist tyranny).

“absurd, slavish, and destructive of the good and happiness of mankind.”<sup>775</sup> Tennessee copied this language for its 1796 Constitution.<sup>776</sup>

During the years leading up the Revolution, and during the Revolution, Great Britain had also asserted that even if Americans had inherent rights, including the right to alter the government (by force if necessary), Americans had voluntarily surrendered those rights to the British Parliament. The Declaration of Independence retorted that such rights were “unalienable.”<sup>777</sup> Many state constitutions in the Founding Era and Early Republic followed suit, specifically stating that the right to alter was “indubitable,” “inalienable,” or “indefeasible.” Or sometimes all three.<sup>778</sup> This continued through 1819.<sup>779</sup> The 1819 constitutions were adopted just a few years after Americans re-won their independence in the War of 1812, which ended in 1815 with Andrew Jackson’s victory at the Battle of New Orleans.<sup>780</sup>

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775. N.H. CONST. pt. 1, art. 10 (“Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.”).

776. See Lewis L. Laska, *The Tennessee Constitution: An Unlikely Path Toward Conservatism*, in *THE CONSTITUTIONALISM OF AMERICAN STATES*, *supra* note 2, at 359. The language is retained in the present constitution, from 1870. TENN. CONST. art. I, § 2.

777. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

778. VT. CONST. ch. 1, art. 6 (“That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged to be most conducive to the public weal.” (copying language from 1777 Constitution of the Republic of Vermont)); VA. CONST. art. 1, § 3 (“That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.”).

779. ALA. CONST. art. I, § 2 (“That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that, therefore, they have at all times an inalienable and indefeasible right to change their form of government in such manner as they may deem expedient.” (adopted 1819, carried forward into later constitutions, including 1875 and the current constitution, from 1901)); CONN. CONST. art. I, § 2 (“All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times an undeniable and indefeasible right to alter their form of government in such manner as they may think expedient.” (adopted 1818)); ME. CONST. art. I, § 2 (“All power is inherent in the people; all free governments are founded in their authority and instituted for their benefit; they have therefore an unalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it.” (adopted 1819, effective 1820)).

780. See ROBERT V. REMINI, *THE BATTLE OF NEW ORLEANS: ANDREW JACKSON AND AMERICA’S FIRST MILITARY VICTORY 194–95* (1999) (Although the battle took place two weeks after a peace treaty had been signed in Belgium, unbeknownst to the combatants, if the British had captured New Orleans, they might have refused to leave, just as they refused to evacuate forts in the American West, notwithstanding their 1783 peace treaty with the United States).

Thereafter, American constitutions kept affirming the right to alter the government, but apparently did not feel the need to put the argument defending this right into state constitutions. The one exception was West Virginia, which seceded from Virginia during the Civil War. The West Virginia Constitution copied the Virginia Constitution's point that the right to alter is "indubitable, inalienable, and indefeasible."<sup>781</sup> That West Virginians for two and half centuries had consented to be part of Virginia did not deprive them of their right to change their minds.

Like most other new states after 1819, Colorado apparently felt so confident about the obvious right to alter the government that did not feel a need to argue on behalf of the right. As noted, Colorado is one of five states that tells us what any altered government must look like: a republican form of government, compliant with the U.S. Constitution.

Three state constitutions have language not adopted in Colorado, which might seem to rule out armed revolution as a last resort. South Dakota specifies that the alteration of the government must be by "lawful and constituted methods."<sup>782</sup> North Carolina's 1868 Constitution stated that any alteration "shall be exercised in pursuance of law," essentially promising not to make a second armed attempt at secession.<sup>783</sup> Rhode Island, based on unique historical circumstances, made a similar point, although more elliptically.<sup>784</sup>

Unquestionably, seeking alteration through the ordinary legal channels is to be preferred. Yet as the American and Texan Revolutions

781. W. VA. CONST. art. III, § 3 ("Government is instituted for the common benefit, protection and security of the people, nation or community. Of all its various forms that is the best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal."); Robert E. DiClerico, *The West Virginia Constitution: Securing the Popular Interest*, in THE CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 221 (noting that section 3 is nearly verbatim from 1776 Virginia Declaration of Rights).

782. S.D. CONST. art. VI, § 26 ("All political power is inherent in the people, and all free government is founded on their authority, and is instituted for their equal protection and benefit, and they have the right in lawful and constituted methods to alter or reform their forms of government in such manner as they may think proper.").

783. N.C. CONST. art. I, § 3 ("The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.").

784. R.I. CONST. art. I, § 1 ("In the words of the Father of his Country, we declare that 'the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.'"). Washington did not mean that statement as ruling out revolution in every circumstance. As of 1775, the British Constitution was widely considered the freest in the world; that did not stop Washington from leading a revolutionary army. Rhode Island had not adopted a constitution after the Revolution and had instead relied on its colonial charter. This served to keep Rhode Island government under the control of a narrow group. A constitution was not adopted until 1842, following an attempted revolution, the Dorr War. So, the 1842 Rhode Island Constitution implicitly rebukes the defeated revolutionaries.

had demonstrated, a government that does not want to rule by consent may prohibit such peaceful alteration, leaving the people no recourse but forcible resistance. The American revolutionaries had considered their armed resistance to be lawful under the highest principles of natural law and the common law.<sup>785</sup> Of course the British government did not agree. Section 2 adopts the American point of view.

*E. The Sole and Exclusive Right of Governing Themselves*

While affirmations of the right to alter the government are common, the Colorado Constitution makes a unique declaration: “The people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state . . . .”<sup>786</sup> Three states have similar language, but there are important differences. The Mississippi, Missouri, and North Carolina constitutions assert the sole and exclusive right “to regulate the internal government and police thereof.”<sup>787</sup> In contrast, the Colorado right of self-governance is not limited to certain things. The Colorado right is the full right “of governing themselves.”<sup>788</sup> Further, Colorado’s Sole and Exclusive Clause goes beyond the clause in other states: Colorado is a “free, sovereign and independent state.”<sup>789</sup>

The “sole and exclusive” language should not be taken hyper-literally. Colorado certainly recognized that laws of the United States would govern Coloradans in part. Sovereignty in Colorado was necessarily mixed.<sup>790</sup> Under the U.S. constitutional system, the federal and state government are each delegated portions of the sovereignty possessed by the people. Coloradans never understood the Sole and Exclusive Clause to mean that they could send or receive ambassadors, issue patents, or perform other sovereign functions of the federal government. At the same

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785. See THE DECLARATION OF INDEPENDENCE (U.S. 1776). The Declaration of Independence sets forth a legal argument as to why the British government has forfeited its legal right to rule America: by injuring rather than defending the inherent human rights that all legitimate governments must protect. *Id.*

786. COLO. CONST. art. II, § 2.

787. MISS. CONST. art. III, § 6 (“The people of this state have the inherent, sole, and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness; Provided, Such change be not repugnant to the constitution of the United States.”); MO. CONST. of 1875, art. I, § 2 (“That the people of this State have the inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness: Provided, Such change be not repugnant to the Constitution of the United States.”); N.C. CONST. art. I, § 3 (“The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.”).

788. COLO. CONST. art. II, § 2.

789. *Id.*

790. See, e.g., THE FEDERALIST, No. 51 (James Madison) (Because in the proposed Constitution the people divide sovereignty between federal and state governments, “a double security arises to the rights of the people.”).



time, they adopted a uniquely strong Sole and Exclusive Clause, a powerful affirmation of States' Rights.<sup>791</sup>

As detailed above, Coloradans had long exercised what they considered to be their rights to govern themselves, starting with the ad hoc governments they created during the gold rush.<sup>792</sup> In the territorial period, Coloradans strongly opposed the appointment of federal territorial officers from outside the territory. “Coloradans fervently believed that no outsider could understand them.”<sup>793</sup>

Today, defying federal statutes based on an overbroad interpretation of congressional power “[t]o regulate Commerce . . . among the several States,”<sup>794</sup> Colorado has created a strictly regulated system for the lawful cultivation and retail sale of medical and recreational marijuana.<sup>795</sup> Colorado’s statutes aim to ensure that Colorado marijuana commerce will be only intrastate.<sup>796</sup> In the spirit of the Sole and Exclusive Clause, Colorado’s marijuana regulations govern something that in 1876 was considered a state matter, far beyond Congress’s enumerated powers.<sup>797</sup>

When the voters of Colorado adopted constitutional amendments for the regulated sale of medical marijuana (2000) and recreational marijuana (2012), they in essence ordered state government officials to conspire to violate the federal Controlled Substances Act.<sup>798</sup> Given total quantities involved in this “conspiracy” (tons of marijuana, and many millions of dollars), the Colorado government officials are, arguably, committing

791. One of the 1859 guidebooks for emigrants had forecast that the West would “open a new field for the elucidation of the great principle of squatter sovereignty”—that is, the people who settle a land will govern it themselves. BLANCHARD, *supra* note 156, at 51–52. When the people were ready to take their place among the States, they would say to the Americans of the Atlantic and Pacific shores, “Behold our mountain land! the place where Freedom first seeks a refuge from the wiles of tyranny, and from which she will last be driven out—Patriotism and heroism are at their highest standard in mountain lands!” *Id.* at 53–54. Geography does influence political culture and individual character. No one can deny that outdoorsmanship—which has always been central to the Colorado way of life—fosters of spirit of self-reliance and independence.

792. Or starting even earlier, in the self-governance of Colorado’s Indian tribes.

793. BERWANGER, *supra* note at 2, at 57; *see also id.* at 137.

794. U.S. CONST. art. I, § 8, cl. 3.

795. *See* COLO. CONST. art. XVIII, §§ 14, 16.

796. *See* COLO. REV. STAT. § 11-33-126 (2017) (requiring marijuana financial services cooperatives to conduct due diligence to thwart out-of-state diversion); § 12-43.3-901 (outlining certain anti-diversion provisions in the Colorado Medical Marijuana Code); § 12-43.4-901 (outlining certain anti-diversion provisions in the Colorado Retail Marijuana Code); § 18-18-406.3 (setting forth anti-diversion provisions for medical marijuana use); § 24-32-117 (awarding state grants to local governments for the purpose of diversion prevention); § 24-32-119 (awarding state grants to law enforcement in order to support investigation and prosecution of gray and black market marijuana activity); § 24-33.5-516(2)(f) (requiring Division of Criminal Justice to study diversion out of state); § 25-1.5-106(1)(d) (“The general assembly hereby declares that it is imperative to prevent the diversion of medical marijuana to other states.”); § 39-28.8-101 (establishing a registration system for marijuana retailers, designed to prevent diversion).

797. *See* Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 56, 59 (2010) (under original public meaning, interstate commerce power does not encompass sales of products within a single state).

798. *Compare* COLO. CONST. art. XVIII, §§ 14, 16, with 21 U.S.C. § 812 (2012) (listing “[m]arihuana” as a Schedule I controlled substance).

federal felonies that qualify them as drug “kingpins,” subject to very severe mandatory sentences.<sup>799</sup>

Yet consistent with the “sole and exclusive right” of Coloradans to govern themselves, state executive branch officials and the Colorado General Assembly have obeyed the Colorado Constitution, and created a carefully controlled, highly taxed, government-supervised system for the production and retail sale of marijuana. “Sole and exclusive” indeed.

#### *F. The Natural Right of Self-Defense*

The final part of the Colorado Constitution’s trilogy of bedrock principles is section 3 of the Bill of Rights:

All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.<sup>800</sup>

Colorado’s article II, section 3, copies a provision which first appeared in the 1780 Massachusetts Constitution. That constitution begins with what became the classic American formulation of the nature of government, copied by many later state constitutions:

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.<sup>801</sup>

Colorado is one of thirty-five states whose constitutions expressly affirm that human rights are inherent, natural, or otherwise *not* the mere creation of positive law. Often, the affirmations of inherent rights include the enumeration of self-defense.<sup>802</sup>

799. See 21 U.S.C. § 848.

800. COLO. CONST. art. II, § 3.

801. MASS. CONST. pt. I, art. I.

802. ALA. CONST. art. I, § 1 (describing the equality and rights of men and their “inalienable rights . . . life, liberty and the pursuit of happiness”); ALASKA CONST. art. I, § 1 (“[A]ll persons have a natural right to life, liberty . . .”); ARK. CONST. art. 2, § 2 (“All men . . . have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty . . .”); CAL. CONST. art. I, § 1 (“All people . . . have inalienable rights. Among these are enjoying and defending life and liberty . . .”); DEL. CONST. pmb. (“Through Divine goodness, all people have by nature the rights . . . of enjoying and defending life and liberty . . .”); FLA. CONST. art. I, § 2 (“All natural persons . . . have inalienable rights, among which are the right to enjoy and defend life and liberty . . .”); HAW. CONST. art. I, § 2 (“All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty . . .”); IDAHO CONST. art. I, § 1 (“All men . . . have certain inalienable rights, among which are enjoying and defending life and liberty . . .”); ILL. CONST. art. I, § 1 (“All men . . . have certain inherent and inalienable rights among which are life, liberty . . .”); IND. CONST. art. 1, § 1 (“[A]ll people are . . . endowed . . . with certain inalienable rights; that among these are life, liberty . . .”); IOWA CONST. art. I, § 1 (“All men and women . . . have . . . inalienable rights . . . of enjoying and defending life . . .”); KAN. CONST. bill of

The Colorado Supreme Court has relied on section 3 to uphold rights of contractual choice, use of property, or the practice of professions.<sup>803</sup> A modern application has been the right to move about freely, including via automobile.<sup>804</sup>

Section 3 resolves an issue that has been subject to debate under the U.S. Constitution, following the *District of Columbia v. Heller*<sup>805</sup> decision about the U.S. Second Amendment.<sup>806</sup> *Heller* upheld the right to keep and bear arms for self-defense.<sup>807</sup> Does this mean that a government could prohibit *unarmed* self-defense, such as fighting back with hands and feet? Or could a government prohibit self-defense entirely, and thereby remove

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rights, § 1 (“All men are possessed of equal and inalienable natural rights, among which are life, liberty . . . .”); KY. CONST. § 1 (“All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . The right of enjoying and defending their lives and liberties . . . .”); ME. CONST. art. I, § 1 (“All people . . . have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life . . . .”); MASS. CONST. pt. I, art. I (“All men . . . have certain natural, essential, and unalienable rights . . . enjoying and defending their lives . . . .”); MO. CONST. art. I, § 2 (“[A]ll persons have a natural right to life . . . .”); MONT. CONST. art. II, § 3 (“All persons . . . have certain inalienable rights . . . and the rights of . . . defending their lives . . . .”); NEB. CONST. art. I, § 1 (“All persons . . . have certain inherent and inalienable rights; among these are life . . . and the right to keep and bear arms for security or defense of self, family, home, and others . . . .”); NEV. CONST. art. I, § 1 (“All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life . . . .”); N.H. CONST. pt. I, art. 2 (“All men have certain . . . inherent rights--among which are . . . defending life . . . .”); N.J. CONST. art. I, ¶ 1 (“All persons . . . have certain natural and unalienable rights, among which are those of . . . defending life . . . .”); N.M. CONST. art. II, § 4 (“All persons . . . have certain natural, inherent and inalienable rights, among which are the rights of . . . defending life . . . .”); N.C. CONST. art. I, § 1 (“[A]ll persons . . . are endowed by their Creator with certain inalienable rights; that among these are life . . . .”); N.D. CONST. art. I, § 1 (“All individuals . . . have certain inalienable rights . . . defending life . . . to keep and bear arms for the defense of their person, family, property, and the state . . . .”); OHIO CONST. art. I, § 1 (“All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life . . . .”); OKLA. CONST. art. II, § 2 (“All persons have the inherent right to life . . . .”); PA. CONST. art. I, § 1 (“All men . . . have certain inherent and indefeasible rights . . . defending life . . . .”); S.D. CONST. art. VI, § 1 (“All men . . . have certain inherent rights . . . defending life . . . .”); UTAH CONST. art. I, § 1 (“All men have the inherent and inalienable right to enjoy and defend their lives and liberties . . . .”); VT. CONST. ch. I, art. 1 (“That all persons . . . have certain natural, inherent, and unalienable rights, amongst which [is] . . . defending life . . . .”); VA. CONST. art. I, § 1 (“That all men . . . have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life . . . .”); W. VA. CONST. art. III, § 1 (“All men . . . have certain inherent rights . . . [t]he enjoyment of life . . . .”); WIS. CONST. art. I, § 1 (“All people . . . have certain inherent rights; among these are life . . . .”); WYO. CONST. art. 1, § 2 (“In their inherent right to life . . . .”).

803. See *Olin Mathieson Chem. Corp. v. Francis*, 301 P.2d 139, 147, 149, 152 (Colo. 1956) (establishing that the Fair Trade Act may not be used to control the price at which a retailer sells ammunition; legislature may not abridge the right to contract); *Chenoweth v. State Bd. of Med. Exam’rs*, 141 P. 132, 134–36 (Colo. 1913) (holding that a physician’s license to practice may not be revoked because he advertised); *Willison v. Cooke*, 130 P. 828, 831–32 (Colo. 1913) (finding that an ordinance may not require consent of nearby property owners for the construction of a store that complies with all building code and zoning rules).

804. *People ex rel. J.M.*, 768 P.2d 219, 221 (Colo. 1989); *People v. Nothaus*, 363 P.2d 180, 214 (Colo. 1961); cf. *Dominguez v. City & Cty. of Denver*, 363 P.2d 661, (Colo. 1961) (arguing that a person behaving innocently may not be ordered to give an explanation for why he is on the streets at a late hour), *overruled by Arnold v. City & Cty. of Denver*, 464 P.2d 515, 517 (Colo. 1970).

805. 554 U.S. 570 (2008).

806. See *id.* at 573 (considering “whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution”).

807. *Id.* at 635.

the predicate for the right to arms? A unanimous Seventh Circuit panel has made the latter argument.<sup>808</sup> I have argued that the Second Amendment implicitly guarantees the right of self-defense (armed and unarmed), just as the First Amendment implicitly guarantees the right of association.<sup>809</sup> Whatever is the correct answer under the Second Amendment, the answer in Colorado is clear: self-defense is a natural right.

One modern application of section 3 has been in regard to the licensed carrying of concealed handguns. Colorado's constitutional right to keep and bear arms expressly exempts concealed carry from the right.<sup>810</sup> Accordingly, the 2003 Concealed Carry Act states that one purpose of the new law is to protect the self-defense rights, which are guaranteed in section 3.<sup>811</sup>

The principles in sections 1 through 3 are the foundation of government in Colorado. They are prior to everything except the boundaries of the state. They must be kept uppermost in mind when interpreting what follows in the Colorado Constitution, especially the Bill of Rights.

### *G. The Militia*

As will be discussed in Part IV, the Colorado right to arms expressly safeguards the natural right of self-defense. Often, this is a right to be exercised by an individual when attacked by a criminal. Sometimes, the natural right of self-defense must be exercised collectively, as Coloradans had to do in the pre-statehood days, and sometimes thereafter. Although the Colorado right to arms section does not specify the bodies that will be responsible for collective self-defense, other parts of the constitution provide for the existence of two such bodies. The first of these is the state militia.

The 1848 Wisconsin constitution had not organized a state militia, but instead left the matter to the legislature.<sup>812</sup> In contrast, the Colorado

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Suppose a state were to decide that people cornered in their homes must surrender rather than fight back—in other words, that burglars should be deterred by the criminal law rather than self help. That decision would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime, and *Heller* concluded that the [S]econd [A]mendment protects only the interests of law-abiding citizens. Our hypothetical is not as far-fetched as it sounds.

Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago, 567 F.3d 856, 859 (7th Cir. 2009) (citation omitted), *rev'd sub nom.* McDonald v. City of Chicago, 561 U.S. 742 (2010).

809. See David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 449–51 (2014); David B. Kopel, *The Natural Right of Self-Defense: Heller's Lesson for the World*, 59 SYRACUSE L. REV. 235, 248 (2008).

810. COLO. CONST. art. II, § 13.

811. COLO. REV. STAT. § 18-12-201(1)(e) (“[T]he issuance of a concealed handgun permit is based on a person's constitutional right of self-protection . . .”).

812. John Zumbrennen, *Wisconsin: Rejection, Ratification, and the Evolution of a People*, in THE CONSTITUTIONALISM OF AMERICAN STATES, *supra* note 2, at 460, 467.

Convention considered the militia of such fundamental importance that article XVII is devoted to it.<sup>813</sup>

Colorado's constitution defines the state militia as all able-bodied males aged eighteen to forty-five.<sup>814</sup> This parallels the federal definition and the constitutions of many other states.<sup>815</sup> By putting the definition of militiamen in the constitution, the Convention seems to have worked to ensure that the militia could never be narrowed to only a small subset of the people. A narrow militia would be a "select militia"—the bane of the American Founders and of the Colorado Convention.

Following a tradition that had been favored by Americans since colonial days, Colorado provided that each company of militia would elect its own officers.<sup>816</sup> The equipment, including arms, should facilitate militia service alongside the regular army: "The organization, equipment and discipline of the militia shall conform, as nearly as practicable, to the regulations for the government of the armies of the United States."<sup>817</sup>

Ever since the early colonial period, even though laws required able-bodied men (and sometimes women) to have their own arms suitable for community defense, the government of a locality, colony, or state would sometimes provide its own supply of "public arms." The public arms and ammunition could be loaned to militiamen who could not afford their

813. See COLO. CONST. art XVII.

814. *Id.* art. XVII, § 1 (unchanged since 1876).

Some scholars of the original U.S. Constitution and the Bill of Rights have emphasized a theory of "civic republicanism." They accurately point out that in the Italian city-states of the Renaissance, and in seventeenth century England, universal militia service was considered an essential part of civic virtue. A few modern scholars put so much weight on the civic republican element of the Second Amendment that they deny the existence of any right to arms, except for militia service. See David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 563–86 (1991) (comparing the perspectives of modern American scholars on the Second Amendment, in light of historical English and Italian republican political theories).

Other scholars acknowledge the civic virtue element of the Second Amendment, but also point out the human rights element, of personal self-defense. They argue that the Second Amendment includes civic republicanism (in the first clause) and human rights (in the main clause). See, e.g., David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 602 (1986).

The U.S. Supreme Court's *District of Columbia v. Heller* favors the latter approach: recognizing the importance of militias does not degrade the right of self-defense. See 554 U.S. 570, 599 (2008).

A republicanism-only arms right would limit the right to citizens only, for the same reason that only citizens may serve on juries. Juries and militias are part of a republican polity's self-governance, and persons who are not part of the polity may not participate in the governance. As described below, Colorado rejected this narrow model for arms rights, by choosing not to limit arms rights to citizens only.

815. See 10 U.S.C. § 246(a) (2012).

816. COLO. CONST. art. XVII, § 3.

817. *Id.* art. XVII, § 2. A major early statehood use of the militia was by Governor Frederick Pitkin (1879–83), who declared martial law in Leadville during an 1880 miners' strike. LAMAR, *supra* note 2, at 255 (citing Dudley Taylor Cornish, *The First Five Years of Colorado's Statehood, 1876–1881*, 25 COLO. MAG. 179, 183 (1948)). Frank Hall later wrote that Governor Pitkin, while sincerely reacting to a clamor from many residents of Leadville, had over-reacted; the disturbances caused by some malcontents could and should have been suppressed by local law enforcement, without necessitating the expense of calling forth the militia. 2 HALL, *supra* note 2, at 460–64.

own.<sup>818</sup> The public arms were also a ready reserve for militiamen whose personally owned arms might be broken, such as during combat. Public arms could also be issued even to militiamen who had their own arms, so that a militia unit would have uniform, interchangeable, high-quality modern arms. As detailed *supra*, Colorado's territorial governments did attempt to maintain public arms, but quality was often low and quantities insufficient. Public arms are addressed in article XVII, section 4: "The General Assembly shall provide for the safe-keeping of the public arms, military records, relics and banners of the State."<sup>819</sup> The provisions of article XVII were typical of many state constitutions of the time.<sup>820</sup>

#### H. The Office of Sheriff

Article XIV of the 1876 constitution provides for county governments and their officers.<sup>821</sup> Among the officers of the county is the sheriff, who is to be elected by the people.<sup>822</sup> When the first English colonists had begun arriving in America, sheriffs in England were usually appointed, not elected.<sup>823</sup> That began to change in America, starting with some sheriff elections in Virginia counties in the mid-seventeenth century.<sup>824</sup> By the time that Colorado's 1876 convention met, the principle of electing sheriffs had been widely established in state constitutions.<sup>825</sup>

As was understood and undisputed in the nineteenth century, sheriffs have a variety of common law powers, which are indefeasible.<sup>826</sup> Among the most venerable of these powers is the authority to summon a posse comitatus. This term is often anglicized as "the power of the county."<sup>827</sup> It is the common law power of a sheriff (and sometimes other officials) to summon any or all able-bodied males in his jurisdiction to assist the sheriff in law enforcement.<sup>828</sup>

The posse comitatus power is at least as old as the reign of the Anglo-Saxon King Alfred the Great in the eighth century.<sup>829</sup> Based on centuries

818. Sometimes these loans were short-term. Other times they amounted to a gift.

819. COLO. CONST. art. XVII, § 4.

820. Also common in other states, although not universal, was an express exemption for conscientious objectors, provided that the exemption was only during peacetime, and that objectors must pay an "equivalent"—a fee for the exemption. *Compare id.* art. XVII, § 5, with OR. CONST. art. X, § 2 (adopted 1857, unchanged since). James Madison had included a conscientious objector provision in his draft of the Second Amendment, but it was deleted by the Senate, on the reasoning that conscientious exemptions were appropriate, but should be left to legislative discretion. Hardy, *supra* note 814, at 610–11.

821. COLO. CONST. art. XIV.

822. *Id.* art. XIV, § 8.

823. David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 780–82 (2015) [hereinafter Kopel, *Posse Comitatus*].

824. *Id.* at 786–87.

825. *See id.*

826. *Id.* at 787.

827. *Id.* at 789.

828. *Id.* at 789–90.

829. *See id.* at 790.

of Anglo-American common law, the sheriff's posse comitatus discretion is near-absolute. He or she may decide whom, within the county, to summon, and what sorts of arms should be brought to service.<sup>830</sup> A *posse* cannot summon itself. In the nineteenth century, duly-summoned *posses* aided the civil power around the nation, as they had been doing from time immemorial.<sup>831</sup> For example, one of the delegates to the Colorado Convention was Casimiro Barela, who as Sheriff of Las Animas County in 1873, had summoned a *posse* that pursued and captured a fugitive who was wanted on charges of murder and robbery.<sup>832</sup> The next year, Sheriff Barela raised a thirty-man *posse* to deal with Comanche, Kiowa, and Cheyenne raids in the Dry Cimarron region southeast of Trinidad.<sup>833</sup> One of the most notable uses of the *posse* during early statehood came around the time of the 1893 Depression, when a Julesburg *posse* stopped a hijacked train.<sup>834</sup>

#### IV. THE RIGHT TO ARMS IN THE COLORADO CONSTITUTION

The Colorado Convention delegates drew on a variety of state constitutions for models, especially Illinois (1870), Missouri (1875), Nebraska (1875), and Pennsylvania (1873).<sup>835</sup> Nebraska and Illinois had many provisions that were adopted in Colorado, but neither state had a right to arms. Indeed, of the thirty-seven states that had joined the Union prior to Colorado, twelve did not have a constitutional right to arms in

830. *Id.* at 804–08.

831. *Id.* at 792, 798–804.

832. JOSÉ E. FERNÁNDEZ, *THE BIOGRAPHY OF CASIMIRO BARELA* 35–36 (A. Gabriel Meléndez trans., 2003) (1911).

833. TAYLOR, *supra* note 2, at 152–53. This may have been related to the Red River War, which mostly took place in north Texas. *See id.*

834. LEONARD & NOEL, *supra* note 2, at 102–04. Julesburg had four different locations during the nineteenth century, all within a few miles of each other. By 1890, the present location had been established. 4 HALL, *supra* note 2, at 321.

Colorado historians writing in the nineteenth century tend to treat *posses* as very ordinary things, so it seems unlikely that all *posse* uses were recorded by historians. Among some notable *posse* uses in Colorado were: GALLAGHER, *supra* note 239, at 42–44 (1859 Denver *posse* hunts for fleeing murderer); 1 HALL, *supra* note 2, at 236–38 (1860 Denver *posse* pursues three men who murdered a man in a saloon); CAROL TURNER, *NOTORIOUS JEFFERSON COUNTY: FRONTIER MURDER & MAYHEM* 68 (2010) (1868 *posse* finds a notorious desperado in Golden); GALLAGHER, *supra* note 239, at 99 (1868 *posse* led by a U.S. Marshal captures murderer and head of a horse-thief ring, near Cache la Poudre River); BERWANGER, *supra* note 2, at 102 (1870 Longmont *posse* catches murderer and stage coach bandit, and kills him in a shootout); SIMMONS, *supra* note 2, at 182 (1878, *posse* assists federal troops chasing Ute raiders in Middle Park); 2 HALL, *supra* note 2, at 381–84 (1879, *posses* involved in settling a conflict between two railroads, obviating the need for militia intervention); 3 HALL, *supra* note 2, at 54–56 (1879 *posse* of cowboys in Garfield County, to resist raids by Ute Chief Colorow); 4 HALL, *supra* note 2, at 160–61 (1881, in Del Norte, sheriff organizes men who track and apprehend infamous gang of stagecoach robbers); D.A. BROCKETT, *WICKED WESTERN SLOPE: MAYHEM, MISCHIEF, & MURDER IN COLORADO* 111 (2012) (1887 manhunt for train robbers near Grand Junction); SIMMONS, *supra* note 2, at 205 (1887 Garfield County *posse* breaks up a Ute Indian hunting camp); LEONARD, *supra* note 628, at 91 (1888 *posse* defends jail against a thousand-man lynch mob; they succeed until electrical wires are cut, allowing the mob to enter in the dark).

835. Hensel, *supra* note 2, at 105–06, 220. Delegates also discussed the constitutions of Alabama, Arkansas, Connecticut, Delaware, Massachusetts, Michigan, Minnesota, New Hampshire, Oregon, Texas, Vermont, West Virginia, and Wisconsin. *Id.* at 106 n.8, 220 n.17. Hensel's thesis remains the best scholarly analysis of early Colorado constitutional history.

1876.<sup>836</sup> Apparently the Colorado Convention did not want a constitution without the right, and the Convention turned to Missouri for a model. The 1875 Missouri Constitution right to arms was the longest such provision in any state constitution at the time. Missouri integrated several features that Colorado wanted: the strongest available language for guaranteeing the right; distinguishing personal defense from community defense, and specifying that the right to arms protects both purposes; making it clear that community defense is not only through militia service; making it clear that community defense was to be led by appropriate legal officials, and not be freelancing, and authorizing restriction or prohibition of the carrying of *concealed* arms.<sup>837</sup>

Like the U.S. Bill of Rights, the Colorado language does not treat rights as a gift from the government. Rather, rights preexist government. As in the phrasing of the Second Amendment, the phrasing of the Colorado Constitution treats the right to arms as already in existence.<sup>838</sup> The text safeguards the right to arms but does not create it.

#### A. “*The Right of No Person*”

Like the rest of the Bill of Rights, the right to arms was not controversial. The Colorado Convention made only one significant change from the Missouri model. Colorado expanded the guarantee to cover every “person,” not just the “citizen.”<sup>839</sup>

This is consistent with the immigrant-friendly attitude of the Convention. When the proposed constitution was sent to the people for

836. JOHNSON ET AL., *supra* note 2, at 738–48. Nebraska, the state that joined just before Colorado, was the last state not to have a right to arms in its original constitution. All 12 states that joined after Colorado had a right to arms right from the start. Of the dozen states that had no right to arms as of 1876, half of them (including Nebraska and Illinois) later amended their constitutions to include the right. *Id.*

Nebraska added its arms right in 1988 by citizen initiative. Along with approximately contemporaneous additions for due process, equal protection, and a prohibition on suspension of habeas corpus, the Nebraska amendments “indicate a strong desire on the part of Nebraskans to maintain their independent and autonomous nature absent any external interference.” Larimer, *supra* note 282, at 546; *see also* NEB. CONST. art. I, § 3 (“the right of the people to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, and recreational use”).

837. *See* MO. CONST. of 1875, art. II, § 17 (“[T]he right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.”).

838. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (right to arms is not “in any manner dependent upon [the U.S. Constitution] for its existence”).

839. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN DENVER, DEC. 20, 1875, at 90, 204–05 (1907). The 1896 Utah Constitution had more ambiguously said that “The people have the right to bear arms . . . .” UTAH CONST. art. I, § 6 (amended 1984). Decades later, the Utah Supreme Court held that legal aliens had no right to arms and suggested that the Utah right to arms did not apply to individuals. *State v. Vlacil*, 645 P.2d 677, 679–80 (Utah 1982). In response, the people of Utah amended the state constitution. *See* 1984 Utah Laws, 2d Sp. Sess., S.J.R. 3 (“The individual right of the people . . .”).



ratification, it was printed in English, German, and Spanish for “inhabitants of the State who speak those languages and who may be unable to read and understand the English language.”<sup>840</sup> Similarly, the constitution required that until at least 1900, state statutes be printed in Spanish and German, as well as English.<sup>841</sup>

Another alien-friendly provision of the Bill of Rights was section 27, which guaranteed aliens the same property rights as citizens.<sup>842</sup> It was hoped that the provision would attract immigrant capitalists.<sup>843</sup> By statute, immigrants would be allowed to vote as soon as they declared their intent to naturalize.<sup>844</sup>

Consistent with the text of the constitution, the Colorado Supreme Court has enforced the arms rights of noncitizens. There is no doubt that a state may reserve the fish and game of a state for the benefit of its citizens.<sup>845</sup> After World War I, under the influence of xenophobia and the Ku Klux Klan, many states adopted gun control laws aimed at legal resident aliens. In 1921, the Colorado legislature banned gun ownership by aliens, ostensibly to prevent them from hunting.<sup>846</sup>

840. COLO. CONST. art. XVIII, § 8 (amended 1990).

841. This had become the practice of the Territorial Legislature. *See, e.g.*, ESTATUTOS REVISADOS DE COLORADO, EN FUERZA DE LEY DESPUES DE LA SUSPENSION DE LA SESION NOVENA DE LA ASEMBLEA LEGISLATIVA (E. T. Wells & Fred. J. Stanton eds., 1872) (Spanish); ALLGEMEINEN GESETZE DES STAATES COLORADO (William M. Clark ed., 1877) (German).

The convention delegate behind the mandate for multilingual publication of statutes was Casimiro Barela, who had sponsored the bill in the Territorial Legislature for Spanish language statutory publication. FERNÁNDEZ, *supra* note 832, at 16–18, 38–42. Barela was elected to the first statehood Senate in 1876 and served as a state senator until he was defeated in a 1916 election. *Id.* at xviii–xxix.

842. COLO. CONST. art. II, § 27.

843. Hensel, *supra* note 2, at 135. In contrast, California’s 1879 constitution had an entire article titled “Chinese.” It authorized the legislature to remove Chinese from cities and towns or to limit Chinese to certain areas therein, forbade corporations to employ “any Chinese or Mongolian,” and forbade governments to employ Chinese. The stated rationale was that the presence of foreigners who are ineligible for citizenship (per U.S. law at the time) was dangerous. CAL. CONST. art. XIX (repealed 1952).

844. BERWANGER, *supra* note 2, at 148.

845. *See, e.g.*, Baldwin v. Fish & Game Comm’n of Mont., 436 U.S. 371, 390–91 (1978); Corfield v. Coryell, 6 Fed. Cas. 546, 549–50 (C.C.E.D. Pa. 1823) (No. 3230).

846.

That from and after the passage of this act, it shall be unlawful for any unnaturalized foreign-born resident to hunt for or capture or kill, in this state, any wild bird or animal, either game or otherwise, of any description, excepting in defense of persons or property; and to that end it shall be unlawful for any unnaturalized foreign-born resident, within this state, to either own or be possessed of a shotgun or rifle of any make, or a pistol or firearm of any kind. Each and every person violating any provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars (\$25) nor more than two hundred and fifty dollars (\$250), or by imprisonment in the county jail not less than ten (10) days or more than three (3) months, or by both such fine and imprisonment; *Provided*, That in addition to the before-named penalty all guns of the above-mentioned kinds found in possession or under control of an unnaturalized foreign-born resident shall, upon conviction of such person, be declared forfeited to the state of Colorado, and shall be sold by the fish and game commissioner as hereinafter directed.

COMPILED LAWS OF COLORADO 1921 § 6882, at 1775 (1922).

In the 1936 case *People v. Nakamura*,<sup>847</sup> the Colorado Supreme Court struck down the ban on alien arms.<sup>848</sup> The Colorado Attorney General argued that the right to arms is only a “collective” right and not a “personal” one.<sup>849</sup> Obviously this argument was difficult to square with the text of the Colorado provision.

Nakamura had been caught while illegally poaching,<sup>850</sup> so the Court could have upheld Nakamura’s conviction, since his activity was something that the state did have power to prohibit. The dissent urged this approach, but the majority held the statute facially void, and thus restored the constitutional rights of aliens.<sup>851</sup>

In 1889, Montana adopted its statehood constitution, copying the Missouri–Colorado model. As to who enjoys the right, Montana chose the Colorado approach with rights for every “person.”<sup>852</sup> The next year, Mississippi wrote a new constitution and took the Missouri approach. So, in Mississippi, noncitizens were excluded from the right to arms.<sup>853</sup>

In modern case law, bans on legal resident aliens keeping or bearing arms have been held to violate the Fourteenth Amendment.<sup>854</sup> Bans on *illegal* aliens keeping or bearing arms have been upheld under the Second Amendment.<sup>855</sup>

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847. 62 P.2d 246 (Colo. 1936).

848. *Id.* at 247.

849. *Id.* at 246–47.

850. *See id.* at 246 (defendant pled guilty to the first count, unlawful possession of three pheasants).

851. *Id.* at 247–48 (Bouck, J., dissenting); *id.* at 247 (majority opinion) (holding that the legislature may ban aliens from hunting, but because the statute applies to arms for defense, it “contravenes the constitutional guaranty and therefore is void”).

852. MONT. CONST. of 1889, art. III, § 13 (“The right of any person to keep or bear arms in defense of his own home, person and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.”). This section was later reenacted verbatim in the 1972 Montana Constitution. MONT. CONST. art. II, § 12.

853. MISS. CONST. art. 3, § 12 (“The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the Legislature may regulate or forbid carrying concealed weapons.”). The 1890 version was more specific than its predecessors, but also marked a retreat for 1868 language that had encompassed “persons.” MISS. CONST. of 1868, art. I, § 15 (“All persons shall have a right to keep and bear arms for their defence.”); MISS. CONST. of 1832, art. I, § 23 (“Every citizen has a right to bear arms in defence of himself and the State.”); MISS. CONST. of 1817, art. I, § 23 (same language as 1832).

854. *See, e.g.,* Fotoudis v. City & Cty. of Honolulu, 54 F. Supp. 3d 1136, 1141–42 (D. Haw. 2014) (striking firearms prohibition for legal aliens); *cf. Fletcher v. Haas*, 851 F. Supp. 2d 287, 303 n.20, 305 (D. Mass. 2012) (striking prohibition on carry permits for legal aliens under the Second Amendment, incorporated to the states via the Fourteenth Amendment).

855. David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 246–48 (2017).

B. *“To Keep and Bear Arms in Defense of His Home, Person and Property,”*

Like the Second Amendment, the Colorado Constitution uses the phrase “keep and bear arms.” One earlier case in Tennessee had stated that the phrase “bear arms” has a military-only connotation, so that “bear arms” means only carrying arms while in militia, and not carrying arms for personal defense.<sup>856</sup> The Colorado Constitution does not take this approach. In Colorado, the right to bear arms is for every “person” in defense of “home, person, or property.”

C. *“Or in Aid of the Civil Power When Thereto Legally Summoned”*

After affirming the right to possess and carry arms for defense of home, person, and property, the Colorado Constitution adds a separate reason why arms are protected: so that persons will be able to come to the aid of the civil power. According to legal historian David Hardy, the federal Second Amendment combines civic republicanism and human rights philosophy.<sup>857</sup> Civic republicans in the Renaissance Italian city-states, and later in Great Britain, extolled the militia, in which almost all able-bodied men bore arms to defend the community.<sup>858</sup> An enduring and constructive Western political philosophy, civic republicanism often considers how respect for individual rights (e.g., owning arms) can promote the common good (e.g., militia defense of a community).

The first clause of the Second Amendment is civic republicanism (the well-regulated militia). The main clause is the human rights tradition: the natural right of every creature to defend itself.<sup>859</sup> James Madison was writing in the language of his time; some modern readers have found it confusing. The Colorado right to keep and bear arms is written more directly. The right to keep and bear arms for self-defense belongs to every person, and so does the right to keep and bear arms for community defense. Each purpose is of fundamental importance, which is why they are inscribed in the Bill of Rights.

One type of keeping and bearing arms “in aid of the civil power when thereto legally summoned” is service in the militia. In Colorado, the need for the militia was freshly in mind. Preventing a repetition of the near-

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856. *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 156–58 (1840). The U.S. Supreme Court, however, has expressly rejected *Aymette*’s “odd reading” of the phrase. *District of Columbia v. Heller*, 554 U.S. 570, 613 (2008).

857. See Hardy, *supra* note 814, at 604–15.

858. See *id.* at 626 n.328; NICCOLÒ MACHIAVELLI, DISCOURSES ON THE FIRST DECADE OF TITUS LIVIUS 99–101 (Ninian Hill Thomson trans., Kegan Paul, Trench & Co. 1883) (1531); JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA 77–78 (1656).

859. The human rights tradition can be traced backwards from American Founders such as Jefferson and Madison to Protestant thinkers to Thomas Aquinas (thirteenth century), and to the republics of the Greeks, the Romans, and the Hebrews. See generally DAVID B. KOPEL, THE MORALITY OF SELF-DEFENSE AND MILITARY ACTION: THE JUDEO-CHRISTIAN TRADITION (2017). The human right of self-defense is also found in other religious traditions, such as those of East and South Asia. See generally David B. Kopel, *Self-Defense in Asian Religions*, 2 LIBERTY L. REV. 107 (2007).

conquest of 1862 would be one benefit of a strong constitutional right to arms. Able to arm themselves, Coloradoans would be better able to defend their state, in the militia.

To Coloradans, the grave danger of an insufficiently armed public was not theoretical. Between 1861 and 1862, Colorado had been menaced by the slave power of the Confederacy. Barely, Coloradans had obtained enough arms and armed men to retain their sovereignty. Throughout the 1860s, the Colorado settlers were under Indian attack, and in 1864 and 1865, they had nearly been wiped out. A prudent, forward-thinking policy would aim to ensure that the people's militia would never again be scarce of arms.

At the 1875 Missouri Convention, a speaker had explained the harmony of the Second Amendment and the Missouri language (which Colorado copied):

How is this to be construed? Simply a right of the citizen of a state to carry a pistol, sabre or musket? . . . The right belongs to every state, not only that its citizens shall always be free to own arms & to carry arms, but also to put those citizens thus armed & equipped in an organization called militia.<sup>860</sup>

The militia is not the only means by which the civil power may summon aid. Another means is the posse comitatus. The constitution mandates that there be County Sheriffs, elected by the people.<sup>861</sup> Under common law, they could summon the posse comitatus, as needed.

The constitutional language “in aid of the civil power when thereto legally summoned” presumes that there is functioning civil power capable of summoning. The Colorado Constitution was intended to create enduring civil power—to defend civil liberty and to foster public goods such as education. If civil power ceased to exist, then whatever people did to defend themselves or their communities would be beyond the scope of what the Colorado Constitution addresses. People would simply be exercising the natural rights recognized in sections 1–3 of the Bill of Rights.

As intended, the constitutional right to arms has helped to keep the civil power functioning effectively. Today, seventeen Colorado County Sheriffs have formal posses, composed of volunteers who receive special training.<sup>862</sup> They aid the sheriff on everything from security at the county fair to road control during weather emergencies to hostage situations.<sup>863</sup>

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860. 1 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 119 (Isidor Loeb & Floyd C. Shoemaker eds., 1930).

861. COLO. CONST. art. XIV, § 8.

862. See Kopel, *Posse Comitatus*, *supra* note 823, at 810–11.

863. *Id.* at 817–23.

In the past several decades, there have been two notable situations in which larger posses, composed of all available volunteers, have been summoned. In 1977, a posse summoned by the Pitkin County Sheriff thwarted the escape of serial killer Ted Bundy, after Bundy escaped from the Pitkin County Courthouse by jumping from a window during a court recess.<sup>864</sup> In 1998, a Hinsdale County posse blocked the escape of two criminals on an interstate crime spree, who had murdered Sheriff Roger DeCourcy at a traffic stop.<sup>865</sup>

The Missouri–Colorado language thus guarantees the ownership of arms that are suitable for *posse* or militia service, and not solely the types of arms that might be suitable for personal self-defense. There is a good argument that arms suitable for the one are also well-suited for the other. But to the extent that there is any divergence, Missouri and Colorado protect both.

Donald Lutz has written that “constitutionalism is an advanced technique for handling conflict.”<sup>866</sup> In Colorado, one of the advanced techniques is that persons will be armed, to defend themselves in an instant, and to defend their communities when lawfully summoned to do so.

*D. “Shall be Called Into Question;”*

This language is somewhat similar to the Second Amendment’s “shall not be infringed.” It is nearly the same as the language of the Fourteenth Amendment, ratified in 1868:

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.<sup>867</sup>

This states the matter firmly. There are many things that the U.S. government may do. Repudiating its debt is not one of them. Unless Section 4 of the Fourteenth Amendment is repealed or revised, the U.S. government cannot fail to perform its legal obligation to pay its debts. There is no wiggle room for evading debt if the government argues that debt repudiation would pass intermediate scrutiny, or some other standard. The question is off the table. The Fourteenth Amendment’s language has served the nation well, by assuring creditors that U.S. debts will always be repaid, no matter what.

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864. *Id.* at 812–13.

865. *Id.* at 813–15.

866. LUTZ, *supra* note 3, at 14.

867. U.S. CONST. amend. XIV, § 4.

Missouri's 1875 use of "called in question" was a change from its 1820 language that the right "cannot be questioned."<sup>868</sup> A 1945 revision improved the flow: "[T]he right of every citizen . . . shall not be questioned . . ."<sup>869</sup> The phrase "shall not be questioned" was first used for the right to arms in the 1790 Pennsylvania Constitution.<sup>870</sup> Kentucky employed the same words in 1792.<sup>871</sup> Maine in 1819 declared that "this right shall never be questioned."<sup>872</sup>

*E. "But Nothing Herein Contained Shall be Construed to Justify the Practice of Carrying Concealed Weapons."*

In Colorado, the right shall not be "called in question." With some small differences in phrasing, the language had originated in Pennsylvania in 1790 and been followed by Kentucky in 1792.<sup>873</sup> Given the strong language, in 1822, the Kentucky Court of Appeals declared

868. Compare MO. CONST. of 1875, art. II, § 17 ("That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons."), with MO. CONST. of 1820, art. 13, § 3 ("[T]he people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance; and that their right to bear arms in defence of themselves and of the state cannot be questioned.").

869.

That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.

MO. CONST. art. I, § 23 (amended 2014).

870. PA. CONST. of 1790, art. IX, § 21 ("That the right of the citizens to bear arms in defence of themselves and the state shall not be questioned."). This language was retained in new constitutions in 1838, PA. CONST. of 1838, art. IX, § 21, and 1874, PA. CONST. of 1874, art. I, § 21. The 1968 constitution slightly revised the language: "The right of the citizens to bear arms in defense of themselves and the State shall not be questioned." PA. CONST. art. I, § 21. The first constitution, in 1776, had declared: "[T]he people have a right [sic] bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up: And that the military should be kept under strict subordination to, and governed by, the civil power." PA. CONST. of 1776, ch. I, art. XIII.

871. KY. CONST. of 1792, art. XII, § 23 ("[T]he rights of the citizens to bear arms in defence of themselves and the State shall not be questioned."). The language was kept in 1799, KY. CONST. of 1799, art. X, § 23 (verbatim of 1792), and 1850, KY. CONST. of 1850, art. XIII, § 25 ("[T]he rights of the citizens to bear arms in defense of themselves and the State shall not be questioned; but the General Assembly may pass laws to prevent persons from carrying concealed arms."). The phrasing in 1891 was different: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons." KY. CONST. § 1.

872. ME. CONST. art. I, § 16 (amended 1987) ("Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned.") The constitution was amended in 1987 to remove "for the common defence." ME. CONST. art. I, § 16, amended by ME. CONST. amend. CLVII.

873. See PA. CONST. of 1790, art. IX, § 21; KY. CONST. of 1792, art. XII, § 23.

unconstitutional a ban on carrying concealed weapons. The court acknowledged that open carry was still allowed, but that did not matter:

[T]o be in conflict with the constitution, it is not essential that the act should contain a prohibition against bearing arms in every possible form--it is the right to bear arms in defense of the citizens and the state, that is secured by the constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution.<sup>874</sup>

Given “the explicit language of the constitution,” the only means to justify a concealed carry ban was to have explicit language allowing such a ban. When creating a new constitution in 1850, Kentucky included such language.<sup>875</sup> Missouri did the same in 1875.<sup>876</sup> The strong language against questioning the right had an express exception for concealed carry. The chairman of the Missouri Convention’s Bill of Rights committee explained that the express exception was necessary because the Kentucky Supreme Court had held that “a provision in the Constitution declaring that the right of any citizen to bear arms shall not be questioned, prohibited the Legislature from preventing the wearing of concealed weapons.”<sup>877</sup>

The canon of construction *expressio unius est exclusio alterius* is that the express mention of one thing excludes another.<sup>878</sup> Expressly giving the government power over *concealed* bearing of arms means that the government does not have a similar power over *openly* bearing arms, or over *keeping* arms.

“[N]othing herein contained shall be construed to justify the practice of carrying concealed weapons”<sup>879</sup> means that nothing contained in the right to arms section is a legal justification for carrying a concealed weapon. This leaves the legislature free to regulate, prohibit, or liberally allow concealed carry, as it sees fit.<sup>880</sup> Thus, at various times Missouri has prohibited concealed carry, has allowed it only with a license, has revised the licensing system, and now allows lawful adult firearms owners to carry

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874. *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 91–92 (1822).

875. See KY. CONST. of 1850, art. XIII, § 25.

876. MO. CONST. of 1875, art. II, § 17.

877. 1 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, *supra* note 860, at 425, 439 (referring to *Bliss*, 12 Ky. (2 Litt.) 90); see also David B. Kopel et al., *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177, 1205 (1995).

878. *Cain v. People*, 327 P.3d 249, 253 (Colo. 2014) (articulating the meaning of *expressio unius est exclusio alterius* and demonstrating its application).

879. COLO. CONST. art. II, § 13.

880. Colorado had copied the 1875 Missouri constitutional text, but Colorado said “shall be construed,” whereas Missouri had said “is intended.” The Missouri Supreme Court, interpreting language that is functionally identical to Colorado’s, rejected the argument that concealed carry constitutional text forbade 2003 Missouri legislature from enacting a system for licensing the carrying of concealed arms by qualified persons. See *Brooks v. State*, 128 S.W.3d 844, 846–48 (Mo. 2004).

concealed without a license, although in fewer places than where open carry or licensed concealed carry is allowed.<sup>881</sup>

In 2003, a Colorado reform law, similar to a statute earlier adopted in Missouri and many other states, made licensing uniform statewide, with licenses to be issued by County Sheriffs. Standards for obtaining a license were made stricter, while persons who met the standards were guaranteed that they would be issued a license.<sup>882</sup> The legislature explained that it was acting to better effectuate self-defense rights, which are guaranteed in article II, section 3.<sup>883</sup>

The Colorado framers understood that arms could be carried openly or concealed. The next-door Territory of Wyoming in 1876 had a statute banning arms carrying in towns, “concealed or openly,” except by “a sojourner.”<sup>884</sup> (The statute was later revised to prohibit only concealed carry, or open carry with intent to criminally injure another.<sup>885</sup>) Unlike in the Wyoming Territory, the State of Colorado’s legislature could prohibit concealed carry only, not open carry.

## V. INTERPRETATION

### A. *What Arms Does the Text Encompass?*

It would be silly to contend that any constitutional right includes only the technology of the time the constitution was written. As the U.S. Supreme Court stated in regard to the Second Amendment:

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.<sup>886</sup>

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881. MO. REV. STAT. § 571.030.1(1) (2017) (concealed carry is unlawful only in certain locations); *id.* § 571.030.4 (location restrictions not applicable to persons with concealed carry permit); *id.* § 571.101.2(1)–(3) (procedures for issuing permits to all qualified adults, mostly recently amended by S.B. 656, 2016 Gen. Assemb., 2d Reg. Sess. (Mo. 2016)); KEVIN L. JAMISON, MISSOURI WEAPONS AND SELF-DEFENSE LAW 122–31 (2003) (describing history of restrictions on concealed carry in Missouri, prior to the 2003 enactment of a “Shall Issue” law).

882. COLO. REV. STAT. § 18-12-201(3); *id.* § 18-12-203(1).

883. *Id.* § 18-12-201(1)(e); *see* COLO. CONST. art. II, § 3.

884. THE COMPILED LAWS OF WYOMING 352 (J.R. Whitehead ed., 1876) (“[I]t shall be unlawful for any resident of any city, town or village, or for any one not a resident of any city, town or village, in said Territory, but a sojourner therein, to bear upon his person, concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village.”).

885. REVISED STATUTES OF WYOMING 1253 (J.A. Van Orsdel & Fenimore Chatterton eds., 1899) (“Every person, not being a traveler, who shall wear or carry any dirk, pistol, bowie knife, dagger, sword-in-cane, or any other dangerous or deadly weapon concealed, or who shall carry or wear any such weapon openly, with the intent, or avowed purpose, of injuring his fellow-man, shall be fined not more than one hundred dollars.”).

886. *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (citations omitted).



This is all the more true for the 1876 Colorado Constitution because firearms innovation and improvement were so rapid in the quarter-century leading to 1876.

It does seem obvious that technology that *was* in existence at the time a constitutional guarantee was written is encompassed in the guarantee. In Colorado, this would include firearms, edged weapons, blunt weapons, and bows.

Because constitutional rights encompass technological improvements and inventions, the modern right to bows would include compound bows, which use cables and pulleys. The same point would be true for other arms.

For defense of home, person, and property, there is no general “best” type of arm. The appropriate, safest defensive arms can be very different from one person to another, depending on age, strength, dexterity, training, and other factors. For one person, pepper spray might be the best defensive arm; for someone else, a stun gun might be better. One reason there are so many different models of firearms and knives is that ergonomics are so varied among the population. A handgun that is a perfect fit for one person may be a terrible fit for another. Among different firearms, there are trade-offs in cost, reliability, accuracy, simplicity of operation, stopping power, and many other characteristics. What is the best, safest choice of a defensive firearm is a question that can only be answered individually, not collectively.

The second purpose of the Colorado right to arms is “in aid of the civil power.” One good model for this type of arms is ordinary law enforcement officers. Their carrying is always “in aid of the civil power.”<sup>887</sup> This means the arms of the ordinary sheriff’s deputy or police officer— not necessarily the types of arms that are carried by special combat police units, such as flash-bang grenades, machine guns, and so on.

#### *B. Justice Wells’s Note to Himself*

Ebenezer Tracy Wells moved to Colorado after serving with distinction in an Illinois unit in the Civil War.<sup>888</sup> Quickly he became a prominent lawyer in Gilpin County, the heart of the mining region.<sup>889</sup> He

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887. See *State v. DeCiccio*, 105 A.3d 165, 173, 199–201 (Conn. 2014) (adopting ordinary law enforcement officer test to strike ban on transporting privately owned police batons from one home to another); *People v. Yanna*, 824 N.W.2d 241, 245–46 (Mich. Ct. App. 2012) (striking ban on electric stun guns, in part because of their widespread use by law enforcement); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1534 (1998) (proposing ordinary law enforcement officer test).

888. WM. RAIMOND BAIRD, *BETAS OF ACHIEVEMENT* 341 (1914).

889. See 3 HALL, *supra* note 2, at 409–10.

was elected to the Territorial Legislative Assembly for 1866–1867.<sup>890</sup> The next year, he wrote a compilation of territorial statutes, the “Revised Statutes of 1868.”<sup>891</sup> President Grant appointed him associate judge of the Territorial Court in 1871, where he served until 1875.<sup>892</sup> He was a delegate to the 1876 Colorado Convention.<sup>893</sup>

At the request of the Republican party, Wells ran for the Colorado Supreme Court in 1876 and won. However, he had run with the understanding that he could resign and resume his lucrative law practice, which he did in 1877.<sup>894</sup> He later taught Property and Trusts at the University of Colorado law school, wrote a treatise on water law at the request of the Colorado General Assembly, and served as the reporter for the intermediate Colorado Court of Appeals.<sup>895</sup>

Although Wells never ruled on a case involving the Colorado right to arms, some handwritten notes may reflect his thinking. In the Colorado State Supreme Court Library is Wells’s copy of the book published by the Convention, containing the proposed constitution, plus the Convention’s address to the people.<sup>896</sup> Handwritten notes on the constitution appear on blue lined note paper before the text begins. Item 68 is: “The provision that the right to bear arms shall be [not called?] in question refers only to military arms: not dirks, bowie knives, etc.” Along with this, Wells cited a recent case from Texas, *English v. State*.<sup>897</sup>

*English v. State* held that the Texas Constitution “protects only the right to ‘keep’ such ‘arms’ as are used for purposes of war.”<sup>898</sup> The Texas Court said the Texas Constitution had the same meaning as the Second Amendment, to which the Court ascribed a military meaning:

The word “arms” in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster

890. 2 HALL, *supra* note 2, at 541–42. Representative from Gilpin in the sixth session of the Territorial Assembly (Dec. 1866–Jan. 1867). *Id.*

891. 1 HISTORY OF COLORADO 735 (Wilbur Fisk Stone ed., 1918).

892. 19 THE PAPERS OF ULYSSES S. GRANT: JULY 1, 1868–OCTOBER 31, 1869, at 500 (John Y. Simon ed., 1995); 2 HALL, *supra* note 2, at 535 (appointed Feb. 8, 1871); 3 HALL, *supra* note 2, at 282; BAIRD, *supra* note 888, at 341. Wells was a great grandson of Artemus Ward, a revered U.S. Representative and Revolutionary War General. PHILIP J. REYBURN, CLEAR THE TRACK: A HISTORY OF THE EIGHTY-NINTH ILLINOIS VOLUNTEER INFANTRY, THE RAILROAD REGIMENT 184 (2012).

893. HISTORICAL COMPENDIUM, *supra* note 2, at 113.

894. 1 HISTORY OF COLORADO, *supra* note 891, at 428, 735; HISTORICAL COMPENDIUM, *supra* note 2, at 114; 3 L.B. FRANCE, REPORTS OF CASES AT LAW AND IN CHANCERY DETERMINED IN THE SUPREME COURT OF COLORADO TERRITORY AND IN THE SUPREME COURT OF THE STATE OF COLORADO (1911).

895. Dina C. Carson, *Faculty, Staff and Administrators of the University of Colorado, 1877–1921*, 43 BOULDER GENEALOGICAL SOC. Q. 3, 66 (2011).

896. THE CONSTITUTION OF THE STATE OF COLORADO ADOPTED IN CONVENTION, MARCH 14, 1876; ALSO THE ADDRESS OF THE CONVENTION TO THE PEOPLE OF COLORADO (Denver, 1876).

897. 35 Tex. 473 (1872).

898. *Id.* at 475.

pistols and carbine; of the artillery, the field piece, siege gun, and mortar, with side arms.<sup>899</sup>

The military arms-only interpretation was also adopted by courts in Tennessee and Arkansas.<sup>900</sup>

Eminent as Justice Wells was, his short note to himself is not the best interpretation of the text. It was not consistent with the arms habits of Coloradans. We have a good idea of the types of guns that some Colorado gun stores carried. Colorado consumers wanted shotguns, rifles, carbines, repeaters, single-shots, bowie knives, other knives, the biggest dragoon handguns, little pocket revolvers, and ladies' pocket derringers. I have not found any advertising for "the field piece, siege gun, and mortar." Pocket handguns are good for personal defense, and not well-suited for military use.

The military-only rule does not fit with the text of the Colorado Constitution. The text plainly calls out two separate purposes: "in defense of his home, person and property, or in aid of the civil power when thereto legally summoned."<sup>901</sup> A military-only rule could fit only with the second purpose. It is true that some military arms, such as muskets and holster pistols, can be suitable for "defense of home, person, or property." But artillery is not. To follow *English* would mean that a person defending her family from a home invader could use a mortar, but not a bowie knife or a pocket revolver. This seems counterintuitive.

Given that Justice Wells was just writing a note to himself, and not a judicial opinion, it is possible that he might have further developed his views on section 13 if he had ever been presented a case challenging the constitutionality of an arms control.

### C. Practices of the Time

Among the sources of original meaning are the practices of the time, as people exercised their rights. During the pre-statehood period,

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899. *Id.* at 476. An earlier Texas case had stated that bowie knives were part of the Texas Constitution right to arms, but extra punishment could be imposed for using a bowie knife in a criminal homicide. *Cockrum v. State*, 24 Tex. 394, 401 (1859). By adopting a military-only theory, the *English* court was able to remove bowie knives from constitutional coverage: "The terms dirks, daggers, slungshots, sword-canes, brass-knuckles and bowie knives, belong to no military vocabulary." *English*, 35 Tex. at 477. To Justice Wells, this seemed the benefit of the military-only rule.

The *English* court bemoaned the Spanish influence on Texas culture, which the court blamed for Texans' affinity for arms. Unlike the common law, Spanish law bore Carthaginian, Visigoth, Arab, and other influences. *Id.* at 479–80. As for Texas's founding traditions, born from its war of independence against Mexico, and its frontier conditions, "[w]e will not say to what extent the early customs and habits of the people of this state should be respected and accommodated, where they may come in conflict with the ideas of intelligent and well-meaning legislators." *Id.*

900. See *Fife v. State*, 31 Ark. 455, 459 (1876); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 182–89 (1871).

901. COLO. CONST. art. II, § 13.

Coloradans had witnessed and taken advantage of rapidly improvement firearms technology. Coloradans after 1876 continued to do so.

The firearms improvements between the 1858 gold rush and the 1876 constitution were discussed in Section I.C. The Colorado Founders had every reason to expect that improvements in older types and the introduction of newer types would continue. The newest developments could be confirmed by a short visit to the nearby gun stores of Gove and Lower.

Among the most important innovations after 1876 was modern smokeless gunpowder.<sup>902</sup> Also, there were new firearms with actions that could do the same work as the lever action, but slightly faster (the pump action, bolt action, and semi-automatic action);<sup>903</sup> and the detachable box magazine (faster to reload than a tubular magazine).<sup>904</sup> Before the century was over, an ordinary consumer could buy a semi-automatic handgun and a twenty-round magazine for the handgun.<sup>905</sup>

Although firearms technology advanced during the twentieth century, much of the advances were simply improvements of what was already on the market in the nineteenth. The twentieth century brought better materials, closer-fitting parts, more precise ammunition, and greater quality for lower prices.<sup>906</sup>

When the Second Amendment was framed, handguns existed; most were single-shot and some expensive ones were multi-shot.<sup>907</sup> This is one reason (but not the only reason) why handguns as a class may not be banned today. Likewise, the 1876 exercise of the right to arms in Colorado included pocket revolvers,<sup>908</sup> which suggests that banning small handguns would be unconstitutional.

Similarly, among the most common arms by 1876 were repeaters that could rapidly fire many shots. This suggests that a ban on repeating arms

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902. This made ammunition much more powerful, and people had to buy new firearms to use it. Because smokeless powder made indoor shooting galleries possible, cities revised their firearms discharge laws to allow for indoor target ranges, as discussed *infra* Section VI.C.

903. For example, Marlin pump action repeaters were on the market by the early 1880s. Among their outlets was the Leadville Armory. See GARAVAGLIA & WORMAN, *supra* note 2, at 196. The pump action (a/k/a slide action) and bolt action had both been patented before the Civil War but did not become common until later. The semi-automatic action was invented in 1885. In a pump action, bolt action, or semi-automatic, the gun shoots one round every time the trigger is pressed. Thus, they are not machine guns or automatics, which fire continuously as long as the trigger is held.

904. This had been invented in 1862 but was not incorporated in a popular firearm until 1896. David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 856–57 (2015).

905. *Id.* at 857.

906. JOHNSON ET AL., *supra* note 2, at 521–23.

907. See David Kopel, *Firearms Technology and the Original Meaning of the Second Amendment*, WASH. POST (Apr. 3, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/03/firearms-technology-and-the-original-meaning-of-the-second-amendment>.

908. See *supra* note 293 and text accompanying note 694.

would be invalid, including any ban on the various types of repeating arms that became common in the final two decades of the nineteenth century: pump action, bolt action, and semi-automatic. As discussed above, the eighteen-shot Winchester model 1866 had been a big success for a decade before the Colorado Constitution. Repeating arms with magazine capacities in the high teens and twenties were familiar in 1876 and more would be brought to the market in the remainder of the century.<sup>909</sup>

#### *D. Law and Order After Statehood*

By the last two decades of the century, the grave dangers of the territorial days were long gone. The Civil War was over, and there were no threats of secession anywhere. The Indians were mostly finished as military powers; whatever off-reservation Utes might do, they could not pose a risk to the survival of the state.

Although the judicial system was well-established, obviating the need for people's courts, people were still mainly responsible for their own self-protection. As of 1887, Denver's population of 65,000 had only forty-three police officers.<sup>910</sup> Escape from Denver's jail (a converted meat market) was not difficult.<sup>911</sup> Besides that, some of the leadership of Denver's police department in the latter 1880s had a close alliance with a notorious gang of burglars and thieves.<sup>912</sup>

Nevertheless, Denver was much more peaceful than its Eastern image. When Alexander Graham Bell visited, he was surprised to report, "I have not, since I have been here, seen a single buffalo, a single cowboy, a single Indian, and I have been in Denver six hours and I have not been shot at."<sup>913</sup>

In Denver, the largest exercise of the right to keep and bear arms "in aid of the civil power when thereto legally summoned"<sup>914</sup> was probably in 1880. A few days before the general election, a Denver Democrat election parade turned into an anti-Chinese riot; the mob hanged a Chinese man for no reason other than his race.<sup>915</sup> The riot was suppressed with difficulty by

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909. See *supra* Section I.C; Kopel, *supra* note 904, at 853–57.

910. LEONARD & NOEL, *supra* note 2, at 66.

911. *Id.*

912. See, e.g., 4 HALL, *supra* note 2, at 447 (describing the Chief of Police of Denver's close connection to burglars and thieves). As a result, the legislature in 1891 put the Denver police under the control of commissioners appointed by the Governor, which led to cleanup of the department. *Id.* at 448. In 1894, Progressive Governor Davis Waite exercised his statutory right to fire Denver's Police and Fire Commissioners. They responded with an armed take-over of the municipal building, leading to an armed siege in which Governor Waite summoned the state militia. This was known as the "City Hall War." The Colorado Supreme Court upheld Waite's authority over the commissioners but criticized him for summoning the militia. *In re Fire & Excise Comm'rs*, 36 P. 234, 239–41 (Colo. 1894).

913. LEONARD & NOEL, *supra* note 2, at 123.

914. COLO. CONST. art II, § 13.

915. 3 HALL, *supra* note 2, at 25–26. One Chinese laundry was protected from the rioters "by a notorious gambler and desperado named 'Jim Moon,' who stood in front with a cocked revolver in

the authorities. To preserve order at the polls a few days later, Denver Sheriff Spangler summoned a posse of 500 men.<sup>916</sup>

In Custer County in 1878, a gang of claim jumpers took over a mine and terrorized the nearby town of Rosita, shooting and severely wounding a local man. The next morning, the authorities closed all the saloons and set up a cordon around the town. “A company of well-armed citizens” confronted and killed one of the gang’s leaders, captured the rest, and spared their lives, contingent on their promise to leave and never return.<sup>917</sup>

In the last two decades of the nineteenth century, Las Animas County had a serious crime problem. The county seat, Trinidad, was called “the hardest town in the west . . . .”<sup>918</sup> Even if not literally the hardest, it was hard.<sup>919</sup>

A study of Las Animas County reported a homicide rate of over twenty persons per 100,000 population in 1880–1899.<sup>920</sup> This is about four times the current U.S. homicide rate.<sup>921</sup> It is double the peak national homicide rates of the twentieth century, in 1980 and 1991.<sup>922</sup> However, the Las Animas figure includes the many homicides that were later determined to be lawful, according to grand or petit juries.<sup>923</sup> Firearms were very

each hand . . . .” *Id.* at 27. As the crowd grew nearer, “he raised his pistols and commanded a halt, saying, ‘This Chinaman does my washing, and “By the Eternal!” you shall not harm a hair of his head.’” The mob went elsewhere. *Id.*

916. *Id.* at 27–28.

917. 4 HALL, *supra* note 2, at 109.

918. See TAYLOR, *supra* note 2, at 125.

919. *Id.* (calling “hardest town” label “not quite” correct, due to the advanced level of commerce and presence of professionals in town). The town was known as a refuge for criminals from elsewhere, in part because the locals tended to accept whatever story a new arrival told. PAUL D. FRIEDMAN, VALLEY OF LOST SOULS: A HISTORY OF THE PINON CANYON REGION OF SOUTHEASTER COLORADO 96 n.31 (1988). Sheriff Juan Tafoya, one of the original settlers, was murdered while discharging his duties in 1872. 4 HALL, *supra* note 2, at 192.

920. CLARE V. MCKANNA, JR., HOMICIDE, RACE, AND JUSTICE IN THE AMERICAN WEST, 1880–1920, at 40 fig.2.9 (1997) (21.4 in 1880–84; 20.6 in 1885–89; 10 in 1890–94; 26.6 in 1895–99).

921. See Criminal Justice Info. Servs. Div., 2015 *Crime in the United States*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-1> (last visited Jan. 12, 2018). The 2015 rate was 4.9 homicides per 100,000 population. *Id.* tbl. 1.

922. See National Archive of Criminal Justice Data, *Estimated Crime in the United States-Total*, FED. BUREAU OF INVESTIGATION, <https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (select “United States-Total” and “Violent crime rates”) (last updated Jan. 26, 2017). The peak U.S. homicide rate in modern times was 10.2 in 1980. *Id.* The peak thereafter was 9.8, having occurred most recently in 1991. *Id.* Although statistics from earlier in the century are less certain, homicide rates during the alcohol prohibition came close to these levels. Douglas Lee Eckberg, *Estimates of Early Twentieth-Century U.S. Homicide Rates: An Econometric Forecasting Approach*, 32 DEMOGRAPHY 1, 1 (1995); see *Homicide Rates 1910-1944*, SCHAFFER LIBR. DRUG POL’Y, <http://www.druglibrary.org/schaffer/Library/homrate1.htm> (last visited Jan. 4, 2018).

923. See MCKANNA, *supra* note 920, at 161; see also *id.* at 30–33 (counting shootings by law enforcement); *id.* at 161 (relying on coroner’s records, which do not differentiate lawful and unlawful homicide), *id.* at 95–96 (about 70% of homicide prosecutions resulted in dismissal of charges or a not guilty verdict); *Homicide Rates 1910-1944*, *supra* note 922.

commonly carried, both openly and concealed, and law enforcement paid little attention to the state statute against concealed carry.<sup>924</sup>

Starting in the 1850s, Hispanic families from northern New Mexico had begun settling in the San Luis Valley and were joined by whites in the 1860s.<sup>925</sup> The population mix began to change following the discovery of vast coal mines in southern Colorado. Many immigrants from southern and eastern Europe came to work in the mines. Initially, they were mainly Italians, but over time, a very diverse group of nationalities moved in.<sup>926</sup> Eventually, many brought their families.<sup>927</sup> Sometimes, they lived in company towns, which were more prevalent after 1900 than before.<sup>928</sup>

In some company towns, the only recreational facility was a saloon.<sup>929</sup> The diverse ethnic groups among the miners did not always get along well with each other.<sup>930</sup> And saloons had always had fights for all sorts of reasons. Because of guns and knives, some fights became homicides.<sup>931</sup> To make things worse, the Italian miners were continuing their homeland custom of vendettas, which led to plenty of unsolved homicides.<sup>932</sup>

When the Colorado right to arms was enacted in 1876, Coloradans were well aware that criminals misused guns. The criminal problem was no justification for prohibiting arms. To the contrary, persons were guaranteed the right to defensive arms. Pursuant to the constitutional guarantee, nineteenth-century legislators, while aware of the crime problem, did not infringe on the rights of Coloradans to possess and to openly carry arms, as will be detailed in the next Section.

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924. *Id.* at 25–27, 93, 113. As of 1874, the Trinidad custom was to carry two guns. *See* TAYLOR, *supra* note 2, at 146.

925. FRIEDMAN, *supra* note 919, at 25, 40; 4 HALL, *supra* note 2, at 192. On Christmas Day 1867, a drunken wrestling match between an Anglo and a Hispanic led to several days of inter-racial violence, with order restored after several days by the Sheriff. 1 HALL, *supra* note 2, at 451. This was known as the Trinidad War. BERWANGER, *supra* note 2, at 114.

926. MCKANNA, *supra* note 920, at 113.

927. *See id.* at 83.

Colorado Fuel and Iron Company (“CF&I”) was the largest private employer and the largest private land-owner in Colorado. Jay Trask, *Introduction* to STACI COMDEN ET AL., *MINING TOWNS IN SOUTHERN COLORADO* 7, 7–8 (2013). Perhaps partly in response to the growing number of families, in 1901 CF&I created a Sociological Department, which made many constructive improvements in the company towns; however, a management change in 1908 ended many of the Department’s programs. RICK J. CLYNE, *COAL PEOPLE: LIFE IN SOUTHERN COLORADO’S COMPANY TOWNS, 1890–1930*, at 20 (1999).

928. MCKANNA, *supra* note 920, at 84–85.

929. *Id.* at 89–90.

930. *Id.* at 157.

931. *Id.* at 90. Companies did sometimes expel miners who engaged in alcohol-fueled violence. CLYNE, *supra* note 927, at 88.

932. MCKANNA, *supra* note 920, at 98–101.

## VI. ARMS LAWS AFTER RATIFICATION OF THE COLORADO CONSTITUTION

Scrupulous adherence to the 1876 constitution was not exactly the norm in late-nineteenth century Colorado. The era was characterized by

executive and legislative disrespect for constitutional mandate. There was little effort to keep state expenses within constitutional limits of state revenue. County and state debt ceilings proved meaningless. As if negligence toward tax and debt restrictions were not enough, the legislature compounded this apathy by robbing the inviolate school fund to finance its own illegally excessive appropriations.<sup>933</sup>

Even so, state legislation after 1876 was almost always compliant with the constitutional right to arms.

There were laws punishing use of a firearm or deadly weapon in a violent crime, in dueling, in helping a prisoner escape, and so on. Employing a firearm to commit violent crimes is obviously not part of the right to keep and bear arms. The other types of arms control laws were almost always respectful of article II, section 13.

### *A. Arms Carrying*

As of 1890, a state statute prohibited concealed carry everywhere when done “with intent to assault.”<sup>934</sup> Peaceable concealed carry was prohibited “within any city, or town, or village in this state, whether the same be incorporated or not . . . .”<sup>935</sup> Perhaps because of slack enforcement of the ban on concealed carry in towns, an 1891 revision ordered law enforcement officers to arrest all persons carrying concealed in towns. If a law enforcement officer failed to do so, any freeholder could bring a suit for the officer to be fined.<sup>936</sup>

In the nineteenth century, many municipalities enacted concealed carry bans, as the constitution expressly permits.<sup>937</sup> Gunnison banned

933. Hensel, *supra* note 2, at iii. In the Seventh General Assembly (1887–88), members stole enormous quantities of furniture, stationary, ink, dictionaries, and carpets. They also repudiated the warrants that had been used to purchase the supplies. 4 HALL, *supra* note 2, at 15.

934. 1 MILLS’ ANNOTATED STATUTES OF THE STATE OF COLORADO § 1365 (J. Warner Mills ed., 1891) [hereinafter 1 MILLS’ ANNOTATED STATUTES]. For prior versions, see THE GENERAL STATUTES OF THE STATE OF COLORADO § 871 (1883); REVISED STATUTES OF COLORADO § 150 (1868); GENERAL LAWS OF THE STATE OF COLORADO § 749 (1877).

935. 1 MILLS’ ANNOTATED STATUTES, *supra* note 934, § 1364.

936. LAWS PASSED AT THE EIGHTH SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF COLORADO 129 § 1 (1891).

937. *E.g.*, THE CHARTER AND ORDINANCES OF THE CITY OF DENVER, ch. VI, art. III, § 16 (Alfred C. Phelps ed., 1878) (misdemeanor to carry concealed “any pistol, bowie knife, dagger or other deadly weapon” with a fine of five to fifty dollars); THE REVISED ORDINANCES OF THE CITY OF GREELEY, no. 88, § 17 (C.D. Todd ed., 1908); THE ORDINANCES OF GEORGETOWN ch. VIII, art. IV, § 9 (Edward O. Wolcott ed., 1877).

For similar ordinances in the early twentieth century, see, for example, THE MUNICIPAL CODE OF THE CITY AND COUNTY OF DENVER ch. XXXII, art. 7, §§ 1332–33 (Charles W. Varnum & J. Frank Adams eds., 1906) (banning concealed carry or “in a threatening manner to display” and providing for return



concealed *and* open carry, as did Pueblo in 1879. This was contrary to the constitutional text. Pueblo fixed its law in 1889, prohibiting only concealed carry.<sup>938</sup>

In 1911, the statewide concealed carry statute would be revised in three ways. First, the nineteenth-century ban on concealed carry in towns was expanded to be applicable throughout the state. Second, the nineteenth-century statutes had applied to concealed carrying of “firearms” or “deadly weapons.” In 1911, this was restated to prohibit concealed carrying “any firearms, as defined by law, nor any pistol, revolver, bowie knife, dagger, sling shot, brass knuckles, or other deadly weapon.”<sup>939</sup> Third, the statute for the first time allowed people to be licensed to carry concealed. The concealed carry ban did not apply to a person who was “authorized to do so” by a police chief, mayor, or sheriff.<sup>940</sup> The licensing systems created by municipalities tended to be highly discretionary.<sup>941</sup> A century later, the general assembly’s 2003 Concealed Carry Act created a uniform and objective statewide system for concealed carry permits to be issued by County Sheriffs.<sup>942</sup> The current statewide law preempts all municipal regulation.<sup>943</sup>

### B. Loose Gunpowder Safe Storage

In the eighteenth century, gunpowder for firearms was carried loose, such as in a powder horn.<sup>944</sup> To load a muzzle-loading firearm, the user first poured in loose gunpowder from the front of the gun (the muzzle). Then he or she would use a ramrod to shove a round bullet down the muzzle.<sup>945</sup> However, beginning in the early-nineteenth century, loose gunpowder for firearms became obsolete. Paper cartridges came into use;

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of the arm if the defendant pays the fine and does not appeal; forfeited arms to be sold by the police magistrate at public auction); ORDINANCES OF THE CITY OF IDAHO SPRINGS COLORADO ch. XVI, art. II, § 275 (F.L. Collom ed., 1905) (no concealed carry; exemptions include the Mayor and Board of Alderman “when executing their legitimate duties”).

938. ORDINANCES OF THE CITY OF PUEBLO no. 523, § 6 (D.A. Highberger & John A. Martin eds., 1908). The book was published at the request of the City Council. *Id.* at 9. The front matter includes a Certificate from the City Clerk attesting that the book is a true copy of the city ordinances. The attestation is dated April 1, 1908. *Id.* The Ordinance states: “Any person who shall, within the limits of the city, carry concealed upon his or her person any pistol, bowie knife, dagger or other deadly weapon, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five nor more than fifty dollars; provided, that this section shall not be construed to apply to any sheriff, constable, marshal, policeman or other officer authorized by law or ordinance to make arrests.” *Id.* no. 523, § 6. It was enacted Aug. 19, 1889, as part of Ordinance no. 207. *Id.*

939. 1 MILLS’ ANNOTATED STATUTES OF THE STATE OF COLORADO § 1964 (J. Warner Mills ed., rev. ed. 1912).

940. *Id.*

941. *See, e.g.*, THE CODE OF COLORADO SPRINGS 1922, ch. VII, art. 1, § 596 (F. L. Sherwin et al. eds., 1922) (city manager can “grant to any and all such persons as he may think proper, license to carry concealed weapons and may revoke any and all such licenses at his pleasure”).

942. COLO. REV. STAT. § 18-12-203.

943. *See id.* § 18-12-201; State v. City & Cty. of Denver, No. 03CV3809, 2004 WL 5212983, at 13–14 (Colo. Dist. Ct. Nov. 5, 2004) (upholding completely preemptive effect of Concealed Carry Act), *aff’d by an equally divided court*, 139 P.3d 635 (Colo. 2006) (mem.).

944. WHELAN, *supra* note 179, at 4–5.

945. *Id.*

they contained the gunpowder and the bullet in a single unit.<sup>946</sup> Metallic cartridges became available in the 1850s and are still the type of cartridge in use today.<sup>947</sup> They contain the bullet, gunpowder, and primer in a single metal case.

Relatively few immigrants to Colorado in the gold rush days, or thereafter, would have needed loose gunpowder for their firearms. Presumably some collectors or poor people had old-fashioned guns that used loose powder. Businesses or hobbyists that manufactured ammunition would of course have large quantities. By far the largest quantities of loose powder would have been possessed for mining, which continued to be the most important economic activity in Colorado. Many municipalities enacted safe storage laws for loose gunpowder. Such laws limited the quantities that could be possessed in a single building, required that gunpowder be stored in sealed tins, and limited gunpowder handling at night, after candles and oil lamps had been illuminated.<sup>948</sup>

Denver was the commercial hub of the Rocky Mountain region,<sup>949</sup> so its merchants were handling large quantities of inbound and outbound powder. A Denver ordinance built on the above model<sup>950</sup> and added detailed rules for safe transport and related activities; for example, powder kegs had to be secured so they did not spill when being transported on city streets.<sup>951</sup>

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946. *Id.* at 8.

947. JOHNSON ET AL., *supra* note 2, at 402.

948. *E.g.*, THE REVISED ORDINANCES OF THE CITY OF GREELEY, *supra* note 937, no. 88, § 27; THE ORDINANCES OF GEORGETOWN, *supra* note 937, ch. V, art. III, § 11 (people may keep no more than fifty pounds of gunpowder; it must be in tin or copper containers of no more than five pounds each; no weighing of gunpowder after the night lighting of lamps, unless in sealed containers). For similar ordinances from the early twentieth century, see ORDINANCES OF THE CITY OF IDAHO SPRINGS COLORADO, *supra* note 938, ch. VIII, art. IV, §§ 105–08; THE CODE OF COLORADO SPRINGS 1922, *supra* note 941, ch. VIII, art. 9, §§ 798–807.

In September 1864, at M.L. Rood’s gun shop in Denver, a workman “accidentally discharged a gun, not knowing that it was loaded. The fire from the piece ignited the powder in three or four open kegs, and the result was an instantaneous demolition of the building and adjoining premises. Fortunately, but one man was fatally injured.” RONZIO, *supra* note 2, at 55. The accident was caused by a violation of the cardinal rule of gun safety, which is: Treat every gun as if it is loaded. Bruce Gray, *The Four Cardinal Rules of Safe Gun Handling*, GRAYGUNS (July 19, 2009), <https://grayguns.com/the-four-cardinal-rules-of-safe-gun-handling>. But there was yet no American organization dedicated to teaching gun safety; the National Rifle Association would not be formed until 1871. WHELAN, *supra* note 179, at 625.

Rood apparently went back into business, presumably with safer practices, since his store is listed in the 1866 Business Directory. RONZIO, *supra* note 2, at 251.

949. LEONARD & NOEL, *supra* note 2, at 12 (“As an inland port on the prairie ocean’s western shore, Denver emerged as a supply and service center destined to outlast most of the mining centers.”) Denver was “the warehouse and distribution center of the Rockies.” *Id.* at 93.

950. THE CHARTER AND ORDINANCES OF THE CITY OF DENVER, *supra* note 938, ch. XV, art. III, §§ 12–14 (gunpowder storage among the “Precautionary Regulations” in Fire Department laws); *see also id.* § 40(18) (City Council may “regulate the storage and transportation of gunpowder, tar, pitch, resin, and other combustible material”).

951. THE LAWS AND ORDINANCES OF THE CITY OF DENVER, COLORADO ch. 7, art. 2, §§ 5–12 (Isham White ed., 1886).

### C. Firearms Discharge

Some localities forbade firearms discharge within city limits. There were provisions to issue permits for shooting matches.<sup>952</sup> These early ordinances did not have explicit exceptions for defensive firearms use, but a ban on self-defense would obviously have been unconstitutional.<sup>953</sup> There is no known record of any prosecution for lawful defensive use under the firearms discharge ordinances.

As of 1876, gunpowder was the traditional black powder, fundamentally the same as gunpowder had been since its invention many centuries before, albeit with many improvements in manufacturing and quality.<sup>954</sup> Black powder creates a great deal of smoke, so indoor shooting ranges were impossible.

Indoor ranges became practical after 1884, when modern “smokeless” gunpowder was invented.<sup>955</sup> It was more powerful than black powder and much more stable (and hence much less likely to be ignited by accident). Smokeless powder burns cleaner than black powder. This made repeating firearms more useful because the user would not have to deal with obscuring smoke caused by a cloud of smoke from the first shot. The more complete burning of smokeless powder also left less residue, so that guns were more accurate, and did not need to be cleaned so often.<sup>956</sup> This was particularly helpful for repeating arms, whose internal parts interact more precisely than the parts for a single-shot firearm.<sup>957</sup>

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After Denver was granted home rule by constitutional amendment in 1902, the new city code reenacted these regulations. THE MUNICIPAL CODE OF THE CITY AND COUNTY OF DENVER, *supra* note 938, ch. XXI, arts. 1–3.

952. *E.g.*, THE CHARTER AND ORDINANCES OF THE CITY OF DENVER, *supra* note 938, ch. 6, art. II, § 1 (also applying to cannons and “any squib, cracker” or anything else “containing powder or other combustible or explosive material”); THE REVISED ORDINANCES OF THE CITY OF GREELEY, *supra* note 937, no. 88, § 26; THE REVISED AND GENERAL ORDINANCES OF THE CITY OF LEADVILLE ch. VII, art. II, § 1 (Daniel Sayer ed., 1881); THE ORDINANCES OF GEORGETOWN, *supra* note 937, ch. VIII, art. II, § 1 (no firearms discharges or other explosions without permission).

953. *Cf.* THE CODE OF COLORADO SPRINGS 1922, *supra* note 941, ch. VII, art. 2, § 607 (firearms discharge exception for any “necessary or lawful act, the same being done in a proper and careful manner”).

954. JOHNSON ET AL., *supra* note 2, at 409.

955. *See* TENNEY L. DAVIS, THE CHEMISTRY OF POWDER AND EXPLOSIVES 292 (1943). Blackpowder is a mixture of sulfur, charcoal, and saltpeter. JOHNSON ET AL., *supra* note 2, at 409. Smokeless powder is made from insoluble nitrocellulose, soluble nitrocellulose, and paraffin. DAVIS, *supra*, at 292.

956. For blackpowder, about 35% of the gunpowder is converted into gas (which pushes the bullet down the barrel out the muzzle), and 65% remains as residue. In smokeless powder, 70% becomes gas, and only 30% solid residue (*fouling*). Because smokeless powder is over twice as efficient, the quantity of powder needed is cut in half. Reducing the quantity of gunpowder further reduces the amount of residue, so smokeless powder left only about one-quarter as much residue as did blackpowder. *See* GREENER, *supra* note 160, at 560.

957. *See* BROWN, *supra* note 160, at 11. In a repeating firearm, if the first and second shots leave less residue in the barrel, then the third shot does not have to push past so much residue. There is less interference with the spin and the perfect forward motion of the bullet, so the bullet will exit the muzzle more precisely on its path to the target. *Id.* Additionally, powder fouling creates corrosive salts, which promote rust. So the advent of smokeless powders significantly improved firearms durability. *Id.*

The transition from black powder to smokeless powder took several decades. The first commercial smokeless powder for rifle ammunition was not introduced until 1894.<sup>958</sup> Most people who wanted to start using ammunition with smokeless powder had to buy new guns; smokeless powder creates a stronger explosion than black powder, and hence greater pressure inside the gun's firing chamber. Newer guns, taking advantage of advances in metallurgy, had the strength to handle smokeless powder.<sup>959</sup>

Smokeless powder made possible the creation of indoor shooting galleries, which proliferated in the following decades. It also made shooting more pleasant (much less smoke, and lower recoil because less powder was needed). It thus helped the growth of recreational shooting. Consequently, municipal firearms discharge laws adapted to authorize firearms discharge in shooting galleries and to provide for operation of galleries under the standard licensing system for public places of amusement.<sup>960</sup>

#### *D. Indians*

In addition to the revision of the state concealed carry statute, the other notable nineteenth-century gun control statute was also enacted in 1891. The legislature prohibited giving or selling arms to Indians.<sup>961</sup>

Although Indian military activity was much-reduced compared to the 1860s, Colorado still had a problem with off-reservation Utes.<sup>962</sup> In New Mexico and Arizona, the great Apache warrior Geronimo did not surrender until 1886.<sup>963</sup> Meanwhile, the Ghost Dance movement was growing rapidly. The Ghost Dance aimed to create an Indian alliance of resistance and spiritual revival.<sup>964</sup> "The rapid spread of the pan-Indian Ghost Dance caused hysteria among white people and the federal government."<sup>965</sup> One result was Wounded Knee Massacre, in South Dakota, on December 29, 1890, in which U.S. Army forces attempted to disarm the Sioux, and then

958. WHELAN, *supra* note 179, at 302.

959. See ROSE, *supra* note 696, at 219 (describing the 1873 invention of decarbonized Bessemer steel, which was much stronger than previous forms of steel).

960. *E.g.*, THE MUNICIPAL CODE OF THE CITY AND COUNTY OF DENVER, *supra* note 938, ch. XXXII, art. 3, § 1277 (firearms and air gun discharge allowed "in shooting galleries or in any private grounds or residence where the projectile fired or discharged from any such gun or device will not traverse any space used in a public way"); *id.* ch. XXXII, art. 4, § 1295 (licensing for shooting matches); *id.* ch. XLVI, §§ 1612–15 (licensing for shooting galleries; pre-license safety inspection of the gallery; no commercial galleries on blocks that are at least two-thirds exclusively residential, without consent of the majority of owners on the block); THE CODE OF COLORADO SPRINGS 1922, *supra* note 941, ch. V, art. 7, §§ 247–50 (licensing for billiard halls, bowling alleys, and shooting galleries).

961. LAWS PASSED AT THE EIGHTH SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF COLORADO, *supra* note 937, at 132 § 1.

962. See *supra* Section II.D.2.

963. EDWIN R. SWEENEY, FROM COCHISE TO GERONIMO: THE CHIRICAHUA APACHES, 1874–1886, at 573 (2010).

964. DAVID HUMPHREYS MILLER, GHOST DANCE vii (1959).

965. SIMMONS, *supra* note 2, at 209.

killed about 200 of them.<sup>966</sup> Perhaps this explains the enactment of the 1891 Colorado statute a few months later.

It is true that as of 1891, most Indians were not citizens.<sup>967</sup> But this was not relevant to the Colorado right to arms, which was for the “person,” not only the “citizen.”<sup>968</sup> The 1891 law did not outlaw arms *possession* by Indians, only the transfer of arms to Indians. An Indian could lawfully travel to another state or territory, buy a firearm there, and bring it home to Colorado.<sup>969</sup>

The 1876 Colorado Constitution had been free of racial prejudice. Instead, it had insisted that in the public schools, “nor shall any distinction or classification of pupils be made on account of race or color.”<sup>970</sup> This

966. See JAMES MOONEY, *THE GHOST-DANCE RELIGION AND WOUNDED KNEE* 869–71 (1973). The Ghost Dance touched Colorado, encompassing the state’s only reservations, namely the Ute reservations in the southwest. See *id.* at 653–54 (map). The movement was popular in the Cheyenne and Arapaho reservations in Indian Territory (the future state of Oklahoma). *Id.* at 774–78. The Ghost Dance movement was pan-Indian and messianic, hoping that the whites would vanish, the buffalo would return, and the Indians could resume their old way of life. While this miraculous expectation was peaceful, the Sioux interpretation was more militant, and believed that the ghost shirt rendered the wearer invulnerable to bullets. See *id.* at 791, 831.

967. See *Elk v. Wilkins*, 112 U.S. 94 (1884) (demonstrating that throughout the nineteenth century, Indians born on reservations were considered citizens of their respective tribal nations, not citizens of the United States, even if they had left the reservation). The 1887 General Allotment Act (Dawes Act) allocated Indian lands in severalty, in lots of 40, 80, or 160 acres. Indians who owned landed were granted citizenship, but not voting rights. SIMMONS, *supra* note 2, at 207. This was applied to Colorado’s Southern Ute reservation by the 1895 Hunter Act. ch. 113, 28 Stat. 677; SIMMONS, *supra* note 2, at 217–18.

Finally, all Indians were granted citizenship by the Indian Citizenship Act of 1924. See Snyder Act, ch. 233, 43 Stat. 253 (1924) (“all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.”). Nevertheless, several states, including Colorado, denied voting rights to some adult Indians. Before a state constitutional amendment in 1970, persons residing on federal land (including military bases, and Indian reservations) were not considered Colorado residents for voting purposes. Colo. Const., art. 7, § 1a (barring the denial of the right to vote “because of residence on land situated within this state that is under the jurisdiction of the United States”); *Cuthair v. Montezuma-Cortez*, Colo. Sch. Dist. No. RE-1, 7 F. Supp. 2d 1152, 1161–62 (D. Colo. 1998) (describing the effect of 1970 amendment on reservation Indians).

968. See *supra* Section IV.A.

969. Federal law did not restrict interstate arms sales until the Gun Control Act of 1968. 18 U.S.C. § 922 (a)(1). The Colorado legislature immediately enacted the requisite legislation, pursuant to the terms of the 1968 federal law, to allow long gun sales from contiguous states. COLO. REV. STAT. §§ 12-27-101 to -104 (repealed 2014) (“It is declared by the general assembly that it is lawful for a resident of this state, otherwise qualified, to purchase or receive delivery of a rifle or shotgun in a state contiguous to this state, subject to [certain] restrictions and requirements . . .”). In 1986, Congress revised the Gun Control Act to re-legalize all interstate long gun sales, so long as the sale was a face-to-face transaction from a licensed dealer in the state where the buyer did not reside, and complied with the laws of both states. Pub. L. No. 99-308, 100 Stat. 449. Colorado later updated its authorization of contiguous state sales to allow long gun sales from all states. Act of May 2, 2014, ch. 147, 2014 Colo. Sess. Laws 498 (repealing aforesaid statute that long guns may only be bought from contiguous states).

970. COLO. CONST. art. IX, § 8. The 1876 constitution, and not the 1891 statute, better reflected Colorado’s character. In the early statehood days:

Utes, Spanish-Americans, Sante Fe traders, border-state Southerners, Welsh miners, and Union veterans now all lived under a constitution borrowed from Pennsylvania and Illinois. . . . Meanwhile, Texans like Charles Goodnight and German-Americans like Colonel Pfeiffer ranched on Mexican land grants in the southern counties, while whole colonies of

included people whose families or ancestors had once lived in Europe, Africa, Latin America, or Asia (the small Chinese population that had begun settling in Colorado), and of course Indians.

Unfortunately, the national problem of racial prejudice had grown much worse by the 1890s than it had been in the 1870s.<sup>971</sup> The 1891 Indian statute is a confirmation of the Convention's mistrust of legislatures, and is consistent with the legislature's proclivity, during this period, for flagrantly ignoring constitutional commands.<sup>972</sup> By 1891, the legislature was a greater threat to law and order than were the Indians. The legislature's behavior was one reason why the 1892 elections turned the state government upside down, giving Colorado a Populist Governor, forty Populist state legislators, and Populist control of the Colorado Senate.<sup>973</sup> For the remainder of the century, the legislature resumed its custom of not enacting gun laws that touched the constitutional right.<sup>974</sup>

#### *E. Posse Comitatus and Militia*

The only other arms control statutes in nineteenth-century Colorado required persons to carry out their duties to aid of the civil power. Posse comitatus service was a common law duty, but the common law had no specific punishment for refusing a summons. Reenacting legislation from territorial days, the state legislature made refusal to serve in the posse comitatus to aid a sheriff or other law enforcement official a criminal

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settlers from New York, Chicago, and St. Louis settled at Longmont and Greeley. Colorado was indeed a frontier melting pot.

LAMAR, *supra* note 2, at 255.

971. See PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 2–3 (2009) (describing the spread of laws against inter-racial marriage); DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 36–37, 40 (2001) (describing the spread of occupational licensing and other laws designed to suppress blacks' economic liberty and prevent free commerce between blacks and whites, such as inter-racial hair cutting).

972. See *supra* note 867.

973. Davis B. Waite was Colorado's first and only Governor who was not a Republican or Democrat. Tom Noel, *Gubernatorial Race Takes Place in History*, DENV. POST (August 26, 2010) (updated May 5, 2016), <http://www.denverpost.com/2010/08/26/gubernatorial-race-takes-place-in-history>. The 1893 State House had 27 Populists, 5 Democrats, and 33 Republicans. The Senate (elected for four-year terms on an alternating biennial cycle) had 13 Populists, 7 Democrats and 15 Republicans. Populist David Nichol was President of the Senate. Jerry Kopel, *Carry Holly*, JERRYKOPEL.COM (Aug. 8, 2008) (originally published in *The Colorado Statesman*), <http://www.jerrykopel.com/2008/Carry-Holly.htm>.

974. Shamefully, the Indian sales ban lingered in the statute books until repealed in 1971 as part of a comprehensive recodification of the Criminal Code. See Act of June 2, 1971, ch. 121, 1971 Colo. Sess. Laws 388, § 1 (repealing all of title 40, the Colorado Criminal Code); COLO. REV. STAT. § 40-11-3 (1953); COMPILED LAWS OF COLORADO 1921, *supra* note 846, § 6889, at 1776; COLO. REV. STAT. § 1832 (1908). It may not have been much enforced, if at all, but it did serve as an official endorsement of racial discrimination.

offense.<sup>975</sup> Some local laws also provided for the posse comitatus.<sup>976</sup> Separately, other statutes further organized the militia.<sup>977</sup> As of 1900, the above were the only statewide gun control laws in Colorado.<sup>978</sup>

#### CONCLUSION

Colorado has long had a thriving arms culture. It started with Indians and continued when settlement from the United States began in 1858. Coloradans had no tradition of pacifism; no people could have survived in Colorado if they did.

Before and after 1876, firearms were being invented and improved at an astonishing rate—the greatest period for development in firearms technology in all of history. Guns were more accurate, more powerful, longer range, faster to reload, and had much greater ammunition capacity. Coloradans enjoyed the benefits of all these improvements, partly thanks to the well-stocked firearms stores just down the street from where the Colorado Convention met.

The Colorado Constitution strongly affirms the natural right of self-defense and the right to the people to alter the government. In the Colorado system of government, the rights of the people are prior to the powers of government. Unlike some other states, Colorado chose to put the right to arms in its supreme law. The Convention chose the strongest, broadest, and clearest language available at the time. The right was extended to every “person,” not just the “citizen.” The right’s dual purposes are personal defense and community defense. The latter is to be done under the direction of appropriate civil authorities, such as sheriffs or militia officers.

Partly because the right was expressed so strongly, it was necessary to express what type of gun control was permissible. While open carry is a constitutional right in Colorado, concealed carry is outside the right to keep and bear arms. In the statehood period during the nineteenth century, the general assembly complied with the constitution by enacting no gun

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975. 1 MILLS’ ANNOTATED STATUTES, *supra* note 934, § 1366. Prior versions were REVISED STATUTES OF COLORADO, *supra* note 934, § 161; GENERAL LAWS OF THE STATE OF COLORADO, *supra* note 934, § 155; THE GENERAL STATUTES OF THE STATE OF COLORADO, *supra* note 934, § 872. The statute was unchanged as of 1908. REVISED STATUTES OF COLORADO 1908, § 1836 (1908) (current version at COLO. REV. STAT. § 18-8-107 (declaring it “a class 1 petty offense” for any person eighteen years or older to “unreasonably refuse[] or fail[] to aid [a] peace officer in effecting or securing an arrest or preventing the commission by another of any offense” when so commanded)).

976. *E.g.*, THE CHARTER AND ORDINANCES OF THE CITY OF DENVER, *supra* note 937, § 10 (Denver Mayor “is hereby authorized to call upon every male inhabitant of said city, over the age of eighteen years to aid in enforcing the laws and ordinances, and in preventing and extinguishing fires, for securing the peace and safety of the city, or carrying into effect any law or ordinance.”); THE MUNICIPAL CODE OF THE CITY AND COUNTY OF DENVER, *supra* note 937, § 27 (allowing fine of up to \$300 for refusal to serve).

977. As in other states, a small portion of the militia was organized into the state’s National Guard and given training and arms.

978. *See* REVISED STATUTES OF COLORADO 1908, *supra* note 975, ch. XXXV (official compilation by the Secretary of State). No new gun controls were enacted by the General Assembly in 1901–08.

control laws other than restrictions on concealed carry. The one exception was the 1891 ban on arms sales to Indians, which seemed to treat Indians as if they had no constitutional rights. Except for that law, the firearms laws of nineteenth-century Colorado appear to have complied with the letter and the spirit of the Colorado Constitution.