The History and Tradition of Regulating Guns in Parks

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Abstract

Since the mid-nineteenth century, governments have banned guns in parks. In the wake of the Supreme Court's decision in New York State Rifle and Pistol Ass'n v. Bruen, *several courts have struck down laws that prohibit guns in parks today as unconstitutional under the Court's new Second Amendment framework. That framework—a standard focused on consistency with the Second Amendment's text and the nation's history of weapon regulation—has led these courts to conclude that modern restrictions on guns in parks violate the Second Amendment right to public carry as articulated in* Bruen.

The release of the Bruen *decision precipitated a surge in cases challenging modern bans on guns in parks. Several states responded to the decision by introducing new place-based restrictions on firearms in an effort to implement the Court's interpretation of the Second Amendment as affording a broad right to carry guns in public while also allowing for prohibitions on guns in sensitive places. These states passed prohibitions on carrying guns in parks, playgrounds, and other areas of outdoor recreation—locations in which guns had previously been regulated by broader restrictions on general public carry. Even though states, localities, and the federal government have long regulated guns in parks and similar spaces, the new state enactments in the aftermath of* Bruen *quickly attracted legal challenges.*

This Article chronicles the history of the American parks movement and historical regulations on guns in parks, dating back to the earliest emergence of modern public parks and continuing through the widespread development of other parks during the decades that followed. This unbroken record of regulation, which was historically unchallenged in court and generally unopposed on grounds of public policy, provides a more than sufficient historical basis to uphold similar laws today under Bruen's *new constitutional framework for Second Amendment challenges.*

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Introduction

> *"The public seemed not only to submit to the enforcement of the necessary regulations, but to welcome the means used for that purpose, and pride was taken in the belief that the park was to present an exceptionally credible exhibition of orderliness and decorum . . . . Even men of reckless disposition and unaccustomed to polite restrictions upon selfishness were under influences when in the park which dissuaded them from a misuse of its privileges."–Frederick Law Olmsted* [4]

Nearly 165 years ago, Central Park opened its gates to the public, and the rules that governed its very first visitors prohibited them from carrying firearms within it.[5] This marked the beginning of a longstanding tradition of prohibiting carrying guns in parks. As modern parks emerged as communal spaces for repose and relaxation in the nineteenth century, a wealth of laws, ordinances, and rules also emerged to prohibit guns in these new spaces. These restrictions were uncontroversial and appear to have been enacted as a matter of course without constitutional concern or challenge in court. Today, however, laws prohibiting the carrying of guns in parks are facing an unprecedented number of constitutional challenges as a consequence of the Supreme Court's recent ruling that the Second Amendment protects a right to carry a gun in public.

In *New York State Rifle and Pistol Ass'n v. Bruen*, the Supreme Court held that the Second Amendment protects a right to carry a gun in public for purposes of self-defense.[6] The *Bruen* majority struck down a requirement in New York's concealed-carry licensing law that prohibited carrying a handgun in public unless applicants could show a need for armed self-protection that was unique from the need of the public in general.[7] In doing so, the Court created a new standard for deciding Second Amendment cases that focused primarily on whether a law is consistent with the Second Amendment's text and the nation's history of weapon regulation.[8] As it did in *District of Columbia v. Heller*,[9] the *Bruen* Court also remarked on categories of laws

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[4] 6 The Papers of Frederick Law Olmsted: The Years of Olmsted, Vaux, & Company 1865–1874, at 574 (David Schuyler & Jane Turner Censer, eds., 1992).

[5] *See Minutes of Proceedings of the Board of Commissioners of the Central Park for the Year Ending April 30, 1858*, at 166 (1858) [https://perma.cc/CV69-3WLZ] ("Be it ordained by the Commissioners of the Central Park: All persons are forbidden . . . [t]o carry fire-arms . . . within it.").

[6] 597 U.S. 1 (2022).

[7] *Id.* at 11.

[8] *Id.* at 24.

[9] District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing

that are constitutional, including those that prohibit the carrying of guns in some so-called "sensitive places."[10]

Several states responded to the *Bruen* decision by enacting new laws restricting the carrying of firearms in sensitive locations, including parks, playgrounds, and other similar areas of outdoor recreation.[11] Although many states—as well as the federal government—have long regulated guns in parks, the new laws passed after *Bruen* quickly attracted legal challenges, as gun rights groups have sought to narrow the window for acceptable "sensitive places" restrictions and expand the scope of the right to public carry.[12] Courts addressing these latest challenges must now attempt to ascertain the constitutional limits of this right in order to determine just where guns can be prohibited without violating a newly established constitutional guarantee.

Bruen has been widely criticized—by both Democrat- and Republican-appointed judges[13]—for creating a test that is difficult or impossible for Courts to apply.[14] Courts are left to make decisions about history using analogies

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in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.").

[10] *Bruen*, 597 U.S. at 30 ("Consider, for example, *Heller*'s discussion of 'longstanding' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.' Although the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited—e.g., legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions. We therefore can assume it settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible.") (citations omitted).

[11] *See, e.g.*, *Press Release: Governor Hochul Announces New Concealed Carry Laws Passed in Response to Reckless Supreme Court Decision Take Effect September 1, 2022*, New York State, (Aug. 31, 2022), https://www.governor.ny.gov/news/governor-hochul-announces-new-concealed-carry-laws-passed-response-reckless-supreme-court [https://perma.cc/7RLA-LDPZ] (discussing N.Y. Penal Law § 265.01-e(2)(d)); *Press Release: Governor Murphy Signs Gun Safety Bill Strengthening Concealed Carry Laws in New Jersey in Response to* Bruen *Decision*, State of New Jersey, (Dec. 22, 2022), https://www.nj.gov/governor/news/news/562022/20221222a.shtml [https://perma.cc/ZE2M-LTWA] (discussing N.J. Stat. Ann. 2C:58-4.6(a)(10); Brian Witte, *Gun Control Among New Laws Taking Effect in Maryland*, Associated Press (Sept. 23, 2023).

[12] *See, e.g.*, Antonyuk v. Hochul, 639 F. Supp. 3d 232 (N.D.N.Y. 2022); Koons v. Platkin, 673 F. Supp. 3d 515 (D.N.J. May 16, 2023).

[13] *See, e.g.*, United States v. Perez-Gallan, 640 F. Supp. 3d 697, 713–14 (W.D. Tex. 2022), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023) ("[O]ne could easily imagine a scenario where separate courts can come to different conclusions on a law's constitutionality, but both courts would be right under *Bruen*."); United States v. Kelly, No. 3:22-CR-00037, 2022 WL 17336578, at *4 n.6 (M.D. Tenn. Nov. 16, 2022) ("Attempting to reconstruct past constitutional understandings through a litigation-driven process of keyword searches seems to rely on the assumption that the past was little more than a differently-dressed version of the present, ripe for easy one-to-one comparisons without regard for deep changes in political structure, unspoken institutional arrangements, or language. As far as the court can tell, that is not what actual historians, as opposed to litigants and litigators, believe.").

[14] Scott Burris, *One Year On,* Bruen *Really is as Bad as it Reads*, The Regulatory Review (Aug. 2, 2023), https://www.theregreview.org/2023/08/02/burris-one-year-on-bruen-really-is-as-bad-as-it-reads/ [https://perma.cc/W5ZF-MUHH] ("The Court's historical analysis in *Bruen* reflects a deep professional legal insularity. This was not history based on broad and deep research on how people lived and thought in the past. Rather, the Court made arbitrary inferences about the meaning of legal events drawn from cases, statutes, and law review articles. This was historicism, not history."); Clara Fong, Kelly Percival, & Thomas Wolf, *Judges Find Supreme Court's* Bruen *Test Unworkable*, Brennan Center for Justice (June 26, 2023), https://www.

based on incomplete and insufficient historical records and under-researched bodies of historical data. The question of guns in parks, however, should not be a hard one.[15]

Under the *Bruen* standard, prohibitions on carrying firearms in parks are clearly constitutional. Indeed, bans on guns in parks are as old as parks themselves. These prohibitions appeared in most major cities and many smaller cities and towns in the nineteenth century as parks were first created, and they continued to be widely adopted in the early twentieth century. These laws were not challenged in court, and there was little objection to them on policy grounds. As we demonstrate here, this unbroken history of regulation provides a more than sufficient historical basis to uphold similar laws today under *Bruen*'s new constitutional framework for Second Amendment challenges.

Part I of this Article discusses the *Bruen* standard, the Court's recent clarification of that standard in *United States v. Rahimi*,[16] and post-*Bruen* challenges to prohibitions on guns in parks. Part II summarizes the history of parks in the United States, from the movement to create urban parks in the mid-to-late nineteenth century to the development of wilderness parks in the following decades. Part III discusses the history of laws regulating guns in parks, beginning with their inception in the mid-nineteenth century. Part IV brings the pieces together, applying the *Bruen* analysis in the context of the history of prohibiting guns in parks.

I. The *Bruen* Standard and Sensitive Places

In *Bruen*, the Supreme Court upended the Second Amendment framework that had been adopted nearly unanimously by the lower federal courts over the fourteen years since *District of Columbia v. Heller* was decided.[17]

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brennancenter.org/our-work/research-reports/judges-find-supreme-courts-bruen-test-unworkable [https://perma.cc/FJV7-P2ZP].

[15] The Supreme Court recently revisited *Bruen*'s history and tradition framework in *United States v. Rahimi*, the first Second Amendment challenge to reach the high court since *Bruen*. *See* 144 S. Ct. 1889 (2024). *Rahimi* involved a challenge to 18 U.S.C. § 922(g)(8), a federal law that prohibits persons subject to qualifying protective orders from possessing firearms. *Id.*; *see* 18 U.S.C. § 922(g)(8) (criminalizing firearm possession while subject to a restraining order that satisfies certain criteria prescribed in statute). In applying *Bruen*, the Court in *Rahimi* upheld the constitutionality of the federal law notwithstanding the absence of a historical record of restrictions that disarmed domestic abusers in our nation's early history. *Id.* at 1897. In reaching its holding, the Court clarified that an appropriate analysis under *Bruen* "involves considering whether the challenged regulation is consistent with *the principles* that underpin our regulatory tradition." *Id.* at 1898 (emphasis added). And the Court expressly advised that modern regulations "need not be" identical to historical predecessors adopted in earlier periods of our nation's history—an analytical approach *Bruen* itself had already cautioned against. *Id.*; *see* Bruen, 597 U.S. at 30 (requiring governments to "identify a well-established and representative historical *analogue*, not a historical *twin*."). However, unlike the absence of precise historical precursors to the law at issue in *Rahimi*, there is an extensive record of historical regulations that banned guns in parks—restrictions nearly identical to the modern laws being challenged in cases today. Hence, while the Court in *Rahimi* refined the framework it had previously adopted in *Bruen*, the record of "historical twins" to today's modern bans on guns in parks makes clear that prohibiting guns in parks is constitutional under even a rigid application of *Bruen*'s historical methodology.

[16] *See* 144 S. Ct. 1889 (2024).

[17] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 26 (2022).

In the two-part framework that applied before *Bruen*, courts first looked to whether a challenged regulation fell within the scope of the Second Amendment as defined by the right's text, history, and tradition.[18] If a regulation did fall within the historical scope of the Second Amendment, a court would then apply either intermediate or strict scrutiny, depending on how substantially the regulation burdened the right.[19] Under this former framework, lower courts upheld a wide variety of gun regulations, and struck down only a few outlier laws.[20]

Despite this framework's near-universal acceptance—and its conformity with the basic structure used for analyzing other constitutional rights—the Supreme Court in *Bruen* adopted a new test for Second Amendment challenges.[21] This new test focuses on discerning the "original meaning" of the Second Amendment's text and examining the history and tradition of firearms regulation in the United States.[22] At step one, courts must first consider whether "the Second Amendment's plain text covers an individual's conduct,"[23] a threshold step that generally tracks with Justice Scalia's textual analysis of the Second Amendment in *Heller*,[24] in which the Court summarized the Second Amendment's text as protecting an "individual right to possess and carry weapons in case of confrontation."[25]

If a challenged regulation does fall within the plain text of the Second Amendment, courts must then consider, at step two of *Bruen*'s test, whether the regulation is "consistent with the Nation's historical tradition of firearm regulation."[26] At this second step, the burden of putting forth the historical record for the court's consideration falls on the government, and courts conducting this history-focused analysis must examine our nation's early gun regulations and other historical materials in order to determine the scope of constitutionally acceptable firearms regulation that legislatures may enact today.[27]

At this second stage, courts are tasked with analyzing whether a particular historical regulation is "relevantly similar" to the modern gun law being challenged.[28] For comparing historical laws and modern laws at this stage, *Bruen* identified two key metrics: "how" and "why" "the regulations burden

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[18] For an excellent explanation of the two-step framework and how this framework is consistent with the standards used for evaluating other constitutional rights, see Brief of Second Amendment Law Professors as Amicus Curiae in Support of Neither Party, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022), (No. 18-280).

[19] *See* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); *see also* Nat'l Rifle Ass'n of Am., Inc. v. ATF, 700 F.3d 185, 195 (5th Cir. 2012).

[20] *See generally Post*-Heller *Litigation Summary*, Giffords Law Center, https://giffords.org/lawcenter/gun-laws/litigation/post-heller-litigation-summary/ [https://perma.cc/7WT6-W77R] (last visited July 20, 2022).

[21] *Bruen*, 597 U.S. at 11.

[22] *Id.* at 18.

[23] *Id.* at 17.

[24] District of Columbia v. Heller, 554 U.S. 570 (2008).

[25] *Id.* at 576.

[26] *Bruen*, 597 U.S. at 24.

[27] In *Bruen*, the Court looked at history spanning more than two hundred years in the seventeenth, eighteenth, and nineteenth centuries. *See id.* at 34–70.

[28] *Id.* at 29.

a law-abiding citizen's right to armed self-defense."[29] Under this test, *Bruen* instructs courts to consider "whether modern and historical regulations impose [a] comparable burden on the right of armed self-defense and whether that burden is comparably justified."[30] The Court advised that a modern regulation need not be "a dead ringer for historical precursors," but also warned against courts upholding "every modern law that remotely resembles a historical analogue."[31]

The Court in *Bruen*, as it did in *Heller*, opined on locations where it "assume[s] it settled" that firearms may be prohibited consistent with the Second Amendment.[32] *Bruen* expanded *Heller*'s list of such "sensitive places"[33] to include legislative assemblies, polling places, and courthouses, and further advised that, without independently showing a historical tradition of similar regulations, courts may analogize to those historically regulated sensitive places to uphold prohibitions in "*new* and analogous" sensitive places.[34]

Two years after *Bruen*, the Court revisited and clarified *Bruen*'s framework in *United States v. Rahimi*,[35] a case challenging the federal law that bars firearm possession by persons subject to certain domestic violence restraining orders.[36] The Fifth Circuit had struck down the law under *Bruen* on the basis that similar restrictions did not exist during the eighteenth or nineteenth centuries.[37] In an 8–1 decision, the Supreme Court reversed the Fifth Circuit and upheld the law.[38] The Court chided the Fifth Circuit and other courts for having "misunderstood the methodology" the Court had adopted in its recent Second Amendment cases.[39] The Court clarified that "the Second Amendment permits more than just those regulations identical to the ones that could be found in 1791,"[40] and that courts applying *Bruen* must analyze the historical tradition of regulation at a higher level of generality.[41] This broader assessment of history, the Court explained, requires lower courts to "consider[] whether the challenged regulation is consistent with the principles that underpin our regulatory tradition,"[42] and "faithfully" assess "the balance struck by the founding generation to modern circumstances."[43] The Court advised that "if laws at the founding regulated firearm use to address particular problems, that will

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[29] *Id.*
[30] *Id.*
[31] *Id.* at 30.
[32] *Id.*
[33] *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).
[34] *Bruen*, 597 U.S. at 30.
[35] 144 S. Ct. 1889 (2024).
[36] *See* 18 U.S.C. § 922(g)(8).
[37] United States v. Rahimi, 61 F.4th 443, 456–61 (5th Cir.), *cert. granted*, 143 S. Ct. 2688, 216 L. Ed. 2d 1255 (2023), *and rev'd and remanded*, 144 S. Ct. 1889 (2024).
[38] *Rahimi*, 144 S. Ct. at 1894. Justice Clarence Thomas, the author of *Bruen*, was the lone dissenting Justice in the Court's ruling in *Rahimi*. *See id.* at 1930 (Thomas, J., dissenting).
[39] *Id.* at 1897 (majority opinion) (discussing District of Columbia v. Heller, 554 U.S. 570, 582 (2008); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 26–31 (2022)).
[40] *Id.* (cautioning that "[h]olding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers").
[41] *Id.* (reaffirming that "[w]hy and how the regulation burdens the right are central to the inquiry" (citing *Bruen*, 597 U.S. at 29)).
[42] *Id.* at 1898 (citing *Bruen*, 597 U.S. at 26–31).
[43] *Id.* (quoting *Bruen*, 597 U.S. at 29 & n.7).

be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category or regulations."[44] That said, even "when a challenged regulation does not precisely match its historical precursors" it can still be constitutional as long as it "comport[s] with the principles underlying the Second Amendment."[45]

In the aftermath of *Bruen*, but prior to the Court's decision in *Rahimi*, several Second Amendment challenges were brought against laws restricting the carrying of guns in sensitive locations, like parks.[46] Most of the challenges arose in states that passed laws prohibiting guns in parks in the months following the *Bruen* decision.[47] Courts addressing these Second Amendment challenges have not been consistent in their application of *Bruen* and have reached disparate results when ruling on the constitutionality of location-based restrictions.

Five federal district courts applying *Bruen*'s new test have held that restrictions on carrying guns in parks violate the Second Amendment.[48] These courts have issued rulings preliminarily enjoining the enforcement of the respective firearms restrictions on the basis that the restrictions lack sufficient historical analogues. In *Antonyuk v. Hochul*, the first prominent guns-in-parks case litigated after *Bruen*, plaintiffs filed a lawsuit challenging the constitutionality of various provisions in New York's post-*Bruen* Concealed Carry Improvement Act.[49] The district court partially granted plaintiffs' motion for a preliminary injunction and blocked numerous provisions of the law from taking effect, including the restriction on carrying guns in public parks.[50]

In evaluating the historical record that New York cited in support of the constitutionality of its restriction on guns in parks, the court discounted the significance of historical laws—even some historical "twin[s]"—in part by characterizing them as insufficiently "representative" of the nation because the laws either came from territorial jurisdictions or covered only a small percentage of the nation's population at the time of enactment.[51] The court also discounted municipal laws that prohibited guns in parks "to the extent they are not accompanied by laws from states," reasoning that those local restrictions "at most . . . support a historical tradition of banning firearms in public

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[44] *Id.*

[45] *Id.* (citing *Bruen*, 597 U.S. at 30).

[46] *See, e.g.*, Antonyuk v. Hochul, 639 F. Supp. 3d 232 (N.D.N.Y. 2022) (challenging prohibitions on firearms possession in places of worship, nursery schools and pre-schools, zoos, playgrounds, bars and restaurants that serve alcohol, theaters, conference centers, banquet halls, protests, and parks); Koons v. Platkin, 673 F. Supp. 3d 515 (D.N.J. 2023).

[47] *See, e.g.*, *Press Release: Governor Hochul Announces New Concealed Carry Laws Passed in Response to Reckless Supreme Court Decision Take Effect*, *supra* note 11; *Antonyuk*, 639 F. Supp. 3d at 250; *Press Release: Governor Murphy Signs Gun Safety Bill Strengthening Concealed Carry Laws in New Jersey in Response to* Bruen, *supra* note 11; *Koons*, 673 F. Supp. 3d at 542.

[48] *See Antonyuk*, 639 F. Supp. 3d at 324–26; *Koons*, 673 F. Supp. 3d at 639–42; Wolford v. Lopez, 2023 WL 5043805, at *21–22 (D. Haw. Aug. 8, 2023); Springer v. Grisham, 2023 WL 8436312, at *5–8 (D.N.M. Dec. 5, 2023); May v. Bonta, 2023 WL 8946212, at *12–13 (C.D. Cal. Dec. 20, 2023).

[49] 639 F. Supp. 3d at 324–26.

[50] *Id.* at 327.

[51] *Id.* at 323–24.

parks *in* a city . . . not public parks *outside* of a city."[52] The court took issue with the absence in the historical record before it of prohibitions on guns in colonial-era greens and commons[53]—spaces that predated the emergence of parks in the mid-nineteenth century—and further minimized the significance of laws enacted in the later part of the nineteenth century "because of their diminished ability to shed light on the public understanding of the Second Amendment in 1791 and/or of the Fourteenth Amendment in 1868."[54] Put simply, the court rejected the historical analogues proffered by New York as being too late in time, too few in number, or too localized in domain to amount to an American tradition that would support the constitutionality of modern regulations prohibiting guns in parks.

Two other federal district courts followed this line of reasoning in Second Amendment challenges brought in New Jersey and Hawai'i. In *Koons v. Platkin*, a case challenging a sensitive places and licensing law that New Jersey passed in the wake of *Bruen*, the court said that the part of the law prohibiting guns in parks was unconstitutional, even though the state had presented over sixty historical laws dating back to 1858 doing precisely that.[55] As in *Antonyuk*, the court in *Koons* placed heavy emphasis on population thresholds, the absence of similar restrictions in colonial greens and commons, and the proposition that laws enacted in the later part of the nineteenth century should not be afforded much weight in the historical analysis.[56] Of the few nineteenth-century laws the court did discuss, it discounted the restrictions as irrelevant because the purpose of the historical laws, the court asserted, were to protect the animals who lived in the parks rather than the people that visited them.[57] Likewise, in *Wolford v. Lopez*, a court reviewed a similar historical record of parks restrictions in a case challenging Hawai'i's ban on guns in parks.[58] In enjoining Hawai'i's law, the court went so far as to treat 1868 as a complete cut-off for consideration—refusing even to consider historical restrictions on guns in parks enacted shortly after 1868.[59]

Following those decisions, a three-judge panel of the United States Court of Appeals for the Second Circuit reversed the *Antonyuk* court's injunction regarding New York's ban on carrying guns in parks.[60] The panel upheld the constitutionality of the law under *Bruen* and concluded the "proffered analogues, which set forth a well-established and representative tradition of firearm regulation in often-crowded public squares such as urban parks, are

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[52] *Id.* at 325.
[53] *Id.*
[54] *Id.* at 323.
[55] 673 F. Supp. 3d 515, 639–42 (D.N.J. 2023).
[56] *Id.*
[57] *Id.* at 642.
[58] Wolford v. Lopez, 2023 WL 5043805, at *21–22 (D. Haw. Aug. 8, 2023).
[59] *Id.* at *22 ("Finally, the State cites numerous local ordinances that regulated firearms in parks, but those ordinances are from 1872 through 1886. Because those local ordinances were passed after the Fourteenth Amendment's ratification in 1868, the Court is constrained in considering them as to the Nation's historical tradition of gun regulation at the time of either the Second Amendment's ratification or the Fourteenth Amendment's ratification." (citation omitted)).
[60] Antonyuk v. Chiumento, 89 F.4th 271, 354–63 (2d Cir. 2023).

sufficient to survive a facial challenge."[61] The panel criticized the district court for disqualifying historical analogues based on "strict quantitative measures," like population size, and for "erroneously discount[ing]" the historical record of territorial laws, municipal laws, and laws enacted in the later part of the nineteenth century.[62] The panel noted it was "unconvinced . . . that the former use of Boston Common and similar spaces as gathering grounds for the militia undermines a tradition of regulating firearms in urban public parks," and the panel criticized the district court for faulting the state for not producing historical restrictions that banned guns in earlier spaces like commons or greens that predated the emergence of modern parks.[63] While the panel in dictum expressed skepticism about the constitutionality under *Bruen* of a restriction on carrying guns in "rural parks," it acknowledged the early stage of the litigation and the absence of arguments so far in the case attempting to distinguish city parks from wilderness parks.[64] Moreover, the panel's hesitation about restrictions on guns in "rural parks" was also based on a smaller subset of historical restrictions presented in the case, as New York proffered eight nineteenth-century park restrictions from major cities and none from national and state parks.[65]

Much like the Second Circuit, other federal and state courts have upheld the constitutionality of modern bans on guns in parks against Second Amendment challenges brought after *Bruen*. These courts concluded that the historical record of similar restrictions enacted as modern parks emerged in the mid-nineteenth century sufficiently established an American tradition of regulating guns in parks.[66]

The conflicting rulings in these recent cases, however, exemplifies the inconsistency in which courts approach the historical analysis inquiry of

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[61] *Id.* at 362–63.

[62] *Id.* at 339, 360–61.

[63] *Id.* at 361–62.

[64] *See id.* at 362 ("Although we doubt that the evidence presently in the record could set forth a well-established tradition of prohibiting firearm carriage in rural parks, we are mindful that this litigation is still in its early stages and that the State did not distinguish between rural and urban parks in its arguments to this Court or below.").

[65] *See id.* at 359. Three days before the Second Circuit issued its decision, a federal district court in New Mexico enjoined a restriction that prohibited firearms in parks in Albuquerque and Bernalillo County, New Mexico, basing its decision largely on the reasoning of the three district court decisions that came before it. Springer v. Grisham, 2023 WL 8436312, at *5–8 (relying on *Antonuk*, *Koons*, and *Wolford*). Shortly after the Second Circuit's ruling, a federal district court in California also relied on the reasoning of those earlier district court rulings and enjoined California's law that prohibits the carrying of firearms in parks and similar recreational spaces. May v. Bonta, 2023 WL 8946212, at *12–13 (C.D. Cal. Dec. 20, 2023).

[66] Maryland Shall Issue, Inc. v. Montgomery County, No. 8:21-cv-01736, 2023 WL 4373260, at *11 (D. Md. July 6, 2023) (concluding that historical record establishes a tradition of "restricting firearm possession and carrying in public parks."), *appeal docketed*, No. 23-1719 (4th Cir. July 10, 2023); Kipke v. Moore, Nos. 1:23-cv-01293 & 1:23-cv-01295 (consol.), 2023 WL 6381503, at *9–10 (D. Md. Sept. 29, 2023) (same, for Maryland state parks and forests); We the Patriots, Inc. v. Grisham, No. 1:23-cv-00773, 2023 WL 6622042 at *8–9 (D.N.M. Oct. 11, 2023) (denying request to preliminarily enjoin prohibitions on carrying firearms in parks based on historical record); *see also* Lafave v. County of Fairfax, 2023 Va. Cir. LEXIS 203 (applying *Bruen*'s framework to state constitutional claim and upholding constitutionality of Fairfax County's restriction on guns in parks as consistent with American tradition of regulating guns in parks).

Bruen, leading to starkly different outcomes despite the courts' access to the same, or very similar, historical record of restrictions.

II. A History of Modern Parks

Parks, in the modern sense, were not created until the mid-nineteenth century.[67] Places called "parks" existed, but they differed significantly from the leisure grounds we would recognize today. Dictionary entries from the colonial and early national period are illustrative: Samuel Johnson's 1755 dictionary, for example, defined "park" as "[a] piece of ground inclosed and stored with wild beasts of chase, which a man may have by prescription or the king's grant."[68] Eighty-eight years later, in 1828, Noah Webster's American dictionary included essentially the same definition, describing a park as "a large piece of ground inclosed and privileged for wild beasts of chase."[69]

The creation of modern parks in the United States was brought about by the work of reformers who sought to make conditions in the rapidly expanding cities more tolerable.[70] These efforts were part of a transnational movement to incorporate naturalistic green spaces into urban environments.[71] While Europeans had an early advantage in the work of reshaping their cities, as previously private royal game parks and gardens could easily be made

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[67] *See generally* David Schuyler, The New Urban Landscape: The Redefinition of City Form in Nineteenth-Century America 1–8 (1988) (describing emergence in nineteenth century of "new urban landscape," whose proponents urged establishment of public parks to "create[] communal spaces" where "rural scenery might sooth the 'nerves and mind' of visitors," and identifying Central Park as "the first major attempt to achieve" the proponents' goals).

[68] Samuel Johnson, A Dictionary of the English Language (1755), https://johnsonsdictionaryonline.com/views/search.php?term=park [https://perma.cc/MJ6F-8H57] (last visited May 19, 2024) ("A piece of ground inclosed and stored with wild beasts of chase, which a man may have by prescription or the king's grant. Manwood, in his forest-law, defines it thus: a park is a place for privilege for wild beasts of venery, and also for other wild beasts that are beasts of the forest and of the chase: and those wild beasts are to have a firm peace and protection there, so that no man may hurt or chase them within the park, without license of the owner: a park is of another nature, than either a chase or a warren; for a park must be inclosed, and may not lie open; if it does, it is a good cause of seizure into the king's hands: and the owner cannot have action against such as hunt in his park, if it lies open.").

[69] Noah Webster, An American Dictionary of the English Language (1828), https://webstersdictionary1828.com/Dictionary/park [https://perma.cc/Z6RT-Y33L] (last visited May 19, 2024) ("P'ARK, *noun* [Latin parcus, saving.] A large piece of ground inclosed and privileged for wild beasts of chase, in England, by the king's grant or by prescription. To constitute a *park* three things are required; a royal grant or license; inclosure by pales, a wall or hedge; and beasts of chase, as deer, etc.Park of artillery, or artillery *park* a place in the rear of both lines of any army for encamping the artillery, which is formed in lines, the guns in front, the ammunition wagons behind the guns, and the pontoons and tumbrils forming the third line. The whole is surrounded with a rope. The gunners and matrosses encamp on the flanks; the bombardiers, pontoon-men and artificers in the rear. Also, the whole train of artillery belonging to an army or division of troops. Park of provisions, the place where the settlers pitch their tents and sell provisions, and that where the bread wagons are stationed.").

[70] Schuyler, *supra* note 67, at 59.

[71] For more on the development of a contemporary Parks Movement in Britain, see Hilary A. Taylor, *Urban Public Parks, 1840-1900: Design and Meaning*, 23 Garden History 201, 201–21 (1995); on the same in France, see Heath Massey Schenker, *Parks and Politics During the Second Empire in Paris*, 14 Landscape J. 201, 201–19 (1995).

publicly accessible, parks in the United States were often built by completely transforming existing urban spaces.[72]

At the center of this movement was Frederick Law Olmsted, arguably the most prolific park designer in American history.[73] He served as the principal architect and first Commissioner of Central Park in New York City and was connected to dozens of park projects in cities across the country.[74] His work revolutionized not just the American urban landscape but the very meaning of the word "park"—which appeared for the first time in an American encyclopedia in 1861, with Olmsted himself as the author of the entry.[75] Olmsted advocated for parks as a new kind of public space, stating in 1881 that "[t]wenty-five years ago we had no parks, park-like or otherwise, which might not better have been called something else. . . . Allow me to use the term *park movement*, with reference to what has thus recently occurred."[76] Olmsted explained that parks in this context were revolutionary, not simply "an improvement on what we had before, growing out of a general advance of the arts applicable to them," but something altogether new.[77]

A. Urban Green Spaces Before Parks

Early American cities were not entirely devoid of green spaces. Americans certainly engaged in outdoor recreation in places like squares, cemeteries, and commons.[78] However, these places were manifestly different in kind.[79] Use of these spaces for entertainment or leisure was merely incidental to their primary purposes—be they decorative (like squares), sanitary (like cemeteries), or extractive (like commons).

Squares, for example, were generally far too small and too enmeshed with the urban environment to allow for the types of passive and restorative recreation envisioned by parks reformers. As one nineteenth century advocate stated in 1851, "[d]eluded New York has until lately, contented itself with little door-yards of space—mere grassplats of verdure, which form the squares of the city, in the mistaken idea that they are parks."[80] Scholars today have come

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[72] For example, St. James Park in Westminster, London, began as a hunting reserve for King Henry VIII, became a private zoo under King James I, and then was gradually opened to the elite friends of the royals and eventually the general public. *St. James Park—From Leper Hospital to Royal Park*, The History of London, https://www.thehistoryoflondon.co.uk/st-jamess-park-from-leper-hospital-to-royal-park/ [https://perma.cc/S7P4-XWTH] (last visited May 19, 2024).

[73] Colin Fisher, *Nature in the City: Urban Environmental History and Central Park,* 25 OAH Mag. Hist. 27 (2011).

[74] Justin Martin, Genius of Place: The Life of Frederick Law Olmsted 1–2 (2011).

[75] Laura Wood Roper, FLO: A Biography of Frederick Law Olmsted 144 (1983).

[76] Frederick Law Olmsted, The Justifying Value of a Public Park 7–8 (1881).

[77] *Id.* at 8.

[78] Thomas Bender, *The 'Rural' Cemetery Movement: Urban Travail and the Appeal of Nature*, 47 N. Eng. Q. 196, 196–211 (1974).

[79] Ann Beamish, *Before Parks: Public Landscapes in Seventeenth- and Eighteenth-Century Boston, New York, and Philadelphia*, 40 Landscape J. 1, 1, 13 (2021) ("Public parks did not appear in the United States until the second half of the nineteenth century," and earlier green spaces were "prepark landscapes.")

[80] Schuyler, *supra* note 67, at 62.

to similar conclusions about the dissimilarity between "greens" and parks—as Dorceta Taylor explains, the former were "multipurpose spaces that served as pastures; sites of executions, rallies and protests; and homes for civic institutions," rather than the sprawling sites with natural scenery and extensive space for recreation.[81] This was certainly true in early New York City. Manhattan's small green spaces—Bowling Green, the Battery, and the yard in front of City Hall (at that time commonly referred to simply as "the Park")—required explicit permission from the mayor to "walk over, stand, or lie upon" the grass.[82] Additionally forbidden in these green spaces were "foot races," "ball," and "any other sport or play whatsoever."[83]

Cemeteries also predated modern parks, and, in addition to their primary function as burial grounds, could serve as a space for repose and contemplation.[84] Visiting cemeteries, which were frequently set in landscaped areas on the edges of cities, became a common form of recreation in the early-to-mid-nineteenth century.[85] These verdant landscapes may have helped to inspire the aesthetic of modern parks, but they obviously served a much different primary purpose.[86] And, unsurprisingly, city-dwellers quickly came to prefer parks, once they were available, as they offered the natural beauty and opportunities for recreation that cemeteries provided but were less likely to impose on visitors reminders of the inevitability of mortality and loss. To quote one Brooklyn newspaper that objected to the incorporation of cemeteries in plans for a park, "people hard pressed by the toils of manual labor, the cares and anxieties of business, or the sorrows that fall in greater or lesser degree to most people, would hardly choose . . . the gloomy associations of the cemetery."[87]

The final space that demands investigation is the commons. Commons were areas of collective production where residents could graze their livestock or engage in reproductive labor by, for example, cleaning carpets or collecting firewood, clay, or stones.[88] Americans inherited the concept of the commons from England, where it had deep roots in that country's property law and

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[81] Dorceta E. Taylor, The Environment and the People in American Cities, 1600s-1900s: Disorder, Inequality, and Social Change 227 (2009).

[82] *A Law to Amend the Law Relative to the Park, Battery, and Bowling-Green. Passed April 13, 1818,* Evening Post (April 17, 1818).

[83] *A Law, Relative to the Park, Battery and Bowling Green, Passed 25th March 1816*, Commercial Advertiser (March 27, 1816).

[84] Schuyler, *supra* note 67, at 37–45. Notably, the carrying and especially discharge of firearms in cemeteries was also heavily regulated. *See e.g.*, An Act Relating to the Laurel Hill Cemetery in Philadelphia, 1847 Pa. Laws 266, § 1 ("That if any person shall open any tomb or grave in the lands of the cemetery of Laurel Hill cemetery company of Philadelphia . . . or shall shoot or discharge any gun or other fire arms within said limits shall be deemed guilty of a misdemeanor."); An Act To Incorporate The Mount Orange Cemetery, In The County of Baltimore, 1841 Md. Laws 114, ch. 148, § 4 ("Any Person who shall willfully destroy, mutilate, deface, injure or remove any tomb, monument, grave stone, or other structure, placed in the cemetery . . . or shall shoot or discharge any gun, or other fire arms, within the said limits, shall be considered guilty of a misdemeanor . . . ."); An Act To Incorporate The Evergreen Cemetery Company Of Bonaventure, 1847 Ga. Laws 138, § 5 (similar); An Act to Incorporate the Proprietors of Oak Grove Cemetery, 1856 Mass. Acts 85–87, chap. 154, § 6 (similar).

[85] Bender, *supra* note 78, at 196–211.

[86] Schuyler, *supra* note 67, at 39.

[87] Schuyler, *supra* note 67, at 55 (quoting the *Brooklyn Eagle*).

[88] Michael J. Rawson, Eden on the Charles: The Making of Boston 28–29 (2010).

traditions.[89] There, the "commons" referred to the unimproved land on a lord's manor, which tenants were allowed to use to graze cattle, collect firewood, or, sometimes, fish or hunt small game.[90] Legally, the lord maintained ownership of the land and could remove it from the commons by improving or cultivating it. That said, tenants understood themselves to have a certain right to common land—which is why the privatization of the commons during the English enclosure movement, in which seven million acres were moved from the commons to private ownership, proved so controversial.[91]

Things worked a bit differently in the American colonies, which mostly lacked manorial land holdings. In early America, commons served roughly the same purposes as those in England, but they were actually owned by the community. As historian Allan Greer has explained, "commons formed an integral part of most early settlements" in the Northeast.[92] Settlers as far west as St. Louis also held land in common for pasturing,[93] and customary rights to graze, fish, and hunt on unenclosed land persisted even through the end of the Civil War in much of the deep South.[94]

Of course, the most famous of the American commons spaces is the Boston Common. In 1634, William Blackstone (a colonist, not the English jurist of the same name) sold a large parcel of land to the settlers of the young town of Boston.[95] As two elderly Bostonians recollected in 1684, that land was then converted into "a place for a trayning field; which ever since and now is used for that purpose & for the feeding of Cattell."[96] These and similar activities persisted in the Common for centuries; it was a space not just for cows to graze and the militia to muster, but also for locals to gather firewood, for the city to execute criminals, and for townspeople to dump their refuse.[97] Some sources wrongly cite the Common's establishment in 1634 to claim it as America's oldest park[98]—but for the first two hundred-plus years of its existence, the Common was a grazing zone, a training field, and, frankly, a dump.[99]

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[89] *Commons*, Encyclopedia Britannica, https://www.britannica.com/topic/commons [https://perma.cc/D66R-U3HX] (last visited May 19, 2024).

[90] *Id.*; *see also* Rawson, *supra* note 88, at 24.

[91] *See generally* Simon Fairlie, *A Short History of Enclosure in Britain*, Hampton Institute (Feb. 16, 2020), https://www.hamptonthink.org/read/a-short-history-of-enclosure-in-britain [https://perma.cc/FV5T-7AJ6] (providing a socialist description and critique of the enclosure movement and a very interesting critique of the concept of the "the tragedy of the commons.").

[92] Allan Greer, *Commons and Enclosure in the Colonization of North America*, 117 Amer. Hist. R. 373 (2012).

[93] Stuart Banner, *The Political Function of the Commons: Changing Conceptions of Property and Sovereignty in Missouri, 1750–1850*, 41 Amer. J. of Leg. Hist. 41, 63–64 (1997).

[94] Steven Hahn, The Roots of Southern Populism: Yeoman Farmers and the Transformation of the Georgia Upcountry, 1850–1890 63 (1983); Barbara J. Fields, *Review*, 28 Intl. Labor and Working-Class Hist. 135, 136 (1985).

[95] Rawson, *supra* note 88, at 24.

[96] Nathaniel B. Shurtleff, A Topographical and Historical Description of Boston 296 (2d ed. 1872).

[97] *See Boston Common*, National Park Service, https://www.nps.gov/places/boston-common-ma.htm [https://perma.cc/UVV7-36B7] (last visited Dec. 7, 2022); Rawson, *supra* note 88, at 23.

[98] *See, e.g.*, *Boston Common*, *supra* note 97.

[99] John D. Cushing, *Town Commons of New England: 1640–1840*, 51 Old Time N. Eng. 86, 92 (1961).

Given this state of affairs, it is not surprising that, in the early-to-mid-nineteenth century, American travelers to Europe, and especially to England, often noted the preponderance of urban parks there as compared to U.S. cities. American author Caroline Kirkland reflected that "[a]fter seeing these oases in the wilderness of streets, one can never be content with the scanty patches of verdure . . . that [in New York] form the only places of afternoon recreation for the weary, the sad, the invalid, the playful."[100] And, conversely, European visitors to the U.S. noted "the almost total absence of public gardens or pleasure-grounds in the large cities."[101]

B. The Creation of Modern Parks

This would begin to change in the mid-nineteenth century, with the advent of the parks movement. It had roots in Europe—the first of the modern publicly funded parks was Birkenhead Park in Liverpool, which opened to the public in 1847.[102] Birkenhead Park would provide inspiration for the design of Central Park, and, in turn, many of the American parks that followed throughout the late nineteenth century.[103] 1847 also saw the inception of Brooklyn's Fort Greene Park. Originally named Washington Park, Fort Greene Park was created largely as a result of advocacy by *Brooklyn Eagle* editor Walt Whitman. But at only 30 acres of hilly, not especially functional land, Fort Greene Park paled in comparison to the parks that enterprising city planners would design over the ensuing years.[104]

Chief among those more impressive parks was, of course, New York City's Central Park. In 1853, the New York state legislature provided funding to purchase the area between Fifth and Eighth Avenues and 59th and 110th Streets in Manhattan for the purpose of creating a centrally located urban park.[105] In 1858, New York City approved a naturalistic design plan by Frederick Law Olmsted, and that same year, the first section of the park opened to the public.[106] Central Park was a sensation. One writer described it as "parkomania."[107] The opening of Central Park inspired Brooklyn, then a separate municipality, to create Prospect Park, which Olmsted also designed

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[100] Schuyler, *supra* note 67, at 63 (quoting Caroline Kirkland).

[101] *Id.* at 64 (quoting Francis J. Grund).

[102] John W. Henneberger, *Origins of Fully Funded Public Parks*, 19 George Wright Forum 13, 13–20 (2002).

[103] *Id.*

[104] Schuyler, *supra* note 67, at 67; *Fort Greene Park*, N.Y.C. Parks, https://www.nycgovparks.org/parks/fort-greene-park/history [https://perma.cc/3B9Q-FX9M] (last visited May 19, 2024) (while the park officially opened in 1850, development of Washington/Fort Greene park continued in fits and starts for the rest of the century, not reaching its present form until 1908).

[105] Tricia Kang, *160 Years of Central Park: A Brief History*, Central Park Conservancy (June 1, 2017), https://www.centralparknyc.org/articles/central-park-history [https://perma.cc/8N9V-P7R6].

[106] *Id.*

[107] Megan Rowley Williams, Through the Negative: The Photographic Image and the Written Word in Nineteenth Century American Literature 39 (2003).

and which opened in 1867.[108] Other cities did the same, with Baltimore, Hartford, Chicago, and Detroit, to name a few, beginning development of their own major parks by the 1870s.[109]

Philadelphia's parks developed along a similar trajectory. While the colony's founder, William Penn, had included some undeveloped, city-owned squares in his original plan for Philadelphia, these proved entirely inadequate to the recreational needs of a growing metropolis.[110] By the early nineteenth century, city residents were so desperate for a taste of nature that they flocked to the landscaped areas around municipal water pumping stations just to enjoy some green space.[111] Finally, in 1855, Philadelphia opened Fairmount Park on land it had begun acquiring the decade prior; even after this official opening, though, the city's most significant park project developed in fits and starts.[112] In 1867, the Pennsylvania General Assembly ordered the creation of the Fairmount Park Commission and empowered it to buy or seize roughly three thousand acres of private land to expand the park—evidence of the importance governmental leaders placed on developing recreational sites for Philadelphia's burgeoning population.[113]

In Boston, the Common underwent a gradual transformation from a communal site of resource development, extraction, and manual labor to a modern park: carefully manicured, meticulously designed, and free of the scenes of working-class urban drudgery that now seemed incompatible with the repose and recreation a park was meant to offer.[114] New trees were planted, new paths were laid, and, most importantly, a number of traditional activities were banned.[115] The first major change came in 1830, when the town forbade its citizens from grazing their cows in the Common's pastures; the last came in 1850, when Bostonians were prohibited from cleaning and beating their rugs on the Common's grounds.[116] In 1859, the people of Boston formally converted the Common into a modern park.[117] Then, in the 1870s, Boston hired

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[108] *Prospect Park 150: The History of Prospect Park*, The Prospect Park Alliance (Jan. 18, 2017), https://www.prospectpark.org/creation-prospect-park/ [https://perma.cc/N28W-7LBC].

[109] Charles Birnbaum, Dena Tasse-Winter, & Arleyn Levee, *Experiencing Olmsted: The Enduring Legacy of Frederick Law Olmsted's North American Landscapes*, The Cultural Landscape Foundation (2022).

[110] Elizabeth Milroy, *Public Parks (Philadelphia)*, The Encyclopedia Greater Phila. (2016), https://philadelphiaencyclopedia.org/essays/public-parks-philadelphia/ [https://perma.cc/TDT6-MSEN].

[111] *Id.*

[112] Michael J. Lewis, *The First Design for Fairmount Park*, 130 Pa. Mag Hist. and Biography 283, 283–97 (2006); Thomas G. Beischer, *Control and Competition: The Architecture of Boathouse Row*, 30 Pa. Mag. Hist. and Biography 299, 299 (2006).

[113] *See* Nate Gabriel, *Visualizing Urban Nature in Fairmount Park: Economic Diversity, History, and Photography in Nineteenth-Century Philadelphia*, *in* A Greene Country Towne: Philadelphia's Ecology in the Cultural Imagination 66 (Alan C. Braddock & Laura Turner Igoe eds., 2016); Milroy, *supra* note 110; Beischer, *supra* note 112, 310.

[114] *See* Rawson, *supra* note 88, at 22–74.

[115] *Id.*

[116] *Id.*; *An Ordinance in Relation to the Common and Public Squares and Public Fountains of the City*, in Peleg Chandler, Charter and Ordinances of the City of Boston 81–83 (1850), https://archive.org/details/charterordinance00bost_0/page/80/mode/2up [https://perma.cc/H2NB-RXK5].

[117] Bulletin of the Park and Outdoor Art Association 3 (1901), bit.ly/3NPLSae.

Olmsted to expand the city's parks system.[118] The result was the so-called "Emerald Necklace," a string of green spaces that looped through Boston and neighboring Brookline, Massachusetts. The project was completed in 1895, with the Common sitting at the center as the crown jewel.[119]

On the opposite side of the country, San Francisco sought to build its own large city park. Olmsted himself was in contention for the role of park designer, offering the city a complex and regionally specific design that incorporated San Francisco's hills and bay in an "irregularly shaped" grounds that would connect multiple parts of the city.[120] A combination of factors—budget shortfalls, a mail delay, the complexity of Olmsted's plans, and the preference of many San Franciscans for a long, rectangular park that more closely mimicked Central Park's distinctive geography—meant that the city ultimately rejected his proposal.[121] San Francisco instead employed William Hammond Hall as designer and superintendent, and under his oversight, Golden Gate Park opened to guests in 1870.[122] As with parks in other cities, construction on and expansion of Golden Gate Park continued for decades.[123]

These changes were adopted across all corners of the urbanizing nation for a variety of reasons. One factor in the creation of modern parks was the spread of cholera and other illnesses in the nineteenth century. At that time, before germ theory, many believed that "unhealthy air"—or "miasma," as it was called—in congested and polluted urban areas caused disease.[124] Doctors thought that natural, open areas like parks could alleviate this problem by facilitating the circulation of fresh air.[125] Class-based considerations also encouraged city planners to incorporate parks. They were likely to raise property values for the lucky (or wealthy) who lived nearby, and they might encourage more respectable forms of entertainment for the growing class of laboring city-dwellers who, elites believed, would otherwise turn to "'uncivilized' leisure practices, such as drinking in saloons, gambling, and cock fighting."[126]

The city parks of the mid-to-late nineteenth century developed in light of the new social and political pressures of a rapidly modernizing country, and they differed significantly from the urban green spaces that preceded

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[118] Madeline Bilis, *The History Behind Boston's Treasured Emerald Necklace*, Bos. Mag., (May 15, 2018), https://www.bostonmagazine.com/property/2018/05/15/emerald-necklace-boston-history/ [https://perma.cc/642R-Y9TK].

[119] *Id.*

[120] Terence Young, *Frederick Law Olmsted's Abandoned San Francisco Park Plan*, *in* The American Environment Revisited: Environmental Historical Geographies of the United States 146–54 (Geoffrey L. Buckley & Yolonda Youngs eds., 2018).

[121] *Id.* at 154–56.

[122] *History of Golden Gate Park*, S.F. Recreation and Parks, https://sfrecpark.org/1119/History-of-Golden-Gate-Park [https://perma.cc/6Q6L-DHVW] (last visited May 19, 2024).

[123] *Id.*

[124] *See* Stephen E. Maizlish, *The Cholera Panic in Washington and the Compromise of 1850*, 29 Wa. Hist. 55, 57 (2017); John B. Osborne, *Preparing for the Pandemic: City Boards of Health and the Arrival of Cholera in Montreal, New York, and Philadelphia in 1832*, 36 Urb. Hist. R. 29, 29 (2008).

[125] Terence Young, *San Francisco's Golden Gate Park and the Search for a Good Society, 1865–80*, 37 Forest & Conservation Hist. 4, 9 (1993).

[126] Colin Fisher, *Nature in the City: Urban Environmental History and Central Park*, 25 OAH Mag. of Hist. 27, 27 (2011).

them. Indeed, park architects went to great lengths to demonstrate to visitors that these modern parks were to be used and, more to the point, enjoyed in ways very different from the commons and greens to which the public had grown accustomed. The extractive acts citizens associated with commons were strictly prohibited in the new parks—thus, for example, Central Park explicitly banned "picking flowers, leaves, twigs, fruits, and nuts," "annoying birds," and "selling merchandise"—as well as carrying firearms.[127] The captain of the Fairmount Park Guard in Philadelphia repeatedly communicated to park commissioners the importance he placed on deterring visitors from engaging in what one scholar has called "preindustrial subsistence practices," including "tree clubbing" (that is, whacking trees to collect fallen fruit or nuts), "killing rabbits," and "shooting at game."[128] These kinds of changes were evident in the new Boston Common, as well. As historian Michael J. Rawson has explained, the "modern Common is exclusively a place of recreation," a marked change from its earlier life as "a place of labor."[129]

While the initial push for parks focused on curating large green spaces for residents of increasingly dense cities, after the Civil War, a related movement emerged to highlight and protect some of the nation's natural wonders. As one Olmsted biographer has noted, "preserving wild places is different from crafting urban spaces," but Frederick Law Olmsted was involved in both. In the mid-to-late nineteenth century, he became not just America's most famous urban parks designer, but also one of its most prominent advocates for national and state parks.[130] Olmsted was involved in preservation efforts around Niagara Falls,[131] Yosemite,[132] and Lake Superior,[133] and he was joined in this work by a whole generation of conservationists. The conservation movement of the late nineteenth and early twentieth centuries was part of a larger push towards the consolidation of the American state's control over the vast swaths of lands it claimed—lands it was only beginning to actually manage and administer after decades of post-Civil War conflict with Native nations out west.[134] This process of administration—the transfiguration of an apparent "wilderness" to "a rational, state-managed landscape"—required "a comprehensive new body of rules governing the use of the environment," as historian Karl Jacoby has explained.[135] Under new conservationist regimes,

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[127] Taylor, *supra* note 71, at 289.
[128] Gabriel, *supra* note 113, at 75–76.
[129] Rawson, *supra* note 88, at 23.
[130] Martin, *supra* note 74, at 2.
[131] Birnbaum, *supra* note 109.
[132] *Id.*
[133] Justin Martin, *Jewels of Olmsted's Unspoiled Midwest*, N.Y. Times (September 2, 2011), https://www.nytimes.com/2011/09/04/travel/jewels-of-olmsteds-unspoiled-midwest.html [https://perma.cc/366L-GBJX].
[134] Mark David Spence, Dispossessing the Wilderness: Indian Removal and the Making of the National Parks (1999); Jeanette Wolfley, *Reclaiming a Presence in Ancestral Lands: The Return of Native Peoples to the National Parks*, 56 Natural Resources Journal 55, 58–60 (2016).
[135] Karl Jacoby, Crimes Against Nature: Squatters, Poachers, Thieves, and the Hidden History of American Conservation 2 (Berkeley, CA: University of California Press, 2014). On the Anglo-American concept of "wilderness" and its relation to both National Parks and Native peoples, *see* Richard White, *The New Western History and the National Parks* 13

traditional subsistence activities were frequently made illegal.[136] Lands that were once fertile hunting grounds became parks in which poaching (and, often, the act of carrying firearms) was strictly forbidden.

The movement for urban parks first coalesced on the East Coast, but the momentum for wilderness parks came from the west. California was home to the first wilderness park, as Congress granted the Yosemite Valley and Mariposa Grove to California in 1864 to preserve for posterity.[137] In 1872, the federal government passed a law setting aside the land that is now Yellowstone National Park.[138] It was the first nationally designated wilderness park of its kind in the world.[139] However, Yellowstone would not function as a park in any meaningful sense for years to come. At the time of its creation, it had not been surveyed, and it was only accessible by "saddle and pack trains, a mode of travel attended with many privations and inconveniences."[140] The government appointed a park commissioner but appropriated no funding for his work.[141] Indeed, park administration was at best chaotic and at worst close to non-existent until 1886, when the United States Army assumed control of Yellowstone.[142] Even then, though, insufficient and unclear legal authority meant that the military could not adequately address even basic concerns like poaching.[143] Only in 1894 did the federal government respond to ongoing chaos in the park by requiring the enforcement of regulations with criminal sanctions, rather than merely ejection from the park.[144]

Congress created a few other national parks in the late nineteenth and early twentieth centuries—Yosemite and Sequoia were set aside in 1890, Mount Rainier in 1899, and Crater Lake in 1902—but administration of the parks was haphazard, shifting between the states, the Department of Agriculture, the Department of Interior, and the Department of War.[145] That changed in 1916 with the creation of the National Park Service (NPS) and the appointment of Stephen T. Mather as Superintendent of Parks.[146] Interested in both

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George Wright Forum 29, 31 (1996); Mark David Spence, *Crown of the Continent, Backbone of the World: The American Wilderness Ideal and Blackfeet Exclusion from Glacier National Park*, 1 Environmental History 29, 30 (1996).

[136] Jacoby, *supra* note 135, at 2–10.

[137] *The History of California State Parks*, California State Parks (May 2013), https://www.parks.ca.gov/pages/712/files/11%20csp-150yearsfinal%20brochure.pdf [https://perma.cc/MQY8-R4RR]. These areas would be incorporated back under federal authority as a national park in 1906.

[138] An Act to set apart a certain Tract of Land lying near the Head-waters of the Yellowstone River as a public Park, 17 Stat. 32 (1872).

[139] *Brief History of the National Parks*, Library of Congress, https://www.loc.gov/collections/national-parks-maps/articles-and-essays/brief-history-of-the-national-parks/ [https://perma.cc/37L2-XRUK].

[140] Report by the Superintendent of Yellowstone National Park in the Year 1872, at 2 (1872), https://www.mtmemory.org/nodes/view/104716 [https://perma.cc/8AL3-XUGJ].

[141] *Id.* at 1. The commissioner was allowed to use funds from leases within the park, but applications for leases to run hotels were denied because the park was inaccessible. *Id.* at 3.

[142] Richard A. Bartlett, Yellowstone: A Wilderness Besieged 155, 215–229 (1988).

[143] *Id.* at 260, 266.

[144] An Act to Protect the Birds and Animals in Yellowstone National Park, and to Punish Crimes in Said Park, and for Other Purposes, 28 Stat. 73 (1894).

[145] *Brief History of the National Parks*, *supra* note 139.

[146] Ney C. Landrum, *The State Park Movement in America: A Critical Review*, 9 Environmental History 75–77 (2004); Richard West Sellars, *Manipulating Nature's Paradise: National*

conserving nature and creating business opportunities, Mather was intrigued by the idea of developing profitable amenities like hotels, ice rinks, and golf courses alongside the parks, as well as the potential to connect wilderness areas to the country's expanding network of rail and car transportation.[147] Within the parks themselves, though, the NPS under Mather prioritized what one historian has called "present[ing] a romanticized version of nature"—meaning culling predator populations, introducing non-native fish for the benefit of sport-fishers, and suppressing all fires, even those that occurred naturally and benefitted forest life.[148] These efforts required a professionalization of park administration, which Mather directed at the same time as he oversaw the creation of a spate of new national parks including Acadia, Bryce, Denali, Grand Canyon, Hawai'i, and Zion.[149] By the time Mather left his post in 1929, the National Park Service had been fully transformed.

While the federal government moved to consolidate some of the country's most picturesque lands into national parks, state governments began, in fits and starts, to do the same on smaller scales. One of the first locations conservationists zeroed in on for protection was New York's Adirondacks Mountains.[150] There were a number of practical reasons to set aside lands in the area for preservation: The rains and mountain snow melts supplied many of the rivers that the state's citizens depended on for fresh water, and unrestrained logging left many conservation-minded New Yorkers concerned about the future of the forests.[151] Conservationists also worried that the boys growing up in an increasingly urban Northeast lacked access to important masculinizing activities like fishing and hiking.[152] The result was that the New York legislature consolidated state property in the Adirondacks into a forest preserve in 1885 and upgraded it to a state park in 1892.[153]

There were other parks under development at the same time: New York also created a state park around Niagara Falls in 1885, and Michigan protected Mackinac Island in 1895.[154] However, by the turn of the twentieth century, as historian Ney C. Landrum has written, "there was still no indication that a state park 'movement' was forming, either nationally or in any given state."[155] Both the creation and the administration of the nation's state parks were disorganized and haphazard. Wisconsin made early headway on the administrative issue in 1907 with the creation of a state park board—one of the first such

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Park Management under Stephen T. Mather, 1916–1929, 43 Montana: The Magazine of Western History 2, 4 (1993).

[147] Sellars, *supra* note 146, at 4–5.

[148] *Id.* at 7–11.

[149] *Brief History of the National Parks*, *supra* note 139.

[150] Jacoby, *supra* note 135, at 11–28.

[151] *Id.*; Philip G. Terrie, *"Imperishable Freshness": Culture, Conservation, and the Adirondack Park*, 37 Forest & Conservation History 132, 135–37 (1993).

[152] Jacoby, *supra* note 135, at 16 (explaining that the "linkage of an environmental crisis (deforestation and water loss) and a social crisis (urbanism and the undermining of traditional models of masculinity) captures the modern and antimodern impulses that, in uneasy combination, lay at the core of the nascent conservation movement").

[153] Terrie, *supra* note 151, at 132; Jacoby, *supra* note 135, at 11–29.

[154] Landrum, *supra* note 146, at 37–38, 44.

[155] *Id.* at 46.

bodies in the country.[156] Several other states followed suit over the next few years. In 1921, NPS Superintendent Mather convened the first ever National Conference on Parks (quickly renamed the National Conference on *State* Parks in its later iterations) in no small part to encourage the states to take on more of the burden of preserving and administering nature reserves across the country.[157] Over the next nine years, at least nine more states created their first-ever state parks.[158]

But the real boom in state park development did not come until the 1930s, when New Deal Era federal programs, especially the Civilian Conservation Corps (CCC), marshaled funds and manpower to develop state park grounds and facilities across the country. The CCC contributed to eight state parks in Florida,[159] sixteen in South Carolina,[160] and more than fifty in Texas.[161] More than 220,000 people found work through the Corps in New York, where the "projects focused mainly on improving state parks and forest lands."[162] All told, between 1933 and 1942, the CCC worked on over 800 state parks.[163] In the words of CCC director Robert Fechner, the Corps had successfully "altered the landscape of the United States."[164] America's state parks system was firmly entrenched in the nation's geography by the end of the Roosevelt Era.

III. The History of Regulating Guns in Parks

From the creation of modern parks in the mid-nineteenth century, laws, ordinances, and regulations have prohibited carrying guns within them. Early park advocates and designers sought to establish rules of behavior to enforce social order in the parks and to promote parks as communal spaces for repose and relaxation—a role markedly distinct from other preexisting public spaces.[165] To train visitors in proper park etiquette, early rules prohibited visitors from engaging in conduct that would disrupt the parks' scenic beauty or interfere with others' enjoyment of the parks.[166] Visitors were prohibited

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[156] *Id.* at 55; *see also* Kenneth I. Lange & D. Debra Berndt, *Devil's Lake State Park: The History of Its Establishment*, 68 Wisconsin Academy of Sciences, Arts and Letters 149, 158 (1980).

[157] Landrum, *supra* note 146, at 79–82, 90.

[158] *Id.* at 100.

[159] *Civilian Conservation Corps Museum*, Florida State Parks, https://www.floridastateparks.org/parks-and-trails/highlands-hammock-state-park/civilian-conservation-corps-museum [https://perma.cc/C3XF-4FK5].

[160] Tara Mitchell Mielnik, New Deal, New Landscape: The Civilian Conservation Corps and South Carolina's State Parks (2012).

[161] *The Civilian Conservation Corps,* Tex. Parks and Wildlife Dept., http://www.texascccparks.org/program/ [https://perma.cc/3SZH-FMAM].

[162] Craig Thompson, *Force for Nature: Civilian Conservation Corps*, 62 N.Y. State Conservationist 30, 33 (2008).

[163] Neil M. Maher, Nature's New Deal: The Civilian Conservation Corps and the Roots of the American Environmental Movement (2008).

[164] *Id.* at 4 (quoting Robert Fechner).

[165] Roy Rosenzweig & Elizabeth Blackmar, The Park and the People: A History of Central Park 239 (1992).

[166] Taylor, *supra* note 81, at 288–89.

from engaging in lewd or obscene acts, playing music, displaying signs or advertisements, and carrying firearms.[167]

When Olmsted envisioned the administration and governance of Central Park, he placed "a dual emphasis on the maintenance of social order and the enrichment of civil society"—social order to be maintained by strict rules about behavior, and societal enrichment to be promoted through a meticulously designed urban park space.[168] In Olmsted's original 1858 rules for the park, which were brief enough to appear on a single sheet to be "posted in conspicuous locations," he declared along with Central Park's Board of Commissioners that "[a]ll persons are forbidden . . . to carry fire-arms."[169]

Figure 1: Rules in Central Park[170]

CENTRAL PARK.—NOTICE.—IN PURSUANCE of the 16th section of an act entitled "An Act for the Regulation and Government of the Central Park," passed April 17, 1857, the Board of Commissioners of the Central Park do ordain as follows:

ALL PERSONS ARE FORBIDDEN

To enter or leave the Park except by the gateways.
To climb or walk on the wall.
To turn cattle, horses, goats or swine into the Park.
To carry firearms, or to throw stones or other missiles within it.
To cut, break, or in any way injure or deface the trees, shrubs, plants, turf, or any buildings, fences, bridges or other constructions upon the Park.
Or to converse or in any way hinder those engaged in its construction.

All persons offending against these ordinances shall be deemed guilty of misdemeanor, and be punished, on conviction before the Mayor, Recorder, or any Magistrate of the City of New-York, by a fine not exceeding fifty dollars; and, in default of payment, by imprisonment not exceeding thirty days.

Visitors may obtain all necessary information and directions from the Police.

The business offices and the Police station of the Park are on 5th-av., at 79th-st.

By order of the Board.

JOHN A. C. GRAY, Vice-President.

David H. Hart, Clerk.

Dated New-York, March 17, 1858.

[167] *Id.* at 289.

[168] Matthew Gandy, Concrete and Clay: Reworking Nature in New York City 103 (2002).

[169] Cynthia S. Brenwall, The Central Park: Original Designs for New York's Greatest Treasure 26–27 (2019); *see also Minutes of Proceedings of the Board of Commissioners of the Central Park for the Year Ending April 30, 1858*, at 166 (1858) [https://perma.cc/9PHR-NZGP] ("Be it ordained by the Commissioners of the Central Park: All persons are forbidden . . . [t]o carry fire-arms . . . within it.").

[170] *Central Park*, N.Y. Times (March 18, 1858).

This proved to be the norm—when parks were created, prohibitions on carrying guns were adopted at the same time. When the citizens of Brooklyn copied Manhattan's achievement and created Prospect Park, they also emulated Central Park's prohibition. In 1866, one year before the park opened to the public, the commissioners of Prospect Park enacted rules forbidding all visitors from "carry[ing] firearms" within it.[171] Two years later, when the Pennsylvania state legislature appropriated funds for Fairmont Park, it also enacted a regulation providing that "[n]o persons shall carry fire-arms . . . in the Park."[172] In 1869, the Common Council of the City of Chicago passed an ordinance banning the carrying of firearms in all city parks.[173] And in 1872, two years after the California legislature designated land for the development of Golden Gate Park and Buena Vista Park in San Francisco, commissioners enacted a restriction on carrying firearms in both.[174]

Prohibitions on guns in parks were in accord with park advocates' concern for maintaining social order, preserving the public's safety, and maintaining peace in the parks. As the Board of Park Commissioners for the City and County of San Francisco remarked happily almost 30 years after opening Golden Gate Park to visitors, park administrators had "more than realized expectations by keeping the Park in an almost ideal state of peace and protection to the public safety."[175] Other park commissions too prioritized the safety of park visitors in regulating the parks and acknowledged the effectiveness of the regulations in doing so.[176] Commemorating the ten-year anniversary of the opening of Fairmount Park, the park commissioners expressed "great[] pride" in "the uniform peace and order maintained in the Park" since its creation and emphasized the public's approval of the rules and regulations and

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[171] Annual Reports of the Brooklyn Park Commissioners 1861–1873, at 136 (1873) (enacted 1866), [https://perma.cc/8ZZJ-C2LZ] ("All persons are forbidden . . . [t]o carry firearms . . . within [Prospect Park.]").

[172] 1868 Pa. Laws 1088, No. 1020, § 21, pt. II [https://perma.cc/D5TL-DHXQ] ("No person shall carry fire arms . . . in [Fairmount Park] or within fifty yards thereof[.]").

[173] Proceedings of the Common Council of the City of Chicago for the Municipal Year 1868, Being From May 4th, 1868 to December 6th, 1869, at 342 (1870), [https://perma.cc/5BS5-JZVL] ("All persons are forbidden to carry firearms . . . within any one of the said public parks."); *see also* Murray F. Tuley, Laws and Ordinances Governing the City of Chicago 88 (1873), [https://perma.cc/5UDD-RHNU] ("All persons are forbidden to carry firearms . . . within any one of the public parks."). For a history of park development in Chicago, see *History of Chicago Parks,* Chicago Parks District, https://www.chicagoparkdistrict.com/about-us/history-chicagos-parks [https://perma.cc/T57Y-E3HH] (last visited May 19, 2024).

[174] San Francisco Municipal Reports for the Fiscal Year 1874–75, at 887 (1875), [https://perma.cc/9GB8-B484] ("Within [Golden Gate and Buena Vista Parks] all persons are hereby forbidden: . . . To carry . . . firearms.").

[175] San Francisco Municipal Reports for the Fiscal Year 1896–97, Ending June 30, 1897, at 185 (1897), [https://perma.cc/3DSH-VR9L].

[176] *See, e.g.*, Eighth Annual Report of the Commissioners of Prospect Park 161–62 (1868) included in Annual Reports of the Brooklyn Park Commissioners (1873) (characterizing the regulations governing Prospect Park as having been "carefully framed, with a view of imposing the least possible restraint upon personal liberty which is consistent with the safety and freedom of others"), [https://perma.cc/FZN3-K6Y8]; Municipal Register of the City of Springfield for 1899, at 499 (1899) ("Public grounds are owned by the citizens, and every man, woman, and child should fully realize and feel their interests in such ownership, and know that they are freely and heartily welcome to enjoy the many blessings that their grounds afford, restricting themselves only to such result and regulations as are necessary for the protection of the parks and their visitors."), [https://perma.cc/9D7Y-MK2U].

the social benefits achieved by the park's tendency "to refine the people, and repress all disorder."[177] In recounting those achievements, the commissioners depicted a stark contrast between the present conditions of the park and those that existed ten years earlier, characterizing those former conditions as "frequently the scene of disorder and even of homicides."[178]

In the subsequent decades, as more cities created parks, prohibitions on guns in those parks continued to go hand-in-hand. Before the end of the nineteenth century, prohibitions on guns in parks were adopted in Buffalo, New York,[179] St. Louis, Missouri,[180] New Haven, Connecticut,[181] Boston, Massachusetts,[182] Saint Paul, Minnesota,[183] Salt Lake City, Utah,[184] Trenton, New Jersey,[185] Grand Rapids, Michigan,[186] Milwaukee, Wisconsin,[187] Cincinnati, Ohio,[188] Wilmington, Delaware,[189] Detroit, Michigan,[190] Indianapolis,

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[177] Annual Report of the Commissioners of Fairmont Park 41–42 (1878), [https://perma.cc/C7QF-JZ86].

[178] *Id.*

[179] Fourth Annual Report of the Buffalo Park Commissioners 24 (1874) (enacted 1873) [https://perma.cc/CP77-Q9FN] ("All persons are forbidden to carry fire arms . . . within the several parks, approaches thereto or streets connecting the same.").

[180] Michael John Sullivan, The Revised Ordinance of the City of St. Louis 635 (1881), [https://perma.cc/B8NE-KXCQ] ("No person shall . . . use or have in his possession ready for use in any street, alley, walk or park of the city of St. Louis" any device that discharges a "fragment, bolt, arrow, pellet, or other missile"); Tower Grove Park of the City of St. Louis 117 (1883), [https://perma.cc/2QPT-2UKZ] ("All persons are forbidden . . . [t]o carry firearms[.]").

[181] City Year Book of the City of New Haven 305 (1882), [https://perma.cc/KGM9-X59X] ("No person shall carry or have any fire-arms on said Park [East Rock Park].").

[182] Thirteenth Annual Report of the Board of Commissioners for the Year 1887, at 86 (1888) (enacted 1886), [https://perma.cc/QS4L-Y5V6] ("[W]ithin the Public Parks, except with the prior consent of the Board, it is forbidden: . . . to carry fire-arms, except by members of the Police Force in the discharge of their duties[.]").

[183] Annual Reports of the City Officers and City Boards of the City of Saint Paul 689 (1889) (enacted 1888), [https://perma.cc/826P-CHBW] ("No person shall carry firearms . . . in any Park or within fifty yards thereof[.]").

[184] The Revised Ordinances of Salt Lake City, with the City Charter and Amendments Thereto 248 (1888), [https://perma.cc/P9RW-BWMT] ("No person shall, within Liberty Park . . . [c]arry . . . firearms.").

[185] City of Trenton, New Jersey, Charter and Ordinances 390 (1903) (enacted 1890), [https://perma.cc/5ZX3-TZT9] ("No person shall carry firearms . . . in said park or squares, or within fifty yards thereof[.]").

[186] Wm. Wisner Taylor, Ordinances of the City of Grand Rapids 193 (1897) (enacted 1891), [https://perma.cc/3HXA-5P2E] ("No person shall . . . carry any rifle, gun, or other fire arm of any kind within any park of the City of Grand Rapids[.]").

[187] First Annual Report of the Park Commissioners of the City of Milwaukee 32 (1892) (enacted 1891), [https://perma.cc/4XSH-3CG8] ("All persons are forbidden to carry fire-arms . . . within the parks.").

[188] Annual Report of the Board of Park Commissioners, for the Year Ending December 31, 1892, at 28 (1893), [https://perma.cc/LWU6-8HKX] ("No person shall bring into . . . the parks any firearms[.]").

[189] The Charter of the City of Wilmington 571 (1893), [https://perma.cc/9HBT-Y4CC] ("No person shall carry fire-arms . . . within the Park[.]"); *see also* John M. Rogers, Report of the Board of Park Commissioners, of Wilmington, Del. for the Year ending December 31st, 1897, at 24 (1898), [https://perma.cc/37AK-6MXY] ("No person shall carry firearms . . . within the boundaries of the Park.").

[190] 1895 Mich. Local Acts 596, § 44, [https://perma.cc/9TDB-W2G7] ("No person shall . . . carry firearms . . . within said park or boulevard[.]").

Indiana,[191] and Kansas City, Missouri.[192] A significant number of other, smaller localities also adopted prohibitions on guns in municipal parks during the nineteenth century.[193] This pattern continued in the early decades of the twentieth century, as well—as more cities developed their own park systems, those cities also enacted prohibitions on guns in parks.[194]

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[191] Edgar A. Brown & William W. Thornton, The General Ordinances of the City of Indianapolis 648 (1904) (enacted 1896), [https://perma.cc/GFJ8-6FLT] ("No person shall . . . have possession of any fire-arm within the limits of any public park.").

[192] Frank F. Rozzelle & George R. Thompson, Charter and Revised Ordinances of Kansas City 1898, at 657 (1898), [https://perma.cc/9NX7-6L7J] ("No person shall . . . carry fire-arms . . . within any park, boulevard, parkway or driveway of this city under the control or supervision of the board of park commissioners, except upon a permit first duly obtained or authority previously granted by said board[.]").

[193] Consider H. Willett, Laws and Ordinances Governing the Village of Hyde Park 310 (1876) (enacted 1875), [https://perma.cc/S7A9-BUXP]; *A Digest of the Ordinances of Town Council of the Borough of Phoenixville* 135 (1906) (enacted 1878), [https://perma.cc/A7S2-MYJ5]; Joseph B. Mann et al., The Revised Ordinances of the City of Danville 83 (1883), [https://perma.cc/8J9S-XNBJ]; W. W. Thomson, A Digest of the Acts of Assembly Relating to, and the General Ordinances of the City of Pittsburgh From 1804 to Jan. 1, 1897, with References to Decisions Thereon 496 (1897) (enacted 1893), [https://perma.cc/947V-G4MK]; A Digest of the Laws and Ordinances for the Government of the Municipal Corporation of the City of Reading, Pennsylvania 240 (1897) (enacted 1887), [https://perma.cc/CKV2-NQLQ]; Charter and Ordinances of the City of Bridgeport 200 (1892) (enacted 1889), [https://perma.cc/B6ZM-VVLE]; The Municipal Code of Berlin, Comprising the Charter and the General Ordinances of the City 76 (1890), [https://perma.cc/5RQG-DDBX]; Laws and Ordinances for the Government of the Municipal Corporation of the City of Williamsport, Pennsylvania 141 (1891) (enacted 1890), [https://perma.cc/74W2-6M2X]; Third Annual Report of the Park Commissioners of the City of Lynn, For the Year Ending December 20, 1891, at 23 (1892) (enacted 1891), [https://perma.cc/X2L6-XD98]; Park Commissioners' Report, Springfield, Massachusetts 82 (1897) (enacted 1891), [https://perma.cc/8Y77-54JK]; Wilbert I. Slemmons et al., Laws and Ordinances of the City of Peoria, Illinois 667 (1892), [https://perma.cc/4RXZ-AEQ9]; Rose M. Denny, The Municipal Code of the City of Spokane, Washington, Comprising the Ordinances of the City 316 (1896) (enacted 1892), [https://perma.cc/94B7-HPXZ]; B. M. Chiperfield, Revised Ordinances of the City of Canton, Illinois 240 (1895), [https://perma.cc/GW6X-XVC3]; The Centralia City Code: Comprising Original Charter and Amendments, the Laws of the State of Illinois Relating to the Government of the City of Centralia, General Ordinances, Special Ordinances and Illinois Central Railroad Contract 188 (1896), [https://perma.cc/Z48W-3VKV]; Warren H. Manning, Report of the Board of Park Commissioners of the City of Rochester, N.Y. 1888 to 1898, at 97–98 (1898) (enacted 1896) [https://perma.cc/2FBE-C783]; Ninth Annual Report of the Board of Park Commissioners of Omaha, Nebraska for the Year 1898, at 51 (1899) (enacted 1898), [https://perma.cc/PR7K-6E7S]; Compilation of the Charter and Ordinances of the City of Battle Creek, Michigan 249 (1908) (enacted 1899), [https://perma.cc/572D-8FMC]; Oscar F. Greene, Revised Ordinances of the City of Boulder 157 (1899), [https://perma.cc/AS2J-953E].

[194] Journal of the Common Council Board of the City of Hartford, for 1901-1902, at 818 (1901), [https://perma.cc/FTA2-7F9M]; New Bedford, Mass.: Ninth Annual Report of the Department of Parks of the City of New Bedford, Mass. 1902, at 74 (1903) (enacted 1902), [https://perma.cc/X7J9-SGBD]; First Annual Report of the Board of Trustees of the Pleasure Driveway and Park District of Springfield, Illinois 69 (1902), [https://perma.cc/5ZGG-S8YY]; 44th and 45th Annual Reports of the Board of Park Commissioners to the Mayor and City Council of Baltimore for the Fiscal Years Ending December 31, 1903, 1904, at 142 (1904), [https://perma.cc/EJH9-KZUM]; First Annual Report of the Board of Park Commissioners of the City of Lowell for the Year ending December 31, 1903, at 58 (1904) (enacted 1903), [https://perma.cc/3NQC-KHXF]; Charter and Ordinances of the City of Pasadena, California 214 (1905) (enacted 1903), [https://perma.cc/GTT9-5ZUJ]; John T. Norton, Municipal Ordinances of the City of Troy 375 (1905) (enacted 1903), [https://perma.cc/Z4U3-KDNU]; Roberts

& Crawford, Charter and Revised Code of Ordinances of the City of Houston, Harris County, Texas, to October 31, 1904, at 358–59 (1904), [https://perma.cc/4LXW-DG3Z]; The Ordinances of the City of Neligh, Nebraska 37 (1906) (enacted 1904), [https://perma.cc/9RRW-K5JX]; D. A. Highberger & John A. Martin, Ordinances of the City of Pueblo 383–86 (1908) (enacted 1904), [https://perma.cc/ZEJ8-KDNF]; James M. Lamberton, A Digest of the Laws and Ordinances for the Government of the Municipal Corporation of the City of Harrisburg, Pennsylvania, in Force August 1, A. D. 1906, at 468 (1906) (enacted 1905), [https://perma.cc/B6XK-KDHA]; Annual Report of the Park Commissioners of the City of Haverhill, Massachusetts for the Year Ending December 31, 1905, at 12 (1906) (enacted 1905), [https://perma.cc/7Q83-Q6WA]; Charter of the City of Saginaw, Michigan, with Amendments Thereto and the Acts of the Legislature Relating to or Affecting the City of Saginaw 173 (1905), [https://perma.cc/S2X9-8P7W]; Amendments to "The Revised Municipal Code of Chicago of 1905" and New General Ordinances 40 (1906), [https://perma.cc/J3RE-FD4E]; Charles W. Varnum & J. Frank Adams, The Municipal Code of the City and County of Denver Approved April 12, 1906, at 479 (1906), [https://perma.cc/64BJ-JADK]; Jess E. Stephens & E. H. Delorey, Penal Ordinances of the City of Los Angeles 41–42 (1922) (enacted 1906), [https://perma.cc/KV6C-TJGL]; Charter and Ordinances of the City of Ann Arbor 340–42 (1908) (enacted 1907), [https://perma.cc/4TN8-6SR2]; I Annual Report of the Commissioners of the District of Columbia Year Ended June 30, 1908, at 85 (1908) (enacted 1907), [https://perma.cc/FT6C-UZW4]; A Digest of the Ordinances and Principal Resolutions for the Government of the City of Oil City, in Venango County, Pennsylvania, in Force January 1st, 1907, at 121 (1907), [https://perma.cc/GZV3-BMES]; Richmond C. Hill, Ordinances of the City of Olean as Amended to September 1922, at 26 (1922) (enacted 1907) [https://perma.cc/9BAG-X9V4]; Compiled and Revised General Ordinances and Compilation of Certain Laws of Kansas Directly Affecting Cities of the First Class 479 (1908) (Parsons, Kan.), [https://perma.cc/26MU-7DQN]; Charter and General Ordinances of the City of Portland, Oregon 483 (1910) (enacted 1907), [https://perma.cc/98VD-J8PF]; Charles S. Gleason, The Charter of the City of Seattle, Adopted at the General Election March 3, 1896 as Amended in 1900, 1902, 1904, 1906 and 1908, and the Ordinances of the City of Seattle from December 1, 1869, to November 1, 1907, at 221 (1908) (enacted 1907), [https://perma.cc/4C4J-CRSP]; Ordinances of the City of Flint, Michigan 354 (1925) (enacted 1908), [https://perma.cc/Z7W3-4E8B]; The Compiled Charter and Ordinances of the City of Waterbury 307 (1913) (enacted 1907), [https://perma.cc/R73W-B4NU]; H. Douglass Hughey, A Digest of the Laws, Ordinances and Contracts of the City of Memphis 657–59 (1909), [https://perma.cc/L8NR-FQBC]; General Municipal Ordinances of the City of Oakland, Cal. Addenda at 15 (1909), [https://perma.cc/U72T-DADG]; E. H. Puryear, Constitution, Charter and Revision of the Ordinances and Municipal Laws of the City of Paducah, Kentucky, Under the Charter Act of March 19, 1894 and Amendments Thereto 489 (1910) (enacted 1909), [https://perma.cc/EGK2-Z43Y]; Forty-Sixth Annual Report of the City of Burlington, Vermont 221 (1910), [https://perma.cc/7LJC-MEYU]; William M. Morrisey & Frederick L. Gregory, Ordinances Governing the City of Jacksonville of the State of Illinois 113 (1910), [https://perma.cc/W4S5-QR7P]; The Code of the City of Staunton, Virginia 115 (1910), [https://perma.cc/KRQ8-CEG6]; Charter & Ordinances City of New Britain 233 (1912) (enacted 1911), [https://perma.cc/QFT6-FEB2]; F. L. Sherwin et al., The Code of Colorado Springs 450 (1922) (enacted 1911), [https://perma.cc/T2QU-VN8S]; Arthur F. Cosby, New Code of Ordinances of the City of New York, Including the Sanitary Code, the Building Code and Park Regulations 389 (1926) (enacted 1912), [https://perma.cc/MY9Q-X9WH]; The City of Oklahoma City, Oklahoma: Charter and Revised General Ordinances 327 (1913), [https://perma.cc/PSX9-H5B3]; Salt Lake City, Utah: P. J. Daly, Revised Ordinances of Salt Lake City, Utah 779 (1913), [https://perma.cc/9Y3F-DGJD]; Laws of California and Ordinances of the County and Cities of Los Angeles County, Relating to Minors 68 (1914) (Compton, Cal.), [https://perma.cc/67BA-8BSL]; Laws of California and Ordinances of the County and Cities of Los Angeles County, Relating to Minors 153 (1914) (Monrovia, Cal.), [https://perma.cc/JML6-RWHG]; Charter and Ordinances of the City of New Haven, Conn. and Special Acts Revised to January, 1914, at 438 (1914), [https://perma.cc/W7PT-27LZ]; Charter and Ordinances of the City of Fresno, California 303 (1916), [https://perma.cc/356Z-EU7L]; Henry L. Anderton, The Code of City of Birmingham, Alabama 662 (1917), [https://perma.cc/BBK5-LAZ4]; Municipal Register for the City of Brockton

With the establishment of national parks during the nineteenth century, the federal government also began restricting firearms in those places. Soon after Congress enacted legislation in 1875 creating Mackinac National Park,[195] a rule was adopted providing that "[n]o person shall carry . . . fire-arms in the park,"[196] which stayed in effect until Congress transferred the park to the state of Michigan in 1895.[197] In 1890, the Department of the Interior prohibited the carrying of firearms in Sequoia National Park,[198] and in 1894, with the advent of more rigorous park oversight in Yellowstone National Park, the possession of firearms in Yellowstone National Park was prohibited as well, absent permission of the park superintendent.[199] Carrying firearms without authorization from park authorities was similarly forbidden in General Grant National Park (now Kings Canyon National Park) and Yosemite National Park in 1902.[200] The practice continued as the federal government established new parks in the decades that followed. Firearms were prohibited in Crater Lake National Park (1902),[201] Mount Rainier National Park (1903),[202] Mesa

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for 1918, at 330 (1918) (enacted 1917), [https://perma.cc/FM92-7YUR]; Hugh McIndoe & E.F. Cameron, The Joplin Code of 1917, at 552 (1917), [https://perma.cc/NW9J-QH8U]; The Revised Municipal Code of Aurora, Illinois of 1920, at 377–78 (1920), [https://perma.cc/ZYE7-MALS]; Revised Ordinances of 1921, City of Burlington, Vermont 1 (1921) [https://perma.cc/SHE7-VSY9]; Digest of the Charter and Ordinances of the City of Chattanooga, In Force on January 1st, 1922, at 144–45 (1922), [https://perma.cc/YE4M-KYRA]; Revised Ordinances of the City of St. Joseph, Missouri 420 (1925), [https://perma.cc/45E6-5K3A].

[195] *See* 18 Stat. 517 (1778–1875) (1875).

[196] Dwight H. Kelton, Annals of Fort Mackinac 22 (1882), [https://perma.cc/KWG8-U8VN].

[197] *See* Dwight H. Kelton, Annals of Fort Mackinac 43 (1895), [https://perma.cc/KW5Q-FLJU] ("No person shall carry . . . fire-arms in the park.").

[198] U.S. Department of the Interior, *Rules and Regulations of the Sequoia National Park* § 5, (Oct. 21, 1890), in Annual Report of the Secretary of the Interior CLXII (Nov. 1, 1890), [https://perma.cc/BD9Q-HW5P] ("[N]o one shall carry into or have in the park any fire-arms, traps, nets, tackle, or appliances, or fish or hunt therein without a license in writing signed by the Secretary or superintendent of the park").

[199] U.S. Department of the Interior, *Rules and Regulations of the Yellowstone National Park* § 5, (Aug. 1, 1894), in Report of the Secretary of the Interior 662 (1894), [https://perma.cc/R5MA-2XR4] ("Firearms will only be permitted in the park on written permission of the superintendent thereof. On arrival at the first station of the park guard, parties having firearms will turn them over to the sergeant in charge of the station, taking his receipt for them. They will be returned to the owners on leaving the park.").

[200] *Rules and Regulations of the General Grant National Park*, (June 2, 1902), in Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1903, Miscellaneous Reports, Part I, 553 (1903); *Rules and Regulations of the Yosemite National Park* (June 2, 1902), reprinted in Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1903, Miscellaneous Reports, Part I, 526 (1903). These sources are all available in Firearms Regulations in the National Parks: 1897–1936, National Park Service (2008) at 9–10, 15, https://npshistory.com/publications/ranger/np-firearms-regs-history.pdf [https://perma.cc/5SRK-VYXZ].

[201] Rules and Regulations of the Crater Lake National Park (August 27, 1902) reprinted in Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1903, Miscellaneous Reports, Part I Bureau Officers, etc. 567 (Washington: Gov't Printing Office, 1903) (documented in Firearms Regulations in the National Parks, *supra* note 200, at 28–29).

[202] Regulations of Aug. 1, 1903 (reprinted in Firearms Regulations in the National Parks, *supra* note 200, at 33).

Verde National Park (1908),[203] and Platt National Park (1908),[204] shortly after those parks were established. The Department of Agriculture banned firearms on the Pelican Island Reservation in 1903,[205] and by 1910, guns were prohibited at all national monuments as well.[206] In 1936, the National Parks Service issued a system-wide prohibition on guns "in all the National Parks, National Monuments, National Military Parks, National Historical Parks, Battlefield Sites, and miscellaneous memorials . . . except upon written permission of the superintendent or custodian."[207] Likewise, in 1946, when the Army Corps of Engineers began to operate recreational areas around federally controlled dams and reservoirs, it too prohibited firearm possession in those locations.[208] Meanwhile, as these developments unfolded, states began establishing state parks,[209] and similarly enacted restrictions that generally prohibited carrying usable firearms in these parks, with a few of the less rigorous restrictions requiring only that guns be unloaded and secured before entry.[210]

Prohibitions on firearms in state parks also proliferated in tandem with state park development in the early twentieth century. Specific legislation restricting firearms in state parks appeared as early as 1901,[211] and by 1936, at least 19 states prohibited firearms in state parks or similar state-controlled park and public recreational areas, including Minnesota,[212] Massachusetts,[213]

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[203] Regulations of March 19, 1908 (reprinted in Firearms Regulations in the National Parks, *supra* note 200, at 38).

[204] Regulations of June 10, 1908 (reprinted in Firearms Regulations in the National Parks, *supra* note 200, at 25).

[205] Exec. Order, March 14, 1903, reprinted in 21 The Auk: A Quarterly Journal of Ornithology 123 (1904) ("No trespassing allowed, nor firearms permitted on the island."), [https://perma.cc/5HF7-PZQC].

[206] Regulations of Nov. 19, 1910 (reprinted in Firearms Regulations in the National Parks, *supra* note 200, at 58–59). Firearms were previously prohibited in Muir Woods National Monument by a 1908 regulation. *See* Firearms Regulations in the National Parks, supra note 200, at 59 n.7.

[207] 1 Fed. Reg. 672, 674 (June 27, 1936).

[208] *See* 11 Fed. Reg. 9278, 9279 (Aug. 24, 1946) (initially codified at 36 C.F.R. § 301.8).

[209] *See generally* Beatrice Ward Nelson, State Recreation; Parks, Forests and Game Preserves 3–6 (1928).

[210] In 1894, for example, the commission appointed to manage the areas of Yosemite Valley and Mariposa Grove—areas maintained as a state park by the State of California until the lands became part of Yosemite National Park in 1906—proposed a restriction for visitors to "deposit all firearms, unloaded" before entry into the park. Biennial Report of the Commissioners to Manage the Yosemite Valley and the Mariposa Big Tree Grove 11 (1894), [https://perma.cc/FA4H-UFLE] ("Campers will deposit all firearms, unloaded, with the Guardian, taking receipt therefor, and the same will be returned when the owners leave the Valley"). As California developed a more holistic state parks system into the twentieth century, it restricted guns in state parks in a similar fashion. *See e.g.*, I Digest of Laws Relating to State Parks 20 (1936), [https://perma.cc/XNP4-4ASH] ("Firearms are not allowed, and must be sealed or checked at the Warden's Office.").

[211] *See, e.g.*, 1901 Minn. Laws 396–97, ch. 250, § 1 ("Any person who shall . . . in any manner whatsoever . . . have in their possession loaded or charged firearms at any point within three thousand (3,000) feet of the outward limits of, or proposed outward boundary line or limits of any . . . state park within this state, shall be guilty of a misdemeanor[.]"); *see also* 1905 Minn. Laws 620, ch. 344, § 53 (prohibiting firearms within state parks or within "one-half mile of the outer limits" of a state park, unless the firearm is unloaded and has been sealed by the park commissioner).

[212] *Id.*

[213] *See* 7 Metropolitan Park Commission Minutes 4–18 (1905), https://archive.org/details/metropolitanpark07mass/page/6/mode/2up?view=theater [https://perma.cc/

Maryland,[214] Wisconsin,[215] Connecticut,[216] North Carolina,[217] Washington,[218] Indiana,[219] South Dakota,[220] Michigan,[221] Kansas,[222] New Jersey,[223] Alabama,[224]

G5AL-3E5L] (enacting separate firearm prohibitions in 9 state reservations utilized for public recreation).

[214] Report of the Maryland State Board of Forestry for 1916 and 1917, at 60–61 (1917), [https://perma.cc/96Y9-BTYT] ("RULES AND REGULATIONS OF THE MARYLAND STATE BOARD OF FORESTRY . . . [Uses like camping require a permit; permittees and their guests] . . . [w]ill not bring into the Patapsco State Park or have in his or their possession while there fire-arms of any description[.]"); *see also* 1927 Md. Laws 1176, ch. 568, § 74 ("Where any portion of a State Game Refuge is used for a State Park, entry by any person within the refuge area for recreational pursuits shall not be restricted on the portion of said territory used as a State Park, so long as such persons do not carry fire-arms[.]").

[215] 1917 Wis. Sess. Laws 1243–44, ch. 668, § 29.57, pt. 4 ("No owner of lands embraced within any such wild life refuge, and no other person whatever, shall . . . within the boundaries of any wild life refuge, state park, or state fish hatchery lands . . . have in his possession or under his control therein any gun or rifle, unless the same is unloaded and knocked down or enclosed within its carrying case[.]"); *see also* Biennial Report of the State Conservation Commission of Wisconsin for the Years 1915 and 1916, at 87 (1916), [https://perma.cc/4ACC-4SRP] ("The following rules and regulations have been adopted [for state parks] . . . [T]he carrying or using of fire arms is strictly prohibited[.]"); Wisconsin State Parks 23 (1933), [https://perma.cc/PZ6N-3DRZ] ("[T]he carrying or using of firearms is strictly prohibited.").

[216] Report of the State Park Commission to the General Assembly for the Fiscal Year ended September 30, 1914, at 28–29 (1914), [https://perma.cc/UUF8-LZJ4] ("Proposed rules and regulations for use of the State Parks. . . . would involve the prohibition of firearms[.]"); Report of the State Park Commission to the Governor For the Two Fiscal Years ended September 30, 1918, at 31 (1918), [https://perma.cc/39HM-LZXK] ("The use of firearms or having them in possession is forbidden[.]").

[217] 1921 N.C. Sess. Laws 54, Pub. Laws Extra Sess., ch. 6, § 3 ("That any person who shall carry a pistol, revolver, or gun in any park or reservation [for the protection, breeding, or keeping of any animals, game, or other birds], without having first obtained the written permission of the owner or manager of said park or reservation, shall be guilty of a misdemeanor[.]").

[218] Raymond H. Torrey, State Parks and Recreational Uses of State Forests in the United States 247 (1926), [https://perma.cc/5X75-ZL7R] ("Among the regulations [of Washington State Parks] which experience has required for conservation, sanitation, cleanliness and good order are prohibitions against fire arms, unleashed dogs, damaging or removing shrubs and trees, and a speed limit of more than 25 miles an hour. Visitors are required to register."); Beatrice Ward Nelson, State Recreation; Parks, Forests and Game Preserves 278 (1928), [https://perma.cc/K2U7-JDQZ] ("The caretakers of the park, and other employees whom the committee may care to designate, are vested with police powers to enforce the laws and the rules and regulations. Among the regulations are the prohibition of firearms[.]").

[219] 1927 Ind. Acts 98 ("[U]pon any lands of this state now or hereafter used for a state park . . . it shall be unlawful for any person to go upon such lands of this state with a gun[.]"); *see also* The Department of Conservation State of Indiana Publication No. 68, at 181 (1927), [https://perma.cc/V73C-LE9Y] ("The carrying or possession of a gun or firearms is prohibited.").

[220] 1927 S.D. Sess. Laws 32, ch. 12, § 16 ("It shall be unlawful to carry fire arms in [Custer State Park], except by duly authorized officers[.]").

[221] Fourth Biennial Report 1927-1928: The Department of Conservation State of Michigan 57 (1928), [https://perma.cc/W7HL-8RTL] ("To carry or have firearms in possession in a State Park is unlawful.").

[222] Third Biennial Report of the Forestry, Fish and Game Commission of the State of Kansas for the Period Ending June 30, 1930, at 23 (1930), [https://perma.cc/5DSL-FNYX] ("To carry or have firearms in possession in a state park is unlawful.").

[223] 1935 N.J. Laws 304–05, ch. 114, § 2 ("No person shall . . . (8) except employees or officers of the commissioners, carry firearms of any description within [Palisades State Park], or carry any airgun, sling shot, bow and arrow, or any other device whereby a missile may be thrown, without a permit from the commissioners[.]").

[224] I Digest of Laws Relating to State Parks *4* (1936), [https://perma.cc/Z99V-FXRU] ("Fire-arms are rigidly excluded from State Parks[.]").

California,[225] Florida,[226] New York,[227] Ohio,[228] Rhode Island,[229] and Virginia.[230] Restrictions of this sort became a matter of course as more states across the country acquired lands for state parks and established state parks systems for their administration.[231] As the various state parks systems developed into the mid-twentieth century, firearms regulations multiplied alongside them.[232]

IV. Responding to Decisions Striking Down Firearms Restrictions in Parks

The evidence supporting a historical tradition of gun regulation in parks is substantial; however, since *Bruen*, at least five federal district courts have determined that modern bans on guns in parks are unconstitutional,[233] and one federal court of appeals panel expressed ambivalence as to the constitutionality of these restrictions in more remote wilderness parks.[234] This is, in part, because of the limited record of historical parks regulations available at the time those cases were decided.[235] This Article, as well as the work the

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[225] *Id.* at 20 ("Firearms are not allowed, and must be sealed or checked at the Warden's Office."); *see also* Administration and Maintenance of Parks: California State Park System (1938) (§ 7) ("No person shall carry or have firearms in any state park[.]").

[226] I Digest of Laws Relating to State Parks 35 (1936) (§ 4), [https://perma.cc/95ZF-S82U] ("Firearms are prohibited within the Park except upon written permission of the Superintendent.").

[227] II Digest of Laws Relating to State Parks 190 (1936) (§ 8) ("The following acts and activities are prohibited within [Niagara Frontier State Park] areas under jurisdiction of this Commission except by permit: The possession of any firearms . . . of any kind[.]"), [https://perma.cc/NRB6-TZD4]; *see also id.* at 195, 201, 205, 221, 228, 236, 255, 264 (restrictions on firearms in eight other park regions administered by separate state commissions).

[228] III Digest of Laws Relating to State Parks 321 (1936) (§ 5), [https://perma.cc/M6E2-TRAU] ("[T]he carrying of firearms, loaded or unloaded, in any state park under the control of the Ohio State Archaeological and Historical Society, is positively forbidden.").

[229] *Id.* at 360 ("REPRESENTATIVE RULES AND REGULATIONS [of the Division of Forests, Parks & Parkways] . . . No person shall . . . have in his possession any firearm[.]"); *see also* Sixth Annual Report of the Board of Metropolitan Park Commissioners 115 (1910), [https://perma.cc/D3CR-3RKQ] ("At Edgefield Beach . . . no dangerous weapons shall be brought on the reservation[.]").

[230] III Digest of Laws Relating to State Parks, supra note 228,at 397 ("Firearms are prohibited at all times.").

[231] *See e.g.*, Seventh Biennial Report of The Mississippi Forestry Commission and The First Biennial Report of The Mississippi State Board of Park Supervisors 105 (1939), [https://perma.cc/X3ZF-MP46] ("Firearms of any kind will not be permitted within a park except when carried by a lawful officer.").

[232] These rules could also come from government entities beyond legislatures and state park commissions. *See, e.g.*, Fifty-third Annual Report of the Railroad Commissioners of the State of New Hampshire 26 (1897) (§ 1), [https://perma.cc/9GHD-W7CQ] ("Rules and Regulations to be Observed by all Visitors at Contoocook River Park . . . . discharging firearms, or unnecessarily carrying them about in the park are forbidden."); The World Almanac and Encyclopedia 563 (1918), [https://perma.cc/6KR7-YSXA] ("The Palisades Interstate Park is a game refuge in which firearms of any description are not allowed.").

[233] *See* Antonyuk v. Hochul, 639 F. Supp. 3d 232, 323–25 (N.D.N.Y. 2022); Koons v. Platkin, 673 F. Supp. 3d 515, 639–42 (D.N.J. 2023); Wolford v. Lopez, 2023 WL 5043805, at *21–22 (D. Haw. Aug. 8, 2023); Springer v. Grisham, 2023 WL 8436312, at *5–8 (D.N.M. Dec. 5, 2023); May v. Bonta, 2023 WL 8946212, at *12–13 (C.D. Cal. Dec. 20, 2023).

[234] *See* Antonyuk v. Chiumento, 89 F.4th 271, 362 (2d Cir. 2023).

[235] In *Antonyuk*, New York presented only eight 19th-century laws that specifically prohibited firearm possession in public parks. *See* 89 F.4th at 356; *Cf. Parks Restrictions*, Everytown

authors have done identifying historical prohibitions on firearms in parks, is intended to reveal the significant regulatory tradition relevant to these types of cases.

Courts have also given other reasons for discounting the vast history of prohibitions on guns in parks. In the *Antonyuk* district court decision, the Northern District of New York gave little weight to park restrictions enacted by municipalities or local park commissions.[236] The court stated that "to the extent these laws come from a handful of cities, the Court has trouble finding that they constitute part of this Nation's tradition of firearm regulation."[237] The court noted that together the cities "amounted to only about 1,608,355 [people], or only about 4.17 percent of the population of the United States."[238] Devaluing *city* laws, however, is an odd approach given that modern parks originated in *cities*. The court's logic here is at odds with the way this form of regulation emerged: The regulatory history of guns in parks is considered unrepresentative because carrying guns in parks was prohibited only in local jurisdictions that had created parks. It seems clear that, when assessing how widespread a tradition of regulation in a sensitive place is, courts should consider restrictions in those jurisdictions that actually housed the sensitive places, rather than looking to jurisdictions that did not. To do otherwise would be like saying, for example, a regulation governing large football stadiums is not a regulatory tradition in New Jersey because it exists only in Piscataway, Princeton, and East Rutherford, cities home to only 97,000 of New Jersey's 8.8 million people (a mere one percent). That those cities are also home to the stadiums of Rutgers and Princeton Universities, the state's largest college football programs, as well as two NFL teams, the New York Giants and New York Jets, seems the more relevant data.

Some decisions have also found that parks regulations came too late in time to be consistent with the Second Amendment's text, history, and tradition.[239] These cases argue that because prohibitions on guns in parks did not exist at the Founding, prohibitions on guns in parks are unconstitutional. This approach is wrong for two reasons.

First, prohibitions on guns in parks come from the most relevant historical period (especially for challenges to state and local laws): the period surrounding the ratification of the Fourteenth Amendment. The Constitution's protection of the right to keep and bear arms did not constrain the states until 1868.[240] As the *Bruen* majority wrote, a state "is bound to respect the

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Center for the Defense of Gun Safety, https://everytownlaw.org/everytown-center-for-the-defense-of-gun-safety/sensitive-places/parks-restrictions/ [https://perma.cc/9KJZ-K7RT] (last visited March 23, 2024) (citing, excerpting, and linking to over 100 historical restrictions on guns in parks).

[236] Antonyuk v. Hochul, 639 F. Supp. 3d 232, 325–26 (N.D.N.Y. 2022).

[237] *Id.* at 300.

[238] *Id.*

[239] *Koons,* 2023 WL 3478604, *83–84; *see also Antonyuk*, 639 F. Supp. 3d at 323 ("Similarly, to the extent the laws come from the last decade of the 19th century (i.e., the 1893 Pittsburgh law and 1895 Detroit law), the Court discounts their weight, because of their diminished ability to shed light on the public understanding of the Second Amendment in 1791 and/or of the Fourteenth Amendment in 1868.").

[240] *See generally* McDonald v. City of Chicago, 561 U.S. 742, 749 (2010).

right to keep and bear arms because of the Fourteenth Amendment, not the Second."[241] And as the people chose to extend the Bill of Rights to the states in 1868, their understanding of the scope of each right at *that* time should control any originalist analysis today. Looking to 1791 for the scope of a right ratified in 1868 would appear to violate the mandate of both *Heller* and *Bruen*: "'Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.'"[242] In the pre-*Bruen* era, several circuit courts adopted an 1868 approach when analyzing the tradition of firearm regulation at the first, historical step of the framework that these courts applied after *Heller*.[243] The Second Circuit and a now-vacated panel decision of the Eleventh Circuit reached the same conclusion post-*Bruen*.[244] The view that the 1868 understanding should control, at least in challenges to state and local laws, is also "ascendant among originalists."[245] As discussed above, the

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[241] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 37 (2022).

[242] *Id.* at 34 (quoting District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008)).

[243] Ezell v. City of Chicago, 651 F.3d 684, 702 (7th Cir. 2011) ("[W]hen state- or local-government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified."); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012) (following *Ezell*); Gould v. Morgan, 907 F.3d 659, 669 (1st Cir. 2018) ("Because the challenge here is directed at a state law, the pertinent point in time would be 1868 (when the Fourteenth Amendment was ratified)."); *see also Bruen*, 597 U.S. at 19 (concluding that "[s]tep one of the predominant framework [applied in the lower courts before *Bruen*] is broadly consistent with *Heller*").

[244] Antonyuk v. Chiumento, 89 F.4th 271, 305 (2d Cir. 2023) ("We therefore agree with the decisions of our sister circuits—emphasizing "the understanding that prevailed when the States adopted the Fourteenth Amendment"—is, along with the understanding of that right held by the founders in 1791, a relevant consideration."); Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1323–24 (11th Cir. 2023), *vacated on grant of reh'g en banc*, No. 21-12314, 2023 WL 4542153 (July 14, 2023) ("This is necessarily so if we are to be faithful to the principle that constitutional rights are enshrined with the scope they were understood to have when the people adopted them. As with statutes, when a conflict arises between an earlier version of a constitutional provision (here, the Second Amendment) and a later one (here, the Fourteenth Amendment and the understanding of the right to keep and bear arms that it incorporates), the later-enacted provision controls to the extent it conflicts with the earlier-enacted provision . . . . The opposite rule would be illogical."); *see also* Md. Shall Issue, Inc. v. Montgomery Cnty., No. 8:21-cv-01736, 2023 WL 4373260, at *8 (D. Md. July 6, 2023) (concluding that "historical sources from the time period of the ratification of the Fourteenth Amendment are equally if not more probative of the scope of the Second Amendment's right to bear arms as applied to the states by the Fourteenth Amendment"); Kipke v. Moore, Nos. 1:23-cv-01293 & 1:23-cv-01295 (consol.), 2023 WL 6381503, at *6 (D. Md. Sept. 29, 2023) (agreeing with *Maryland Shall Issue*); We the Patriots, Inc. v. Lujan Grisham, No. 1:23-cv-00771, 2023 WL 6622042, at *8 (D.N.M. Oct. 11, 2023) (agreeing with *Bondi* and *Maryland Shall Issue* that Reconstruction-era sources "are more probative" than founding-era sources as to the Second Amendment's scope).

[245] Evan D. Bernick, *Fourteenth Amendment Confrontation*, 51 Hofstra L. Rev. 1, 23 (2022); *see also* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 115–16, 116 n.485 (2008) (asserting that "[Akhil] Amar is exactly right" that 1868 meaning controls); Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 Geo. J.L. & Pub. Pol'y 1, 52 (2010) ("1868 is . . . the proper temporal location for applying a whole host of rights to the states, including the right that had earlier been codified as the Second Amendment . . . . Interpreting the right to keep and bear arms as instantiated by the Fourteenth Amendment—based on the original public meaning in 1791—thus yields an inaccurate analysis."); Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, But the Fourteenth Amendment May*, 45 San Diego L. Rev. 729, 748 (2008); Stephen A. Siegel, *Injunctions for*

tradition of prohibiting guns in parks was well underway by the time of the ratification of the Fourteenth Amendment and continued uninterrupted in the decades afterwards. This is undoubtedly the kind of historical tradition the Court envisioned in *Bruen*.

Second, even if 1791 were the most relevant time period, the Supreme Court left the door open for the consideration of parks regulations enacted later in the historical record. In *Bruen*, the Court stated that in "cases implicating unprecedented societal concerns or dramatic technological changes," "a more nuanced approach" to historical analogy would be required.[246] The majority acknowledged that "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868."[247] The parks movement represented a change in social circumstances; the parks themselves, and even the urban centers they were first created to improve, did not exist at the Founding. Under an analogical approach, prohibitions on guns in parks should survive constitutional scrutiny.

Another reason courts have given for rejecting the extensive history of gun regulation in parks is the idea that these bans on guns in parks were merely round-about hunting prohibitions.[248] While some prohibitions do reflect a concern about interference with wildlife,[249] the safety concerns from shooting guns at birds in busy parks would likely not be limited to injuries to birds.[250] And even when regulations expressed concerns about hunting, it was often in the disjunctive with the carry prohibition. For example, the St. Paul's ordinance stated: "No person shall carry firearms or shoot birds in any Park or within fifty yards thereof . . . ."[251] In general, though, early

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Defamation, Juries, and the Clarifying Lens of 1868, 56 Buff. L. Rev. 655, 662 n.32 (2008) ("I am unable to conceive of a persuasive originalist argument asserting the view that, with regard to the states, the meaning of the Bill in 1789 is to be preferred to its meaning in 1868."); Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 Ind. L.J. 1439, 1441 (2022); Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction xiv, 223, 243 (1998) (noting that a "particular principle in the Bill of Rights may change its shape in the process of absorption into the Fourteenth Amendment").

[246] *Bruen*, 597 U.S. at 27.

[247] *Id.*

[248] Koons v. Platkin, 2023 WL 3478604, *84 (D.N.J. 2023).

[249] 1868 Pa. Laws 1088, No. 1020, § 21, pt. II ("No person shall carry fire arms or shoot birds in the park or within fifty yards thereof[.]"); Fourth Annual Report of the Buffalo Park Commissioners 24 (1874) (ch. 1, § 1) ("All persons are forbidden to carry fire-arms or fire at or shoot any bird or animal . . . within the several parks[.]"); Annual Reports of the City Officers and City Boards of the City of Saint Paul 689 (1889) ("No person shall carry firearms or shoot birds in any Park or within fifty yards thereof[.]").

[250] *See supra* note 144; *see also* Henry A. Ward, Annals of Richfield 65 (1898), [https://perma.cc/V822-NHSS] (detailing an 1880 term on conveyance of land for Woodside Park in Richfield Springs, NY that prohibited "[t]he use of . . . any manner of fire-arms, air-gun, or any weapon or instrument which may be dangerous to the safety of visitors, or used to kill birds[.]").

[251] Annual Reports of the City Officers and City Boards of the City of Saint Paul 689 (1889) ("No person shall carry firearms or shoot birds in any Park or within fifty yards thereof . . . ."); *see also* 1868 Pa. Laws 1088, No. 1020, § 21, pt. II ("No person shall carry fire arms or shoot birds in [Fairmount Park] or within fifty yards thereof[.]"); City of Trenton, New Jersey, Charter and Ordinances 390 (1903) (§ 8) ("No person shall carry firearms . . . in said park or squares, or within fifty yards thereof[.]"); *but see* Annual Report of the Board of Park Commissioners, for the Year Ending December 31, 1892, at 28 (1893) (§ 13) ("No person shall bring into or discharge within the parks any firearms or other device by which

prohibitions did not reference hunting at all. New York's 1858 prohibition on guns in Central Park stated: "All persons are forbidden . . . to carry fire-arms or to throw stones or other missiles within it."[252] Essentially identical language was used for Prospect Park, Tower Grove Park in St. Louis, and parks within Chicago.[253] Golden Gate Park made it illegal "to carry or especially to discharge firearms."[254] Residents of Boston were prohibited "to discharge or carry firearms, except by members of the police force in the discharge of their duties."[255] And many other prohibitions used similar non-hunting-focused language.[256] As discussed above, the disturbances caused by shooting—and even the mere presence of firearms in these spaces—were inconsistent with the kind of repose and tranquil recreation the early parks were intended to provide.

However, even if there was not a clear tradition of prohibiting guns to protect people, rather than animals, it is unclear why the specific motivation for historical prohibitions should limit modern lawmakers to identical motivations today. In *Bruen*, the Court said that "features that render regulations relevantly similar" include "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[257] The Court then elaborated that "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry."[258] To spend so many pages discussing analogy just to conclude, in sum, that

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birds or animals may be killed, injured, or frightened; no person shall throw stones or missiles within the parks.").

[252] Minutes of Proceedings of the Board of Commissioners of the Central Park, for the Year Ending April 30, 1858, at 166 (1858).

[253] Annual Reports of the Brooklyn Park Commissioners 136 (1873) ("All persons are forbidden . . . [t]o carry firearms . . . within [Prospect Park.]"); Murray F. Tuley, Laws and Ordinances Governing the City of Chicago 88 (1873) ("All persons are forbidden to carry firearms or throw stones or other missiles within any one of the public parks."); David H. MacAdam, Tower Grove Park of the City of St. Louis 117 (1883).

[254] San Francisco Municipal Reports for the Fiscal Year 1874-5, Ending June 30, 1875, at 887 (1875).

[255] Thirteenth Annual Report of the Board of Commissioners for the Year 1887, at 86 (1888).

[256] A Digest of the Laws and Ordinances for the Government of the Municipal Corporation of the City of Reading, Pennsylvania 240 (1897) (§ 20, pt. 8) ("No person shall carry firearms, or shoot in the common, or within fifty yards thereof[.]"); The Revised Ordinances of Salt Lake City, with the City Charter and Amendments Thereto 248 (1888) (§ 6) ("No person shall, within Liberty Park . . . [c]arry or discharge firearms."); The Municipal Code of Berlin, Comprising the Charter and the General Ordinances of the City 76 (1890) (§ 263) ("All persons are forbidden to carry fire arms or to throw stones or other missils within anyone of the public parks of this City."); Laws and Ordinances for the Government of the Municipal Corporation of the City of Williamsport, Pennsylvania 141 (1891) (§ 1, pt. 21) ("No person shall carry fire-arms, or shoot in the park, or discharge any fireworks, or throw stones or missiles therein."); First Annual Report of the Park Commissioners of the City of Milwaukee 32 (1892) (§ 3) ("All persons are forbidden to carry fire-arms, or to throw stones or other missiles within the parks."); Park Commissioners' Report, Springfield, Massachusetts 82 (1897) (§ 3) ("[W]ithin the Public Parks, except with prior consent of the Board, it is forbidden . . . to discharge or carry firearms, firecrackers, torpedoes or fireworks"[.]"); Third Annual Report of the Park Commissioners of the City of Lynn, For the Year Ending December 20, 1891, at 23 (1892) (§ 3) ("[W]ithin the limits of Lynn Woods, except with the prior consent of the Board, it is forbidden . . . to discharge or carry firearms[.]").

[257] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 29 (2022).

[258] *Id.*

modern laws are analogous to historical ones only when they have an identical impact on the right and are adopted for exactly the same purpose would seem counterintuitive, to say the least. It would be especially bizarre if the historical-analogical method allowed the government to prohibit firearms for the protection of the squirrels living in parks but not to adopt identical measures for the protection of the people visiting.[259]

Conclusion

In *Bruen*, the Supreme Court made clear that a modern law can survive a constitutional challenge brought under the Second Amendment if the government can "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[260] The American parks movement and the contemporaneously enacted regulations that forbade firearms within those parks are the first links in a long regulatory chain that connects directly to modern prohibitions on guns in parks today. From early enactments by localities to the restrictions imposed in national and state parks, these laws constitute an unbroken line of authority establishing that prohibitions on firearms in parks—city and suburban parks, state parks, and national parks—are consistent with our nation's historical tradition of firearm regulation. Under *Bruen*, this historical record of restrictions leaves little doubt that prohibiting guns in parks today is constitutional.

[259] In some contexts, a legislature's purpose or motivations can play a role in deciding a law's constitutionality, but generally only when the purpose or motivation relates to an otherwise neutral law intended to accomplish an unconstitutional purpose. *See generally* Leon Friedman, *Intent, Purpose, and Motivation in Constitutional Litigation*, 15 Touro L. Rev. 1607 (1999).

[260] *Bruen*, 597 U.S. at 17.