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The Faces of the Second Amendment Outside the Home, Take Three: Critiquing the Circuit Courts Use of History-in-Law

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THE FACES OF THE SECOND AMENDMENT
OUTSIDE THE HOME, TAKE THREE: CRITIQUING
THE CIRCUIT COURTS USE OF HISTORY-IN-LAW

PATRICK J. CHARLES*

ABSTRACT
This article seeks to critique the circuit courts’ varying history-in-law approaches, as well as to provide advice on the proper role that history-in-law plays when examining the scope of the Second Amendment outside the home. This article sets forth to accomplish this task in three parts. Part I argues why history-in-law is appropriate when adjudicating Second Amendment decisions outside the home. Part II examines the benefits and burdens of utilizing history-in-law as a method of constitutional interpretation, while breaking down the alternative approaches employed by circuit courts when adjudicating Second Amendment decisions outside the home. Lastly, Part III offers practical advice on the use of history-in-law moving forward.

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In the decade since the Supreme Court decided *District of Columbia v. Heller*, there has been extensive commentary on the scope of the Second Amendment outside the home. And recently, with the Court having granted certiorari in *New York State Rifle & Pistol Association, Inc. v. City of New York, New York*, the topic is of particular importance. In many instances, given *Heller'*s focus on text, history, and tradition, much of the commentary centers on history-in-law; that is, the study of how the law has evolved in a particular area, what events and factors caused the law to evolve, and how—if at all—this history is important for the courts when adjudicating constitutional questions. Understandably, given how much the public, political, and


legal discourse surrounding the Second Amendment has changed over the past two centuries, there is a variance of scholarly opinion when it comes to history-in-law and the Second Amendment outside the home. Some legal commentators have opined that the rich history of armed carriage regulations from the thirteenth-century through the eighteenth-century is informative. Meanwhile, others have signaled that the history of the Antebellum South should serve as the constitutional baseline. There are indeed other opinions, including a small minority of legal commentators who call for dispensing with history-in-law altogether.

There is also a variance of history-in-law approaches to the Second Amendment outside the home among the circuit courts. Some circuit courts have approached history-in-law with scholarly vigor. Others have tailored any history-in-law analysis to coincide with the historical pronouncements in *Heller.* Meanwhile, a handful of


6 See, e.g., Cornell, The Right to Keep and Carry Arms in Anglo-American Law, supra note 4, at 15-44; Charles, Faces of the Second Amendment, supra note 4, at 7–43; Charles, Scribble Scribble, supra note 3, at 1822–40.

7 See, e.g., Kopel, The First Century of Right to Arms Litigation, supra note 3, at 127–86; O'Shea, supra note 4, at 585–676.

8 See, e.g., Griepsma, supra note 2, at 284–311; Beard, supra note 2, at 215–38.

9 See, e.g., Peruta v. Cty. of San Diego (*Peruta II*), 824 F.3d 919, 926 (9th Cir. 2016) (en banc); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 84 (2d Cir. 2012).

10 See, e.g., Wrenn v. District of Columbia, 864 F.3d 650, 658 (D.C. Cir. 2017); Moore v. Madigan, 702 F.3d 933, 935 (7th Cir. 2012).
circuit courts have made the conscious decision to forego engaging in history-in-law altogether.\(^{11}\)

This article sets forth to critique the circuit courts' varying history-in-law approaches, as well as provide advice on the proper role that history-in-law should play when examining the scope of the Second Amendment outside the home—advice that hopefully the Supreme Court will take into account when the Justices hear their first Second Amendment outside the home case next term. This article sets forth to accomplish this task in three parts. Part I makes the case why history-in-law is appropriate when adjudicating the Second Amendment outside the home. Part II briefly examines the benefits and burdens of utilizing history-in-law as a method of constitutional interpretation, and then proceeds to break down the different approaches the circuit courts use when adjudicating Second Amendment outside the home claims. Lastly, based on the lessons learned from the different history-in-law approaches used by the circuit courts, Part III offers practical advice on the use of history-in-law moving forward when adjudicating the Second Amendment outside the home.

I. WHY HISTORY-IN-LAW WHEN ADJUDICATING THE SECOND AMENDMENT OUTSIDE THE HOME?

The use of history-in-law is a time honored tradition in American jurisprudence.\(^{12}\) Since the Constitution's inception, lawyers and jurists have relied on history, in one form or another, to adjudicate questions and controversies.\(^{13}\) History-in-law is particularly applicable when courts hear constitutional cases of the first impression.\(^{14}\) The reason for this is straightforward; without case precedent to guide or instruct the courts, courts will seek solace in another form of precedent—history. Whether it is historical texts, events, or tradition, history provides the courts with an authoritative starting point from which to judicially reason. This is not to say that history-in-law is

\(^{11}\) See Gould v. Morgan, 907 F.3d 659, 670 (1st Cir. 2018) (implying via Heller's "tea leaves" that "the Second Amendment is not limited to the home"); Drake v. Filko, 724 F.3d 426, 431 (3d Cir. 2013) (refusing to engage "in a full-blown historical analysis given other courts' extensive consideration of the history and tradition of the Second Amendment"); NRA of Am., Inc. v. McCraw, 719 F.3d 338, 347 (5th Cir. 2013) (holding age-based restrictions on concealed carry licenses to be longstanding without any history-in-law analysis); Woollard v. Gallagher, 712 F.3d 865, 875 (4th Cir. 2013) (declining to "impart a definitive ruining on the scope of the Second Amendment outside the home"); United States v. Masciandaro, 638 F.3d 458, 466 (4th Cir. 2011).


\(^{14}\) See generally Lorianne Updike Toler et al., *Pre-Originalism*, 36 HARV. J.L. & PUB. POL’Y 277 (2012) (providing data on the different uses of history by the Supreme Court when adjudicating cases and controversies of first impression).
never used when adjudicating cases that are not of the first impression.\textsuperscript{15} It should be noted, however, that the more case precedent there is relevant to a particular constitutional question, the less likely it is that a court will lean towards using history-in-law as a jurisprudential tool.\textsuperscript{16} In other words, there is a precedential sliding scale when it comes to the courts using history-in-law. The less case precedent that is available regarding any particular constitutional question, the more likely it is that a court will resort to history-in-law.

This precedential sliding scale on the use of history-in-law has been front and center as circuit courts have wrestled with the question: "What is the scope of the Second Amendment outside the home?"\textsuperscript{17} There are two underlying reasons for this. First, \textit{Heller} left this question open (as well as many other Second Amendment questions),\textsuperscript{18} and this in itself is justification for the use of history-in-law.\textsuperscript{19} Second, there is virtual unanimity among the circuit courts that \textit{Heller} strongly suggests history-in-law must serve as a jurisprudential guide.\textsuperscript{20} Essentially, the way the circuit

15 See, e.g., Binderup v. AG of United States, 836 F.3d 336, 348 (3rd Cir. 2016).

16 See Masciandaro, 638 F.3d at 466.

17 Compare Bonidy v. United States Postal Serv., 790 F.3d 1121, 1124 (10th Cir. 2015), and Culp v. Madigan, 840 F.3d 400, 403 (7th Cir. 2016), with Peterson v. Martinez, 707 F.3d 1197, 1209–11 (10th Cir. 2013), and Moore v. Madigan, 702 F.3d 933, 936–37 (7th Cir. 2012).

18 See Peruta v. Cty. of San Diego (\textit{Peruta I}), 742 F.3d 1144, 1150 (9th Cir. 2014), rev'd en banc, 824 F.3d 919 (9th Cir. 2016) ("It doesn't take a lawyer to see that straightforward application of the rule in \textit{Heller} will not dispose of this case. It should be equally obvious that neither \textit{Heller} nor \textit{McDonald} speaks explicitly or precisely to the scope of the Second Amendment right outside the home or to what it takes to 'infringe' it."); Drake v. Filko, 724 F.3d 426, 431 (3d Cir. 2013) ("It remains unsettled whether the individual right to bear arms for the purpose of self-defense extends beyond the home."); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 88 (2d Cir. 2012) ("\textit{Heller} provides no categorical answer to this case. And in many ways, it raises more questions than it answers."); id. at 89 ("What we do not know is the scope of [the Second Amendment] beyond the home and the standards for determining when and how the right can be regulated by a government."); Masciandaro, 638 F.3d at 466 ("But in [deciding \textit{Heller}], the Court did not define the outer limits of the Second Amendment right to keep and bear arms.").

19 The only constitutional question that \textit{Heller} definitively answered is that the Second Amendment protects an actionable individual right to "keep and bear arms," and it is a right that expressly prohibits the federal, state, and local governments from banning the ownership of common use firearms for armed self-defense of one's home. See District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008).

20 See Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 687 (6th Cir. 2016) ("\textit{Heller}'s analytical structure and its conclusions command resort to historical evidence in determining the scope of the Second Amendment."); Peruta v. Cty. of San Diego (\textit{Peruta II}), 824 F.3d 919, 929 (9th Cir. 2016) ("In analyzing the meaning of the Second Amendment, the Supreme Court in \textit{Heller} and \textit{McDonald} treated its historical analysis as determinative . . . . In determining whether the Second Amendment protects the right to carry a concealed weapon in public, we engage in the same historical inquiry . . . ."); GeorgiaCarry.org, Inc. v. Georgia, 687 F.3d 1244, 1261 (11th Cir. 2012) ("\textit{Heller} commands that . . . courts must read the challenged statute in light of the historical background of the Second Amendment."). The notable exception to \textit{Heller}'s reliance on history is the list of "presumptively lawful" regulations, which the court majority did not expound upon. These regulations include "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and
courts see it, is that Heller's dependence upon history-in-law is a signal to lower courts that they too must attempt a "historical inquiry into any question concerning the right to keep and bear arms" before resorting to other jurisprudential tools. 21

Thus far, it appears that every circuit court has acquiesced to Heller's history-in-law suggestion, and each has done so by adopting a two-step inquiry when adjudicating Second Amendment cases. 22 The first step involves the courts examining whether the challenged conduct is within the scope of the Second Amendment. In completing this step, if the case is one of first impression, the courts often resort to history-in-law. 23 If the challenged conduct does not fall within the scope of the Second Amendment, the case is extinguished. 24 However, if the conduct is viewed within the scope of the Second Amendment (or presumed to be within the scope of the Second Amendment), the courts then proceed to step two, which involves applying some level of means-ends scrutiny to the challenged law or regulation. 25

There is much to be said about how the circuit courts employ the entire two-step inquiry. It is indeed a subject of much scholarly discussion. 26 But, because this article is focused on critiquing the use of history-in-law when adjudicating Second Amendment outside the home claims, Part II will only explore how the different circuit courts have used history-in-law at step one.

21 Miller, Text, History, and Tradition, supra note 2, at 861–62; see also Masciandaro, 638 F.3d at 470 (observing that "historical meaning enjoys a privileged interpretative role in Second Amendment context").

22 See, e.g., Gould v. Morgan, 907 F.3d 659, 666 (1st Cir. 2018); Binderup v. AG of the United States, 836 F.3d 336, 345 (3rd Cir. 2016); Kolbe v. Hogan, 813 F.3d 160, 171–72 (4th Cir. 2016); N.Y. State Rifle & Pistol Ass’n v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015); United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013); NRA of Am. v. Bureau of Alcohol, 700 F.3d 185, 194–95 (5th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Georgia Carry.org, 687 F.3d at 1261 n.34; Heller v. District of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011); Ezell v. City of Chi., 651 F.3d 684, 701–03 (7th Cir. 2011); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Johnson, No. CR15-3035-MWB, 2016 U.S. Dist. LEXIS 5731, at *18 (N.D. Iowa Jan. 19, 2016).

23 See, e.g., Binderup, 836 F.3d at 348.

24 See, e.g., Gould, 907 F.3d at 669.

25 It should be noted that there are some minor differences as to how each circuit court applies this two-step approach. For some examples, see Heller, 670 F.3d at 1252; Ezell, 651 F.3d at 701–04; Reese, 627 F.3d at 800–01; United States v. Marzarella, 614 F.3d 85, 89 (3d Cir. 2010).

II. HISTORY-IN-LAW, THE SECOND AMENDMENT OUTSIDE THE HOME, AND THE CIRCUIT COURTS

As a matter of constitutional interpretation, the late Justice Antonin Scalia, who authored the majority opinion in *Heller*, once characterized history-in-law as the "*best means available* in an imperfect world."27 Scalia offered three arguments in support of this characterization.28 One is that the practice of history-in-law is far better than other methods of constitutional interpretation because, in the end, it intruded far less "upon the democratic process" given that only history can properly inform jurists on the origins of rights.29 Scalia also advanced the argument that the "methodological differences that divide historians, and the varying interpretive assumptions they bring to their work, are nothing compared to the differences of the American people[.]"]30 Here, Scalia's point was simply that history-in-law, unlike other forms of constitutional interpretation, is based upon reasoned facts rather than the tenets of moral philosophy.31 This brings us to Scalia's third and last argument for favoring history-in-law over other forms of constitutional interpretation—namely that history-in-law ultimately produces far "less subjective" outcomes.32

On its face, Scalia's "less subjective" claim is most persuasive. Few, if anyone, will disagree that historical facts are historical facts no matter who presents them, and the more historical facts available from which to judicially reason, the less subjective the judicial outcome will be.33 However, a closer examination of Scalia's "less subjective" argument for utilizing history-in-law proves to be more nominal than real. The unabashed reality is, like other methods of constitutional interpretation, legal professionals, and jurists can manipulate history-in-law in any number of ways.34

28 *Id.*
29 *Id.* (citations omitted).
31 *McDonald*, 561 U.S. at 804 (Scalia, J., concurring).
Perhaps the most common method is cherry-picking historical evidence that only supports one side of an argument and minimizing or discarding the rest as insignificant and unpersuasive.\textsuperscript{35} This method is commonly referred to in historical academia as "law office history" or "history lite."\textsuperscript{36} Another method often used to produce a desired outcome is to simply manufacture historical findings through legal inference, all the while presenting those findings as being substantially supported by the evidentiary record.\textsuperscript{37} This author has referred to this method in other writings as "explaining away history."\textsuperscript{38} What it entails is lawyering the content of historical texts to bolster a particular legal argument rather than providing substantiated historical evidence that actually confirms it.\textsuperscript{39} To state this differently, when a legal professional or jurist explains away history, they are merely presenting a historically based interpretation


\textsuperscript{37} See, e.g., J.G.A. Pocock, Virtue, Commerce, and History 7 (1985) (“The non-historical practitioner is not concerned with what the author of the statement made in a remote past meant by it so much as with what he in his present can make it mean.”); J.G.A. Pocock, Virtues, Rights, and Manners: A Model for Historians of Political Thought, 9 POL. THEORY 353, 362–64 (1981) (discussing how “law-centered” paradigms lead to “liberal” historical claims because they do not take into account the whole). These unproven inferences can create a domino chain of inaccurate history that can have far reaching negative effects in law, history, and politics. Herbert Butterfield, The Whig Interpretation of History 6 (1931) (“the more [historians] are making inferences instead of researches, then the more whig our history becomes if we have not severely repressed our original error . . . .”); See CHARLES, HISTORICISM, supra note 13, at 90–98.

\textsuperscript{38} Charles, Historiographical Crisis, supra note 4, at 1769–76.

\textsuperscript{39} This would be the academic equivalent of a historian presenting an unsubstantiated historical theory as a viable historical thesis. See CHARLES, HISTORICISM, supra note 13, at 87–90.
of text or texts that appears plausible. But, this is not factually-based or contextual history. It is mythmaking.40

There are indeed other methods in which history-in-law can be manipulated to produce a desired result, and at different parts in this article, said methods will be expounded upon. For now, the point to be made is any notion of history-in-law being a less subjective form of constitutional interpretation is demonstrably false. This criticism of history-in-law is in not in any way meant to suggest altogether eliminating the use of history when adjudicating constitutional questions. Such a bold step would unravel the entire legal system. The fact of the matter is, that history and the law are inseparably bound together. It has always been that way and will always be that way. To quote from Judge Richard A. Posner, the law is the "most historically oriented, or if you like the most backward-looking, the most 'past dependent,' of the professions."41

Another criticism of history-in-law worth mentioning is it can often bind lower courts to accept historical myth as historical fact.42 This is often the case when a court of final appellate jurisdiction poorly or incorrectly analyzes history in a ruling. Perhaps the most well-known example is the Supreme Court’s interpretation of the Fourteenth Amendment’s Privileges or Immunities Clause. In 1873, despite the congressional record and other historical evidence strongly suggesting that the Privileges or Immunities Clause was drafted and ratified with the purpose of incorporating the Bill of Rights to the states, the Supreme Court came to the historical conclusion that the clause was merely intended to constitutionally differentiate between rights associated with federal and state citizenship.43 To this day, despite an ever growing body of scholarship showing numerous history-in-law inaccuracies with the Supreme Court’s historical conclusion on the Privileges or Immunities Clause,44 this 1873 history-in-law assessment remains legally binding on the lower courts.45

There is an argument to be made that Heller has placed the lower courts in a similar history-in-law situation—at least that is how some circuit courts have interpreted


42 For more on this, see Patrick J. Charles, History in Law, Mythmaking, and Constitutional Legitimacy, 63 Clev. St. L. Rev. 23, 40-53 (2014).

43 Slaughter-House Cases, 83 U.S. 36, 74 (1873).


45 McDonald v. City of Chi., 561 U.S. 742, 54-56 (2010).
However, other circuit courts have read *Heller* as permitting them to examine portions of the historical record anew. *Heller* infers as much. In the majority opinion, Scalia cautioned that *Heller* should not be interpreted to be "an exhaustive historical analysis" on the scope of the Second Amendment, nor is intended to prohibit future "historical justifications" for upholding "longstanding" gun control regulations.

Whether *Heller* does or does not bind lower courts in utilizing history-in-law is merely one of many issues in which the circuit courts have disagreed when adjudicating Second Amendment claims. These disagreements will be outlined below, and we begin with the Eleventh Circuit, which was the first circuit court to use history-in-law to adjudicate a Second Amendment outside the home claim.

A. Georgiacarry.org v. Georgia—History Narrowly Tailored

In 2010, Georgia enacted a law that prohibited the carrying of weapons and long guns in certain locations unless the property owner or custodian gave permission. Among the locations included in the Georgia law were state and local government buildings, courthouses, jails, prisons, bars, mental health facilities, polling places, and places of worship. The Georgia law was subsequently challenged as a violation of the Second Amendment, particularly as it applied to places of worship. In resolving this constitutional question, the Eleventh Circuit turned to history-in-law, but made sure to narrowly tailor the issue as to whether Second Amendment protects a right to bring a firearm on the private property of another against the wishes of the owner. The Eleventh Circuit also made sure to narrowly tailor its use of history-in-law by focusing the bulk of its historical analysis on individual rights as they were understood late eighteenth-century. Because *Heller* held that the Second Amendment protects a "pre-existing right," it was proper that such a right be contemporaneously weighed against other individual rights.
In this case, the rights that the Second Amendment needed to be weighed against were individual property rights.\textsuperscript{55} Ultimately, by narrowly tailoring the constitutional issue and confining the history-in-law analysis to the late eighteenth-century, the Eleventh Circuit concluded that the "pre-existing right codified in the Second Amendment does not include protection for a right to carry a firearm in a place of worship against the owner's wishes."\textsuperscript{56} As the Eleventh Circuit noted, not only would recognition of such a Second Amendment right conflict with centuries of precedent relating to property law, tort law, and criminal law, but there was not one iota of historical evidence—at least not in historical context—to suggest that people living in the late eighteenth-century interpreted the Second Amendment as protecting a right to carry weapons on the property of another.\textsuperscript{57} The only historical evidence that the plaintiffs could muster to the contrary was a colonial Georgia law that required all persons attending church services to carry firearms for the "necessary . . . security and defence of [the] province from internal dangers and insurrections[.]"\textsuperscript{58} But, as the Eleventh Circuit pointed out, to interpret this colonial Georgia law as enshrining a right to carry firearms on private property would break the bands of historical elasticity.\textsuperscript{59} The law's purpose was simply to "defend the community against an internal or external threat," and was "practical" for those Americans living at that time.\textsuperscript{60} Nothing more.

In conducting its analysis, however, there is one historical aspect of the colonial Georgia law that the Eleventh Circuit overlooked. The colonial Georgia law was merely one of many in Anglo-American statute books pertaining to compulsory arms bearing.\textsuperscript{61} These laws obligated citizens to keep and/or carry arms for the public defense, whether it be for militia service, security patrols, the hue and cry, or watchman duty.\textsuperscript{62} And, contrary to historical assertions of the plaintiffs in this case,
there is nothing in the historical record that even remotely suggests compulsory arms bearing laws were enacted with the underlying purpose of recognizing a right to go publically armed.\textsuperscript{63} If the historical record informs us of anything, it is that the opposite was true; that is, the government could stipulate specific time, place, and manner restrictions on arms bearing, particularly in public places.\textsuperscript{64} Although the Eleventh Circuit overlooked these historical details, its absence does nothing to diminish the court's overall analysis.\textsuperscript{65} The court would have still determined that any Second Amendment rights outside the home can be limited or restricted altogether upon entering the private property of others. It was an easy case for the Eleventh Circuit to get right.\textsuperscript{66}

\textsuperscript{63} The fallacy of this line of historical argument has been previously expounded upon. \textit{See} Charles, \textit{Faces, Take Two}, \textit{supra} note 4, at 479 ("\textquoteright[ Advocates for broad Second Amendment rights often] conflate compulsory arms bearing for militia service, security patrols, and the hue and cry with a right to 'peaceably carry' firearms in the public concourse. The fallacy embodied by this line of historical argument is obvious. While [advocates for broad Second Amendment rights] are indeed correct that late eighteenth-century citizens were often obligated to take part in providing security, they omit that such armed carriage and firing of those arms was at the license of government, not at the whim or discretion of individual citizens. This is an important legal and historical distinction, yet it is omitted [by these advocates].").


\textsuperscript{65} As a historical side-bar, the Eleventh Circuit could have also examined late eighteenth-century hunting law and tradition to support its analysis. \textit{See} Joseph Blocher, \textit{Hunting and the Second Amendment}, 91 Notre Dame L. Rev. 133, 161–65 (2015). Even by the early twentieth-century, there was virtual unanimity among sportsmen and hunters that private property rights superseded any rights or privileges pertaining to hunting. \textit{See}, e.g., John B. Burnham, \textit{A Hunting License Test, Field & Stream}, Jan. 1931, at 15; \textit{Enforcing the New Game Laws, Sports Afield}, Oct. 1931, at 35; Hugh Grey, \textit{Let's Outlaw the Game Violators, Field & Stream}, Mar. 1947, at 28; Gilbert Irwin, \textit{Etiquette for Your Sports Afield, Am. Rifleman}, Aug. 1932, at 8, 30; Archibald Rutledge, \textit{The Sportsman's Best Friend, Field & Stream}, Dec. 1940, at 15. This understanding continued into the mid-twentieth century. \textit{See}, e.g., Louis F. Lucas, \textit{Only Hunters Can Save Public Hunting, Am. Rifleman}, Sept. 1959, at 16 ("When our forefathers established our government, it was decreed that wild game belongs to the states in their sovereign capacity for the use and enjoyment of all the people. At the same time, it was decreed that the landowner has the right to determine who may come upon his land to hunt game.").

\textsuperscript{66} \textit{See} Joseph Blocher & Darrell A.H. Miller, \textit{The Positive Second Amendment: Rights, Regulation, and the Future of Heller} (Cambridge University Press, 2018) ("Most pernicious . . . is the extent to which the Second Amendment is routinely invoked to address issues that aren't even constitutional. For example . . . only government actors are subject to constitutional rules. As a matter of law, then, it is simply wrong to invoke the Second Amendment against private companies . . . Gun rights advocates can of course argue that allowing firearms onto private property is good policy, and supporters of gun regulation can argue the opposite, but that debate has nothing to do with Second Amendment law."); \textit{see also} Blocher & Miller, \textit{What Is Gun Control?}, \textit{supra} note 2, at 313–23; Joseph Blocher, \textit{The Right Not to Keep or Bear Arms}, 64 Stan L. Rev. 1, 41–45 (2012). But \textit{see} Volokh, \textit{Implementing the
B. Kachalsky v. County of Westchester—History as a Guidepost

Not long after the Eleventh Circuit decided Georgiacarry.org v. Georgia, the Second Circuit held oral arguments in Kachalsky v. County of Westchester.67 The issue before the Second Circuit was the constitutionality of New York’s concealed carry license scheme, which requires applicants to first demonstrate a "proper cause" or "justifiable need" before being able to publicly carry a concealed handgun for self-defense.68 While the plaintiffs argued that any "proper cause" requirement to obtain a concealed carry license was an affront to the Second Amendment, the defendants countered that armed carriage restrictions in public were longstanding, and therefore, presumptively constitutional.69 Both the plaintiffs and defendants relied on history-in-law to bolster their arguments.70

The Second Circuit started its history-in-law analysis by addressing the heart of the plaintiffs' history-in-law claim—the claim being that in the nineteenth-century the prevailing rule of law was that state and local governments could categorically ban the concealed carriage or open carriage of dangerous weapons, but not both.71 In other words, according to the plaintiffs, nineteenth-century law dictated that if a state or local government categorically banned the concealed carriage of dangerous weapons in public, it could not simultaneously ban their open carriage, and vice-versa.72 Ultimately, the Second Circuit concluded that this line of argument was historically disingenuous.73 Indeed, the plaintiffs were correct that some nineteenth-century courts issued opinions that embodied this rule of law.74 However, as the Second Circuit noted, this alternative outlet conception of the Second Amendment outside the home was "hardly . . . universal."75 The truth was that there were a variety of opinions on the right to keep and bear outside the home in the nineteenth-century.76 This historical observation ultimately set the tone for the remainder of the Second Circuit’s history-in-law analysis.

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67 Kachalsky v. Cty. of Westchester, 701 F.3d 81 (2d Cir. 2012).
68 N.Y. PENAL LAW § 400.00(2)(f) (Consol. 2018).
69 Kachalsky, 701 F.3d at 88.
70 Id.
71 Id. at 89.
72 Id.
73 Id. at 90.
75 Kachalsky, 701 F.3d at 90.
76 See CHARLES, ARMED IN AMERICA, supra note 5, at 139–50; Joseph Blocher, Firearms Localism, 123 YALE L.J. 82, 108–21 (2013); Ruben & Cornell, Firearms Regionalism, supra note 4, at 124–35.
From the perspective of the Second Circuit, given that history did not "speak with one voice," it was best to take a restrained approach to history-in-law. The Second Circuit accomplished this by intently focusing on the one historical theme that the parties did not dispute—the government's justification for regulating firearms outside the home has almost always been more substantial than inside the home. In support of this historical conclusion, the Second Circuit outlined the history of armed carriage laws from the late eighteenth-century to the close of the nineteenth-century. The Second Circuit stopped short, however, of invoking the power of history to categorically dismiss the plaintiffs' Second Amendment claim. Rather, history merely guided the Second Circuit to apply the proper level of means-end scrutiny (intermediate scrutiny), which then led the panel to unanimously uphold New York's "proper cause" requirement as "substantially related to the states' important public safety interest."

The Second Circuit's rationale for not invoking the power of history to categorically dismiss the plaintiffs' Second Amendment outside the home claim was two-fold. First, the Second Circuit agreed with the plaintiffs that the Second Amendment "must have some application" outside the home. Second, the Second Circuit was unable to find any historical evidence that "directly" addressed the constitutional issue before the court: "Can New York limit handgun licenses to those demonstrating a special need for self-protection?"

The first rationale makes perfect judicial sense, for if the Second Amendment protects an individual's right to own what *Heller* describes as "common use" weapons, individuals must possess some basic ancillary right to acquire said weapons in commerce, transport them for lawful purposes, and so forth. The second rationale, however, is completely misguided. This is because the Second Circuit unknowingly omitted that there is a long history of requiring individuals to demonstrate a special need before being able to carry dangerous weapons in public. Such laws began appearing in statute books in the early to mid-nineteenth century. These laws were a variant of the 1328 Statute of Northampton and generally stipulated:

77 *Kachalsky*, 701 F.3d at 91.
78 *Id.* at 94.
79 *Id.* at 94–96. For a more detailed history of armed carriage to the close of the nineteenth-century, see Charles, *Faces, Take Two*, supra note 4, at 378–431.
80 *Kachalsky*, 701 F.3d at 98.
81 *Id.* at 89.
82 *Id.* at 91.
85 Charles, *Faces, Take Two*, supra note 4, at 433.
86 *See, e.g.*, 1835 Mass. Acts 750.
If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace.\textsuperscript{87}

In accord with the Statute of Northampton, these laws prohibited the act of carrying dangerous weapons in public.\textsuperscript{88} What distinguished this nineteenth-century variant from its English predecessor was the former provided a statutory exception if the individual was able to demonstrate an “imminent” or “reasonable” fear of assault or injury to their person, family, or property.\textsuperscript{89}

From a micro level, there is indeed an argument to be made that these nineteenth-century variants of the Statute of Northampton are dissimilar to modern laws that require individuals to demonstrate a special need before obtaining a license to carry dangerous weapons in public. The former clearly allows some personal discretion in determining when it was in fact necessary to carry dangerous weapons in public. Meanwhile, the latter requires individuals to first obtain a license. But, from a macro level, the two laws are not all that different, for both effectively serve the same purpose.

\textsuperscript{87} \textit{Id.; see also} The Revised Statutes of the State of Wisconsin, Passed at the Annual Session of the Legislature Commencing January 13, 1858, and Approved May 17, 1858, 985 (1858) (“If any person shall go armed with a dirk, dagger, sword, pistol or pistols, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his person”); Edward C. Palmer, The General Statutes of Minnesota 629 (1867) (“Whoever goes armed with a dirk, dagger, sword, pistol or pistols, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his person”); John Purdon, A Digest of the Laws of Pennsylvania, from the Year One Thousand Seven Hundred to the Twenty-First Day of May, One Thousand Eight Hundred and Sixty-One, at 250 (Frederick C. Brightly ESQ. ed., 9th ed.1862) (“If any person, not being an officer on duty in the military or naval service of the state or of the United States shall go armed with a dirk, dagger, sword or pistol, or other offensive or dangerous weapon, without reasonable cause to fear an assault or other injury or violence”); The Revised Statutes of the State of Maine Passed October 22, 1840, 709 (1841) (“Any person, going armed with any dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his person”); The Revised Code of the District of Columbia 570 (1857) (“If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his person”); Revised Statutes of the State of Delaware, to the Year of Our Lord One Thousand Eight Hundred and Fifty-Two, 333 (1852) (“Any justice of the peace may also cause to be arrested . . . all who go armed offensively to the terror of the people, or are otherwise disorderly and dangerous.”); The Statutes of Oregon Enacted and Continued in Force by the Legislative Assembly as the Session Commencing 5th December, 1853, 220 (1854); 1870 W. Va. Laws 702, 703, ch. 153, § 8.

\textsuperscript{88} Compare 2 Edw. 3, c. 3 (1328) (Eng.), with 1835 Mass. Acts 750.

\textsuperscript{89} See A Practical Treatise, or An Abridgement of the Law Appertaining to the Office of Justice of the Peace 184 (C.A. Mirick & Co. West Brookfield 1841); Peter Oxenbridge Thacher, Two Charges to the Grand Jury of the County of Suffolk for the Commonwealth of Massachusetts, at the Opening of Terms of the Municipal Court of the City of Boston, on Monday, December 5th, A.D. 1836 and on Monday, March 13th, A.D. 1837, at 27–28 (Dutton & Wentworth, Boston 1837).
of restricting the carrying of dangerous weapons in public unless it is absolutely necessary to do so.\(^9^0\) It is a point of historical emphasis that, throughout the nineteenth-century, the habitual or promiscuous toting of weapons was denounced as a "cowardly," "immoral," "evil," "wicked," "uncivilized," "lawless," and "barbarous" practice that was inconsistent with a well-regulated society.\(^9^1\) Even the late nineteenth-century's foremost advocates of using the pistol for self-defense, whether it was in the home or in public, denounced the practice:

As for the practice of constantly carrying pistols during ordinary business hours . . . too much cannot be said in condemnation of it. There is no possible ground for which it can be justified. Aside from the liability to accident . . . it begets a swaggering, reckless air in those who indulge in it. No man who has any regard for himself, or for the feelings of others, will ever put a pistol in his pocket without asking himself: "Is it necessary that I should go armed on this occasion?" In nine cases out of ten the answer will be in the negative.\(^9^2\)

Still, even if the Second Circuit, or any circuit court for that matter, thought it prudent to place aside these nineteenth-century variants of the Statute of Northampton as historically incompatible with modern "proper cause" armed carriage licensing laws, it is undisputed that laws requiring individuals to first obtain a license before carrying dangerous weapons in public are one of the most longstanding firearms

\(^9^0\) For some examples of how these nineteenth-century variants of the Statute of Northampton were adjudged by nineteenth-century courts, see Charles, Armed in America, supra note 4, at 143–45, 154–55; State v. Barnett, 34 W. Va. 74 (1890); Tipler v. State, 57 Miss. 365 (1880); State v. Duke, 42 Tex. 455 (1875); see also Concealed Weapons, The Crim. L. Mag. and Rep. 1886, at 403, 413–14 (summarizing the rule of law as to when there was an "imminent" threat and armed carriage was "reasonable").

\(^9^1\) See Charles, Armed in America, supra note 5, at 143–44, 147, 153, 165, 172.

\(^9^2\) The Pistol as a Weapon of Defense: In the House and On the Road 12 (1875); see also id. at iv ("while we would be all means discourage the indiscriminate carrying of firearms, we would recommend every one to acquire a thorough knowledge of the best methods of using them . . . . The author, although a firm believer in the value of the pistol, practically skilled in its use, and never during the last twenty years without a good one in his possession, has never, in all that time, carried one on more than five occasions."). It is also worth noting that the authors of this book conveyed the importance of obeying the armed carriage laws in different jurisdictions, as well as having been properly trained in the interests of public safety. Id. at 9–10 ("It is not every one that has the right to carry an instrument which may at any moment be so used to cause the death of others; without hesitation we exclude from this category children and imbeciles, but the further question arises: Shall every man that in ordinary business matters is accounted of sound mind, be allowed to carry a pistol, when he chooses to do? So far as legal enactments are concerned, nothing can be done to discriminate between the most nervous individual, and the coolest and bravest man in existence. But upon those with whom moral and prudential considerations have as great weight as the laws of the statute book, we would urge that no man has a right to carry such a terribly efficient instrument of destruction unless he is perfectly assured of his power of self control, and of his ability to use the weapon without incurring the danger of injuring friends and innocent persons. Nervous and excitable persons; those who in any trying emergency are liable to lose their self control, and to fire at random, should never carry a pistol under any circumstances whatever.").
regulations. The first "proper cause" armed carriage licensing laws began appearing in the ordinance books in the mid nineteenth-century, and subsequently spread in cities and towns throughout the United States. These laws appeared everywhere, from Milwaukee, Wisconsin, to New York City, to Wheeling, West Virginia. "Proper cause" armed carriage laws were in fact so well accepted, that they were supported by both proponents and opponents to armed carriage restrictions. As one newspaper correspondent put it, discretionary armed carriage laws were preferred to others, particularly outright prohibitions, because they permitted "law abiding persons to go armed" when "forced to do so by imperative circumstances," and placed them "under legal responsibility in reference to the methods of its employment," yet denied the "highwayman, the burglar, the thief, the town brawler, and the known loafer and vagabond" the privilege.

What is perhaps most historically relevant about the spread of these first armed carriage licensing laws is not one nineteenth-century court—at least not that any legal scholar or historian has found—held such laws to be unconstitutional. As far as any historian has been able to find, only one legal challenge to armed carriage licensing laws was recorded. It was an 1883 case involving Wheeling, West Virginia's ordinance which prohibited the concealed carriage of "any pistol, dirk, bowie knife,.

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93 See Charles, Faces, Take Two, supra note 4, at 419–22 n.245.

94 See Ordinances of the Mayor, Aldermen and Commonalty of the City of New York, in Force January 1, 1881, at 214–15 (Elliott F. Shepard & Ebenezer B. Shafer eds., 1881); Laws and Ordinances for the Government of the City of Wheeling, West Virginia 206 (1891) (1881 ordinance requiring a "permit in writing from the mayor" to carry "any pistol, dirk, bowie knife or weapon of the like kind," as well as prohibiting certain concealed weapons); The General Ordinances of the City of Milwaukee to January 1, 1896: With Amendments Thereto and an Appendix 692–93 (Charles H. Hamilton ed., 1896). For a detailed list of mid-to late nineteenth-century armed carriage licensing laws, see Charles, Faces, Take Two, supra note 4, at 419–22 n.245.

95 See Charles, Faces, Take Two, supra note 4, at 422, 424–25.


97 Charles, Armed in America, supra note 5, at 158.

98 From a historiography standpoint, it is worth noting that not every nineteenth-century case pertaining to armed carriage laws (or any category of law for that matter) was fully recorded or published in a legal digest or case volume. The 1878 Missouri Supreme Court case of State v. Reando provides the perfect a case in point. The findings in the case seems to have only survived through a newspaper reprint of the opinion, See The Supreme Court: On Carrying Concealed Weapons, State Journal (Jefferson City, MO), Apr. 12, 1878, at 2. Reando is not even listed in the Missouri Supreme Court Historical Database. However, Reando was briefly reported in an 1878 issue of the Central Law Journal. See Abstract of Decisions of the Supreme Court of Missouri: October Term, 1877, 6 Central L. J. 16, (1878) ("The act of the legislature prohibiting the conveying of fire-arms into courts, churches, etc. . . . is constitutional. It is a police regulation not in conflict with the provisions of the organic law . . . . State v. Reando."). It is also worth noting as a matter of historiography that an overwhelming majority of armed carriage court proceedings have been lost to history. A quick perusal of nineteenth-century newspapers and local police arrest records underscores this point. While there historical sources show the frequent enforcement of armed carriage laws, the full details of the actual court proceedings were rarely made public.
or weapon of the like kind, without a permit in writing from the mayor to do so."

Presiding over the case was West Virginia Circuit Judge Henry Brannon. Before the court, the defendant argued that Wheeling's armed carriage licensing law was unconstitutional because it infringed upon the Second Amendment and violated the Fourteenth Amendment's Privileges or Immunities and Equal Protection Clauses. In issuing his judgment, in accord with other nineteenth-century jurists, Brannon embraced the armed citizenry model of the Second Amendment, as well as the "civilized warfare" test regarding what types of arms were constitutionally protected. Brannon, however, rejected the claim that "proper cause" armed carriage licensing laws were even remotely in conflict with the Constitution:

In this case it is urged that this act is void, because in violation of the Second Amendment of the Federal Constitution, which provides that "a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed, and also because it grants the right to carry weapons for self-defense only to persons who are quite and peaceable citizens of good character and standing, and thus violated the fundamental principle that all citizens stand equal before the law: and violates that provision of the Fourteenth Amendment prohibiting States from passing "any law which shall abridge the privileges or immunities, or deny to any person within their jurisdiction the equal protection of the laws."

It is a very grave act for a court to overthrow and defeat an act of the Legislature, and should be done only when its unconstitutionality is manifest. Where the repugnance to the Constitution is undoubted, the judge must yield to that high duty of respecting the highest law, the will of the people expressed in the Constitution, rather than the will of the Legislature; but never where he is doubtful, and all doubts go in favor of the act. All courts hold this doctrine . . . .

Is it the right of the citizen to wear abroad the small and insidious arms prohibited by this act? Or does the second amendment only guarantee the right to bear large arms, such as are useful in war and in defense of liberty

99 Laws and Ordinances for the Government of the City of Wheeling, supra note 94, at 206.

100 Judge Brannon was later appointed to the West Virginia Supreme Court and wrote one of the most comprehensive treaties on the constitutional meaning and purpose of the Fourteenth Amendment. See Henry Brannon, A Treatise on the Rights and Privileges Guaranteed by the Fourteenth Amendment to the Constitution of the United States (1901). In the treatise, Judge Brannon reiterated how neither the Second nor Fourteenth Amendments guaranteed a right to armed carriage in public: "The second [amendment] does not grant the right to carry a weapon . . . [nor does it] impair the state power of regulation and police in this respect." Id. at 92; see also id. at 290.

101 Concealed Weapons: Judge Brannon's Decision on This Subject, Wheeling Register, Oct. 15, 1883, at 1.

102 Both the armed citizenry model of the Second Amendment and the "civilized warfare" test came to prominence in the early to mid-nineteenth century. See Charles, Armed in America, supra note 4, at 122–41.
against arbitrary power? Clearly the latter only. In days of tyranny long ago, when nonarchical power sought supreme way and to trample down freedom, history tells us that one of its favorite methods was the disarming of the people and wrenching from their hands and homes those arms useful and effective in defense of liberty and dangerous only to tyrants. In this free country this amendment was incorporated [via the Fourteenth Amendment’s Privileges and Immunities Clause] to avoid the dangers of the past. Another reason for its adoption was this: Standing armies had been engines of oppression in the past, and American sentiment was opposed to them, and as a substitute reliance was placed on the citizen-militia, and to render it efficient it was desirable to train it to the use of arms common in war. The intimate connection in the amendment of this provision about learning arms with the language, "a well regulated militia being necessary to the security of a free state," shows that military efficiency and popular liberty were in the mind of its draftsman rather than individual privilege. It intended, it defends individual privilege to save the right of the citizen to keep at his home and premises arms ordinarily used in war, and has no reference to small weapons which may be hidden in in the pocket and first seen when drawn to people and the public peace are the highest objects of protection of the law, and this act has these high objects in view. The pistol, the bowie-knife, the stiletto, the slug shot, the billy, and the knuckles are weapons of the ruffian and law breaker, are used in the riot or affray, are dangerous in moments of anger or intoxication, and from them a vast amount of murder, bodily injury and family disasters arise, and from them many a bitter tear has flowed. Certainly it was never intended by the constitution to prohibit the Legislature from protecting the lives of the people and the public peace from their greatest foes; it was not intended to withhold the power to regulate within the bounds of prudence and usefulness the bearing of these weapons. It certainly cannot be converted into a license to the evil disposed to make their persons walking arsenals to run rampant over the peace of the State, and disarm the Legislature of power to regulate or check it. Such a construction would make the Constitution defend lawlessness, tumult, and anarchy, and sacrifice law, order and public security. I cannot wield to this dangerous construction. The construction of law must be reasonable. The act is wise and salutary, is doing good in this State, and the courts should sustain it . . . 

. . . Remember that this act recognizes the right to keep and carry a pistol about one’s dwelling house or premises, carrying it from the place of purchase [to] home, and from home to a place of repair and back again, and only prohibits their carriage on the premise of others and in public places. For the purposes of self-defense in immediate danger it[] allows a peaceable citizen of good character to carry weapons. These exceptions in the act are useful and necessary; but who will say that it is a useful or necessary privilege to the citizen to go abroad through the land wearing these deadly weapons?103

103 Concealed Weapons: Judge Brannon’s Decision on This Subject, supra note 101, at 1. As outlined in supra note 98 (discussing Reando), not every nineteenth-century case pertaining to armed carriage laws was fully recorded or published in a legal digest or case volume. This
It was at this juncture that Brannon responded to the defendant’s argument that the discretionary portion of the armed carriage licensing law violated the Fourteenth Amendment’s Equal Protection Clause. Hereto though, considering the broad police powers retained by state and local governments to ensure the public safety, Brannon did not find the defendant’s argument legally sufficient:

[I]t is argued . . . that the act discriminates between citizens, by allowing persons of good character the right of self-defense, while denying it to others. It does not deny the right of self-defense, for if a person of the worst character were assailed and in such danger as to warrant the exercise of the right of self-defense and with his pistol were to slay his adversary, he could plead self-defense on trial for murder, whilst he might be indicted for carrying a pistol beforehand. It is not a denial of the plea of self-defense; it only denies to bad, dangerous persons the right to arms beforehand and carry weapons, because they are a danger to the place, whereas the law-abiding are not.

The power of regulation visited in the Legislature for police purposes and the maintenance of morals, law and order for the good of society are necessarily wide, even though it may seem to work discrimination between persons.

The right to earn a livelihood is a great right; yet no one can practice law, keep a hotel or sell liquor without proving a good moral character. Such has been the law for years, and no one has questioned its validity. A doctor must now prove a good character to practice. These powers of apparent discrimination must exist *ex necessitate rei*, from the necessity of the case. Liberty to the citizen is a great attribute and deserving of all protection; but it must be liberty regulated by law and consistent with the behests of organized civil society, not mere self-willed, arbitrary license.\(^{104}\)

Unmistakably, Brannon’s opinion, and the history of nineteenth-century armed carriage licensing laws, is historical evidence that speaks “directly” to the constitutional issue that was before the Second Circuit: “Can New York limit handgun licenses to those demonstrating a special need for self-protection?”\(^{105}\) However, much like the Eleventh Circuit in *Georgiacarry.org v. Georgia*, these omissions would have done nothing to alter the Second Circuit’s final judgment. The Second Circuit would have still upheld New York’s “proper cause” requirement for public armed carriage.

**C. Moore v. Madigan—Precedent Defines History**

Just two weeks after the Second Circuit decided *Kachalsky v. County of Westchester*, the Seventh Circuit offered its opinion on the Second Amendment case provides historians with another example. To the best of author’s knowledge, the case was only published in the *Wheeling Register*. However, there may also be an unknown copy in either the holdings of the National Archives or West Virginia State Archives that this author has been unable to locate.

\(^{104}\) *Id.*

\(^{105}\) *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012).
outside the home. The case was Moore v. Madigan, and the issue before the Seventh Circuit was the constitutionality of an Illinois law forbidding the carrying of an operable firearm for self-defense in public, either concealed or openly. The Illinois law outlined three legal exceptions: individuals carrying an operable firearm (1) on their own property (owned or rented); (2) within their place of business; or, (3) on the property of another, but only on the condition that the property owner or custodian had given consent to do so.108

The legal arguments made for and against the constitutionality of the Illinois law mirrored those made before the Second Circuit. While the plaintiffs argued the law violated the Second Amendment as defined by Heller, the defendants responded that Heller’s core holding of having access to an operable firearm for armed self-defense did not apply outside the home. Hereto, the parties relied heavily on history-in-law as a means to bolster their respective arguments, and it seemed that another circuit court was going to wade through the competing, and often contrasting, historical narratives on the scope of the Second Amendment outside the home.110 This ultimately turned out not to be the case.

In a split opinion written by Judge Richard A. Posner, the Seventh Circuit ruled that it was unnecessary to look at the competing history-in-law claims given that Heller already provided the answer. What particularly stood out for Posner was Heller’s pronouncement that the Second Amendment protects “the individual right to possess and carry weapons in case of confrontation.” This made Moore an easy case for Posner to decide. The way Posner rationalized it, given that the Supreme Court interpreted “bear arms” to mean “carry arms,” any Second Amendment rights to armed self-defense that exist within the home must equally apply outside the home, and therefore any law that completely prohibited armed self-defense in public places must be unconstitutional on its face.

106 Moore v. Madigan, 702 F.3d 933, 934–35 (7th Cir. 2012).
107 Id.
109 Moore, 702 F.3d at 934–35.
110 Id. at 935.
111 Id. (“The appellees ask us to repudiate the [Supreme] Court’s historical analysis [in Heller]. That we can’t do. Nor can we ignore the implication of the analysis that the constitutional right of armed self-defense is broader than the right to have a gun in one’s home.”); id. at 942 (“We are disinclined to engage in another round of historical analysis to determine whether eighteenth-century American understood the Second Amendment to include a right to bear guns outside the home. The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.”).
113 Moore, 702 F.3d at 936 (“[O]ne doesn’t have to be a historian to realize that the right to keep and bear arms for personal self-defense in the eighteenth century could not rationally be limited to the home.”).
114 Id. at 936–42.
Precedentially speaking, it is difficult to argue with Posner's reasoning. The Seventh Circuit is indeed bound by the historical pronouncements of the Supreme Court. Often times this includes any historical analysis in support of said pronouncements. The point is that *Heller*’s failure to provide the lower courts with any jurisprudential guidance has left jurists with one of two choices when it comes to deciding Second Amendment cases. The first is to wrestle with *Heller*’s conflicting dicta and examine each case on its merits. The second is to accept *Heller*’s historical pronouncements on the right to armed self-defense at face value. As it stands today, either choice is arguably correct. Posner and the Seventh Circuit were simply the first to make the second choice. In Posner’s mind, it was the best way to make judicial sense out of the "vast terra incognita" left in the wake of *Heller*. As it turns out—as is often the case in constitutional law—there can be multiple answers to the same question, each of which are doctrinally persuasive.

This is not to say that Posner’s opinion is immune from history-in-law criticism. In fact, it is fair to characterize Posner’s analysis as historical hyperbole at best. This is because of the three paragraphs in the opinion that Posner actually dedicates to the Founding Era, not one of the historical pronouncements contained within them survives rigorous academic scrutiny. What further undermines Posner’s history-in-law analysis is there is no substantiated historical evidence, nor positive historical pronouncements that suggests the Founding Fathers drafted, promulgated, or ratified the Second Amendment with the purpose of carrying a ready operable firearm for armed self-defense in public places.

Another history-in-law criticism of Posner’s opinion in *Moore* is it seeks to roll back the Constitution to a particular time and era, all the while rejecting all other times and eras as inconsequential. Here, Posner chose the Founding Era as instructive, and understandably so, given the Second Amendment was drafted, promulgated, and

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116 *Compare Heller*, 554 U.S. at 592, *with Moore*, 702 F.3d at 933.

117 *See Heller*, 544 U.S. at 594–95.

118 *Moore*, 702 F.3d at 943 (Williams, J., dissenting) ("The majority opinion presents one reading of *Heller* and *McDonald* in light of the question presented here, and its reading is not unreasonable.").

119 *Id.* at 942.

120 *Id.* at 943–47 (Williams, J., dissenting).

121 *Compare id.* at 936–37, *with Charles, Faces, Take Two, supra* note 4, at 378–401.

ratified in the late eighteenth-century. However, by making this history-in-law choice, Posner in essence muted the bulk of the historical record, including the lessons of the American experience relating to armed carriage—lessons that significantly contradict Posner’s decision to give Second Amendment rights outside the home the same force of law as inside the home.

While there are many historical lessons that illustrate this point succinctly, one stands out. This lesson being that throughout most of the twentieth-century, not even gun-rights advocacy groups claimed there was a Second Amendment right to carry firearms in public places. From the early twentieth-century, when the editors of sports, hunting, and shooting magazines organized the first gun-rights movement, to the late 1970s, when the National Rifle Association (NRA) was leading the gun rights movement, time and time again, when pressed on the issue, gun-rights advocacy groups conceded that the Second Amendment did not protect a right to carry firearms in public. This included the NRA at one point noting that the Founding Fathers did not subscribe to such a right. Indeed, the gun-rights advocacy groups of today

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123 Moore, 702 F.3d at 943 (Williams, J., dissenting) (agreeing with the majority that the "relevant date" for any history-in-law analysis is 1791).


125 See, e.g., A Joint Resolution of the National Police Officers Association and the National Shooting Sports Foundation, in Fact Pack II on Firearms Ownership 99–101 (1970); Transporting Your Firearms, Am. Rifleman, June 1970, at 41; National Rifle Association, Statement of the National Rifle Association of America at its 94th Annual Members Meeting, April 3, 1965, in James V. Bennett Personal Papers, Subject File, 1933–1966, box 11, National Rifle Association Literature (Boston: John F. Kennedy Presidential Library); National Firearms Act: Hearing Before the Committee on Ways and Means House Resolution 59 (1934); United States Revolver Association (USRA), The Case against the Anti-Revolver Law, in Hearing Before the Committee on Ways and Means, House of Representatives on the Proposed Revenue Act of 1918, Part II, at 1190–94 (Government Printing Office, 1918); The Effects of Revolver Legislation upon Hardware Dealers, Am. Artisan, May 25, 1912, at 3; see also Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirty-Fourth Annual Meeting 714 (1924) (noting how the USRA advocates that "[g]reat care should be exercised in the drafting of a provision concerning the carrying of concealed weapons," and "convincing evidence of necessity should be required before such a permit is granted."); Anti-Pistol Legislation and Its Tendencies: A Bullet-Proof Revolver Law, Hardware Reporter, March 21, 1913, at 59 (noting that the USRA, arms manufacturers, and a "great majority of dealers" favored "laws which prohibit the carrying of firearms, except by those persons who have secured permits from the proper authorities").

126 See National Rifle Association, Annual Report of the Executive Director and Secretary to the Board of Directors for the Calendar Year 18 (1947) ("Most States have regulatory legislation of some kind. Regulations covering the carrying of weapons into places of public assembly were common during the Colonial period.") (on file with author).
maintain a much different, more expansive view, but it is historically indisputable that the chief gun-rights advocates of years past did not.

Consider, for instance, a statement by Stanley Spisiak before the 1967 New York State Constitutional Convention, written to support an amendment that would have enshrined the "right to possession of firearms by the people of the state for protection of their homes and their persons and for recreational purposes" in the New York Constitution. A former director of the NRA affiliated Erie County Sportsmen's

127 See CHARLES, ARMED IN AMERICA, supra note 5, at 276–95 (examining how the meaning of the Second Amendment transformed at the behest of gun rights advocates in the late twentieth-century).

128 Consider the Firearms Lobby of America (FLA), which in 1970 advocated for "common sense" legislation regarding the "legitimate carrying of firearms." See Letter from Morgan Norval, Director FLA, to H. Ertle, Feb. 18, 1970, in William B. Saxbe Papers, box 27, folder 4, Crime-Fire Arms Control (Columbus, OH: Ohio State University Archives) [hereinafter Saxbe Papers]. What the FLA meant by the "legitimate carrying of firearms" was not the preparatory carriage of loaded firearms in public places. Rather, "legitimate carrying" was the transportation of firearms, "properly cased and unloaded," from one jurisdiction to another without being hampered by local firearms laws. See Sportsmen's Bill of Rights!, AIM & FIRE. THE OFFICIAL PUBLICATION OF THE "FIREARMS LOBBY OF AMERICA," no. 3, at 2, in William B. Saxbe Papers, box 27, folder 4, Crime-Fire Arms Control. This right to transport unloaded and cased firearms was not intended to preempt local firearms laws altogether. Such laws "would still be in force for the residents of the jurisdiction and if our traveler were involved in any crime of violence utilizing a firearm then [they] would and should be punished under the provisions of the local law." Id. The FLA's firearms transportation legislation was likely inspired from a booklet of "positive federal firearms laws" put together by the Florida Sportsmen's Association years earlier. See Letter from James E. Edwards, Florida Sportsmen's Association Legislative Chairman, to Robert L.F. Sikes, Jan. 12, 1966, in Robert L.F. Sikes Papers, box 282, folder Firearms 1966 (Pensacola, FL: University of West Florida Archives) [hereinafter Sikes Papers]; James E. Edwards, "Positive Gun Laws," Florida Sportsmen's Association (Dec. 1965), in Sikes Papers, box 282, Folder Firearms 1966. One law, titled "Lawful Transport of Firearms Bill," would have allowed certain classes of persons to transport firearms in interstate commerce—to include law enforcement, military, government officials, sportsmen and hunters engaged in hunting or target shooting, and people changing residences—in contravention of state and local laws for a short period of time. Edwards, "Positive Gun Laws," in Sikes Papers, box 282, folder Firearms 1966, at 5–6. However, such classes of persons were required to transport the firearm in a "secure[] and completely enclosed . . . case or container[.]"] Id. at 6. For another useful source showing how sportsmen were merely fighting for a basic right to transport firearms, see Alan S. Krug, Model Firearms Legislation, in FACT PACK II ON FIREARMS OWNERSHIP, supra note 125, at 32–33.

129 The full proposed amendment read, "[t]he right to possession of firearms by the people of the state for protection of their homes and their persons and for recreational purposes having existed since the founding of the state and the nation, and that right having been guaranteed by the Constitution of the United States, it is hereby confirmed by this Constitution and the legislature shall make no law abridging the right of the people to possess and use firearms for lawful purposes." See No. 253: A Proposition to Amend Article One of the Constitution, In Relation to the Right to Bear Arms, May 15, 1967, in Stanley Spisiak Papers, box 22, folder 8, Gun Legislation (Buffalo, NY: Buffalo History Museum) [hereinafter Spisiak Papers]; see also Bill Roden, Adirondack Sportsman, POST-STAR (Glens Falls, NY), June 22, 1967, at 15; HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 257–58 (1997). The proposed amendment did not pass the Constitutional Convention. Rather, the delegates by a vote of ninety-nine to fifty-four approved a resolution in favor of stricter firearms controls. See More Control Over Firearms, ITHACA J.,
Alliance, Spisiak was no stranger to standing up for gun rights and, in the process, opposing gun controls. However, in accord with the sportsmen of the era, Spisiak did not interpret the right to keep and bear arms as including a right to preparatory armed carriage in public places. "The imposition of reasonable restrictions on the carrying of firearms is not at all inconsistent with preserving the right to possess and, in proper circumstances, use a gun," stated Spisiak. Additionally, Spisiak noted that, therefore:

Local ordinances forbidding the carrying of loaded guns on the streets of a city, or prohibiting the discharge of firearms within city or village limits and laws prohibiting the transporting of guns, loaded and ready to fire in automobiles are all reasonable restrictions with which no gun owner has a quarrel.

Spisiak's opinion was aligned with that of the NRA. NRA President Harold Glassen's speech at Duke University's Law Forum evidences this. In discussing the constitutional limits of the Second Amendment, Glassen asked the Duke students and faculty in attendance, "Does [the right to keep and bear arms] mean that every individual has a right to carry a gun at all times, concealed or openly?" Glassen then answered his own question with "[o]bviously not." This is not to say that every gun-rights supporter living at that time supported restrictions on carrying firearms in public places. Historically speaking, there have

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130 See Conservation Unit Expanding Program at County Fair, SUN AND ERIE COUNTY INDEPENDENT (Hamburg, NY), July 31, 1952, at 12; Spisiak Papers, box 3, folders 1–4, Allied Sportsmen of Western New York Records; Spisiak Papers, box 3, folder 11, Allied Sportsmen of Western New York Constitution.

131 See CHARLES, ARMED IN AMERICA, supra note 5, at 210–11; see also Oscar Godbut, Wood, Field and Stream: Sportsmen Are Not Expected to Complain about Proposed Curbs on Weapons, N.Y. TIMES, June 26, 1964, at 24 (stating that sportsmen would not object to a New York City law prohibiting the carrying of a "loaded rifle or shotgun" unless it was in a case, and similar laws were "ideal safety measures"); Sportsmen's Bill of Rights!, AIM & FIRE, supra note 128, at 2 (not objecting to laws requiring persons traveling with firearms to have them cased and unloaded).


133 Id.


135 Id. at 7.

136 Id. at 8; see also [Summary of NRA's Position on Gun Controls], undated, in Glassen Papers, supra note 134, box 1, at 1–2 ("NRA opposes discretionary permit to acquire or possess [firearms] . . . . We do not oppose state laws on carrying . . . . We recognized state's right to strictly control carrying of concealed weapons").
always been gun-rights supporters who believed the "right to keep and bear arms" encompassed a right to carry firearms anywhere and everywhere.\footnote{137} Until the mid-1980s, however, the belief that the Second Amendment protected a right to armed carriage was shared only by an insular minority of gun-rights supporters.\footnote{138} Even in the turbulent 1960s—when some extreme gun-rights advocates were challenging the political status quo on the constitutionality of firearms restrictions—the idea that the Second Amendment protected a right to carry firearms in public places was only accepted on the outskirts of the political fringe.\footnote{139} In fact, at the time, to even advance such an idea to lawmakers was seen as a political death sentence for gun-rights advocacy.\footnote{140} In the words of E.B. Mann, who in the 1960s and 1970s served as editor-in-chief of multiple shooting magazines and served on the boards of directors of multiple gun-rights advocacy organizations, to "insist . . . [on] the inclusion of an unlicensed right to carry would inevitably foredoom [the future of gun rights] to failure. [Such a right] would be abused by many more people than it could benefit; and every abuse would do us all incalculable damage."\footnote{141}

What this history demonstrates is that Posner’s history-in-law justification for giving Second Amendment rights outside the home the same force of law as inside the home is not so much about adhering to principled history and tradition, but about selecting a useable past from which to reinforce a jurisprudential outcome. Much like the Second Circuit in Kachalsky, Posner could have taken the historical lessons of the twentieth-century and concluded that armed carriage regulations outside the home qualify as longstanding, and therefore any Second Amendment rights outside the home are much more limited than inside the home.\footnote{142} However, Posner adopted a highly selective approach to history-in-law, an approach that can lead to very different results depending upon such factors as time, era, and region.\footnote{143}

While the distinction between Posner’s and the Second Circuit’s approach to history-in-law is doctrinally important (given that it produced two very different standards of review), it is far from certain whether it would have prevented the Illinois
law from being struck down as unconstitutional. On the one hand, history-in-law supports concluding that the Illinois law is a constitutional exercise of state police power, that is, if one accepts at face value the statements of chief gun rights advocates regarding armed carriage for most of the twentieth-century. Time and time again, these advocates conceded that the Second Amendment was not intended to protect a right to carry operable firearms in public places. Only ancillary carry rights such as carrying firearms while hunting or transporting inoperable firearms from place to place were deemed protected. The Illinois law appears to have accounted for these ancillary carry rights. On the other hand, history-in-law also supports striking down the Illinois law as unconstitutional, that is, if one accepts late twentieth-century historical developments as authoritative. By the turn of the twentieth-century it was generally accepted, as a matter of law, that although state and local governments

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144 Compare Moore, 702 F.3d at 941 ("the court in Kachalsky used the distinction between self-protection inside and outside the home mainly to suggest that a standard less demanding than 'strict scrutiny' should govern the constitutionality of laws limiting the carrying of guns outside the home; our analysis is not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states.").


146 See, e.g., NRA Basic Policy, Am. Rifleman, July 1964, at 31 ("The NRA is opposed to the theory that a target shooter, hunter, or collector, in order to transport a handgun for lawful purposes, should be required to meet the conditions for a permit to carry a concealed weapon . . ."); Edson, To Keep and Bear Arms, supra note 145, at 16 ("The right to own a personal weapon amounts to little without the corresponding right to carry it from place to place—from home to range, from tournament to tournament, in the upland country in search for birds, or in the deepest wilds in the hunt for game.").

147 See Charles, Faces, Take Two, supra note 4, at 471–74. From the early to the mid-twentieth century, there were a myriad of approaches by state and local governments pertaining to the preparatory armed carriage of firearms in public. Some state and local jurisdictions prohibited the preparatory armed carriage of firearms altogether, whether done openly or concealed. Some required a license to carry, whether done openly or concealed. Meanwhile, others prohibited the preparatory concealed carriage of firearms, yet permitted their open carriage so long as the person maintained a license to do so. For the varying approaches to armed carriage from the early to mid-twentieth century, see F.J.K. Restrictions on the Right to Bear Arms: State and Federal Firearms Legislation, 98 U. Pa. L. Rev. 905, 909–10 (1950); Sam B. Warner, The Uniform Pistol Act, 29 J. Crim. L. & Criminology 529, 539–43 (1938); Digest of State Firearms Laws, Part I and Part II, Am. Rifleman, Nov. 1936, at 26–27; Digest of State Firearms Laws, Part III and Part IV, Am. Rifleman, Jan. 1937, at 32–33.
maintained broad police power to regulate dangerous weapons in the interest of public safety, they could not completely extinguish individuals from exercising their right to self-defense in extreme cases.\(^{148}\) The Illinois law being challenged in *Moore* did not provide any self-defense exception.\(^{149}\)

**D. Peterson v. Martinez—Consensus History**

In 2013, the Tenth Circuit decided *Peterson v. Martinez*, which involved a constitutional challenge to Colorado's concealed carry law as it applied to out-of-state residents.\(^{150}\) The plaintiff, a resident of Washington State, was denied a Colorado concealed carry license on the grounds that he did not meet Colorado's statutory residency requirement.\(^{151}\) Subsequently, the plaintiff sued on multiple grounds; one of which was the law violated the Second Amendment because it prohibited most out-of-state citizens "any meaningful opportunity . . . to bear arms" in Colorado.\(^{152}\) The Tenth Circuit approached the plaintiff's Second Amendment claim much in the same way that other circuit courts have done. It started at step one of a two-step inquiry.\(^{153}\)

At this step, much like the Seventh Circuit in *Moore*, the Tenth Circuit afforded considerable weight to *Heller*’s historical pronouncements.\(^{154}\)

Where the Tenth Circuit distinguished itself, however, was by limiting the step one inquiry to the concealed carriage of firearms.\(^{155}\) This made the Second Amendment challenge an easy one for the Tenth Circuit to dismiss.\(^{156}\) From the Tenth Circuit's perspective, not only did *Heller* positively cite to a number of nineteenth-century cases upholding concealed carriage bans, but legal scholars and historians from across the ideological spectrum agree that concealed carry laws are some of the most longstanding firearms restrictions in American history.\(^{157}\)

The Tenth Circuit applied what can best be described as a consensus history approach.\(^{158}\) It is an approach that is the least susceptible to criticism as a matter of history-in-law because it only relies on those broader facets of history that are undisputed.\(^{159}\) As for any history-in-law criticism of *Peterson*, there is nothing that

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\(^{148}\) Charles, Armed in America, supra note 5, at 312.

\(^{149}\) See 720 ILL. COMP. STAT. ANN. 5/24-1(a)(4), (10), -1.6(a).

\(^{150}\) *Peterson*, 707 F.3d at 1202.

\(^{151}\) *Id.*

\(^{152}\) *Id.* at 1202–03.

\(^{153}\) *Id.* at 1211.

\(^{154}\) *Id.* at 1207–10.

\(^{155}\) *Id.* at 1211.

\(^{156}\) *Id.* ("Given [Supreme Court dicta] and the Supreme Court's admonition in *Heller* that 'nothing in our opinion should be taken to cast doubt on longstanding prohibitions,' we conclude that Peterson's Second Amendment claim fails at step one of our two-step analysis: the Second Amendment does not confer a right to carry concealed weapons.") (citations omitted).

\(^{157}\) *Id.* at 1207–12.

\(^{158}\) See Charles, History in Law, supra note 42, at 48 (stating the consensus approach relies "on those broader facets of the evidentiary record that are not in historical dispute.").

\(^{159}\) See Nelson, History and Neutrality, supra note 34, at 1277–83; see also Posner, Past-Dependency, supra note 40, at 595 ("There is no problem with judges using history when there
stands out. If anything, the Tenth Circuit should be commended for taking the history-in-law path of least resistance.

But even if the Tenth Circuit adopted a different history-in-law approach in *Peterson*, it would not make much of a difference. Regardless of whether the Tenth Circuit narrowly tailored the historical inquiry like the Eleventh Circuit, used history as a guidepost as did the Second Circuit, or relied exclusively on *Heller*’s historical pronouncements like the Seventh Circuit, the jurisprudential outcome would remain the same. The outcome being that, throughout most of American history, the concealed carriage of dangerous weapons in public places has been subject to regulation under the government’s police power, and therefore, the concealed carriage of dangerous weapons in public is outside the Second Amendment’s protective scope.160

E. *Peruta v. County of San Diego*—Consensus History Defeats Choice of History

If the consensus approach adopted by the Tenth Circuit is the least susceptible to history-in-law criticism, it begets the question of what history-in-law approach is the most susceptible? The answer for many historians is originalism, which is a form of constitutional interpretation and construction that views the Constitution’s text as a past to be preserved for the present.161 While there are many history-in-law criticisms of originalism, two are chief among them.162 The first is, although historical texts, evidence, and sources are the foundation of any originalist inquiry, the manner in which those historical texts, evidence, and sources are interpreted and utilized is not

is a consensus among professional historians.”); Flaherty, supra note 36, at 554 (“If historical scholarship in a given area has settled on a certain account, or more likely, on a framework for debate, historical assertions that acknowledge that account or framework will simply be more persuasive.”).


one and the same with history. The reason for this requires contrasting originalism's purpose, with that of history. While the purpose of history is to preserve the past for the sake of preserving the past—that is to provide a highly contextualized understanding of the past—the purpose of originalism is to merely harness the authoritative power of history to provide answers to constitutional questions. To state it more simply, originalism is not history. It is a fact that originalism's chief proponents openly concede.

This brings us to the second chief criticism of originalism. Because originalism is about producing jurisprudential outcomes—to include jurisprudential outcomes that history cannot remotely answer—originalism is often susceptible to manipulation. This can be easily achieved by stacking the evidentiary deck in one's favor, all the while ignoring historical context. Methodologically speaking, this is accomplished when originalists synthesize copious amounts of unrelated historical texts in search of a common meaning. This common meaning is then used to bend, alter, or omit historical evidence in a way that produces subjective outcomes.


See, e.g., Kurt T. Lash, The Fourteenth Amendment, Original Meaning Originalism and How to Approach the Historical Record: A Response to David Upham, LIBR. OF L. & LIBERTY (Oct. 8, 2014), http://www.libertylawsite.org/2014/10/08/the-fourteenth-amendment-original-meaning-originalism-and-how-to-approach-the-historical-record-a-response-to-david-upham/ (noting that originalism is not about getting history right, but about "the original meaning of the text . . . by investigating the historical usage of terms . . . to determine the likely understanding of a competent speaker of the English language."); Michael Rappaport, Gordon Wood on History and Originalism, LIBR. OF L. & LIBERTY (Oct. 24, 2013), http://www.libertylawsite.org/2013/10/24/gordon-wood-on-history-and-originalism/ (stating that new originalism is about the "investigation of legal meanings" rather than an attempt to "understand the past to the full extent that a historian needs to."); see also Gary Lawson, No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory, 64 FLA. L. REV. 1551, 1559 (2012).

Charles, The 'Originalism is Not History' Disclaimer, supra note 164, at 6–10.


Understanding these chief history-in-law criticisms of originalism are important, for they pervade the Ninth Circuit's decision in *Peruta v. County San Diego* (hereinafter *Peruta I*). At issue in the case was the constitutionality of California's "proper cause" requirement for the concealed carrying of a handgun. Much like in New York, California's law affords local officials discretion in determining whether an individual needed to carry a concealed firearm in public places before being permitted to do so. Also, much like in New York, California's law was challenged on the grounds that affording local officials such discretion was an affront to the Second Amendment.

In a split opinion written by Judge Diarmuid O'Scanlalin, the Ninth Circuit ruled that California's "proper cause" law was unconstitutional, not because "concealed carry *per se*" was "outside the scope of the right to bear arms," but because California law also prohibited the open carriage of an operable firearm in public. To O'Scanlalin, this fact was crucial to the outcome of the case, to which he stated that:

Peruta seeks a concealed carry permit because that the only type of permit available in the state. As the California legislature has limited its permitting scheme to concealed carry—and has thus expressed a preference for the manner of arms-bearing—a narrow challenge to San Diego County regulations on concealed carry . . . is permissible.

To support this outcome, O'Scanlalin relied almost exclusively on originalist methodologies. O'Scanlalin started his opinion by analyzing the original public meaning of the phrase "bear arms." Ultimately, O'Scanlalin concluded, in accord with *Heller*, that to "bear arms" is to "carry arms," and such a conclusion "strongly" infers that the Second Amendment "secures a right to carry a firearm in some fashion outside the home." From there, O'Scanlalin managed to fashion a one-sided narrative in which the Second Amendment outside the home and inside the home were historically understood to be one and the same. O'Scanlalin accomplished this by breaking virtually every history-in-law objectivity rule, including omitting historical

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170 *Peruta v. Cty. of San Diego* (*Peruta I*), 742 F.3d 1144, 1172 (9th Cir. 2014), rev'd en banc, 824 F.3d 919 (9th Cir. 2016); see Darrell A.H. Miller, *Peruta, the Home-Bound Second Amendment, and Fractal Originalism*, 127 Harvard L. Rev. F. 238, 239 (2014).

171 *Peruta I*, 742 F.3d at 1147–49.


173 *Peruta I*, 742 F.3d at 1196.

174 *Id.*

175 *Id.* at 1172–73.

176 *Id.* at 1152–53.

177 *Id.* at 1153.

178 *Id.* at 1170.
evidence, fabricating history, explaining away conflicting historical evidence, and so forth, all under the false flag of having conducted the most "complete historical analysis of the scope and nature of the Second Amendment right outside the home."\textsuperscript{179}

It would have been understandable if O'Scannlain would have followed the path of Posner and declared that the history of the Second Amendment outside the home was settled as a precedential matter.\textsuperscript{180} O'Scannlain, however, went demonstrably further by picking and choosing which historical sources are right, or consistent with a broad right to armed individual self-defense, and which sources are wrong, or contradict the recognition of such a broad right.\textsuperscript{181} Equally concerning is that, at no point, did O'Scannlain even attempt to examine how the American tradition of armed carriage evolved, when it evolved, how it evolved, and why it evolved.\textsuperscript{182} Rather, O'Scannlain focused intently on highlighting a handful of nineteenth-century cases, treatises and texts (often selectively quoting them) that supported a one-sided historical narrative.\textsuperscript{183}

There are indeed other history-in-law concerns with O'Scannlain's opinion; the most notable being the opinion's assessment of English history and tradition.\textsuperscript{184} According to O'Scannlain, English law only prohibited the carriage of "uncommon, frightening weapons," but "wearing ordinary weapons in ordinary circumstances posed no problem."\textsuperscript{185} O'Scannlain supports this proposition by relying on a strand of scholarship, generally referred to as the "Standard Model" Second Amendment in academic circles,\textsuperscript{186} which claims that the 1328 Statute of Northampton was almost never enforced, and when it was enforced, it was only in instances where the carrying of arms was done in a reckless manner that terrified the people.\textsuperscript{187}

\textsuperscript{179} Id. at 1173; see also id. at 1175 (criticizing other circuit courts opinions on the Second Amendment outside the home for "evading an in-depth analysis of history and tradition").

\textsuperscript{180} See Moore v. Madigan, 702 F.3d 933, 943 (7th Cir. 2012) (Williams, J., dissenting) ("The majority opinion presents one reading of Heller and McDonald in light of the question presented here, and its reading is not unreasonable.").

\textsuperscript{181} Miller, supra note 170, at 239–40.

\textsuperscript{182} See Peruta I, 742 F.3d at 1147–79.

\textsuperscript{183} Compare id. at 1157–66, with id. at 1185–90 (Thomas, J., dissenting).

\textsuperscript{184} See id. at 1154.

\textsuperscript{185} Id.


What O'Scannlain overlooks, however, is that the Standard Model's historical take on the Statute of Northampton has been thoroughly debunked. The fact of the matter is that the Statute of Northampton was frequently enforced as a prohibition on carrying dangerous weapons in the public concourse. To this effect, the royal proclamations of Henry IV, Henry VI, Elizabeth I, and James I confirm its enforcement. Elizabeth I's proclamations are particularly significant, given that the Statute of Northampton's restriction was extended to modern weaponry, to include firearms, pistols, and concealable weapons. James I reinforced this rule of law, but it was Elizabeth I's proclamations that legal commentators took notice of from the late sixteenth century through the eighteenth century. This history was either purposely omitted, or

188 See Peruta I, 742 F.3d at 1182–84 (Thomas, J., dissenting). To date, there have been two scholarly attempts to salvage a limited reading of the Statute of Northampton. See Kopel, The First Century of Right to Arms Litigation, supra note 4, at 133–40; Nicholas J. Johnson et al., Firearms Law and the Second Amendment: Regulation, Rights, and Policy 91–99 (2017). However, these scholarly attempts omit key historical evidence that rebuts their overall findings. See Tim Harris, The Right to Bear Arms in English and Historical Context, A Right to Bear Arms?: The Contested Role of History in Contemporary Debates on the Second Amendment (Jennifer Tucker, Barton C. Hacker, and Margaret Vining eds., forthcoming 2019) (on file with author); Charles, Faces, Take Two, supra note 4, at 379–401, accord Charles, Armed in America, supra note 5, at 114–20 (formally crediting Harris for having corrected the history surrounding Sir John Knight's case).

189 Charles, Faces of the Second Amendment, supra note 4, at 11–19.

190 Id. at 16–17, 20–23.

191 See Calendar of State Papers Domestic: Elizabeth, 1601–03, With Addenda 1547–65, at 214 (June 1602) (Mary Anne Everett Green ed., 1870); By the Quene Elizabeth I: A Proclamation Against the CARRIAGE of DAGGES, AND for Reformation of Some Other Great Disorders 1 (Christopher Barker, London 1594); By the Quene Elizabeth I: A Proclamation Against the common Use of Dagges, Handgunnes, Harquebuzes, Calliueres, and Cotes of Defence 1 (Christopher Barker, London 1579); see also Instructions to the Constables of Rye Upon the Late Proclamation Against the Common Use of "Dagges, Handgunnes, Harquebuts, Calivers and Coates of Defence" (The National Archives, East Sussex Record Office 1578–1579) (on file with author) ("Ye are to have a dilligent care to suche as ye shall see to carry any dagges, pistolles, harquebusies, calivers and suche leike in the stretes or other places within the liberties (excepte at the days of common musters and to the places of exercise for the shot) and if ye fynde eny to carry eny such peces to staie them and to cease the said peces, and them to present to Mr. Maior or one of the jurates of your ward."); By the Quene [Elizabeth I], for as much as Contrary to Good Order and Expresed Lawes Made by Parliament in the XXXIII Yere of the Raigne of the Quenes Majesties Most Noble Father of Worthy Memory Kyng Henry the Eighth 1 (1559) ("Many men do daily . . . ryde with Handgonnes & Dagges, under the length of three quarters of a yarde, whereupon have folowed occasions for sundrye lewe and eyvyl persons, with such unlawfull Gones and Daggges now in time of peace to execute greate and notable Robberies, and horrible murders . . . Her Majestie consedyring, withit he advise of her Counsayle, howe beneficiall a lawe the same is, and specially at this tyme moste nedefull of dewe execution, and howe negligentely it is of late observed: Strayghtly therefore chargeth and commandeth, not onely all maner her loving subjects fro[m] henceforth to have good and specyally regarde to the due execution of the same Statute, and of every part thereof . . .").

192 See, e.g., Michael Dalton, The Countrie Justice, Containing the Practices of the Justices of the Peace Out of Their Sessions 129 (London, Printed for the Society of Stationers, 1618) ("All such as shall go or ryde armed (offensively) in Fayres, Markets, or elsewhere; or shall weare or carry any Dagges or Pistoll charged: it seemeth any Constable
carelessly overlooked, by the strand of Second Amendment scholarship that O'Scannlain relied upon.

This historiographical oversight on the Statute of Northampton, although important in distinguishing myth from fact, is minor compared to O'Scannlain's use of early nineteenth-century history. To the untrained eye, O'Scannlain's analysis of nineteenth-century case law may appear valid. There were indeed a number of Antebellum Era court decisions that constitutionally distinguished between the open and concealed carriage of dangerous weapons. While the former was sometimes deemed constitutionally protected, the latter was not. This was not always the case, but from the early to mid-nineteenth century, based largely on these court decisions, there were regions and pockets within the United States that understood the Second Amendment as constitutionally protecting some aspects of open carriage.

seeing this, may arrest them and may carry them before the Justice of the Peace. And the Justice may binde them to the peace, yeah though those persons were so armed or weaponed for their defence; for they might have had the peace against the other persons: and besides, it striketh a feare and terror into the Kings subjects."; JOSPH KEBLE, AN ASSISTANCE TO THE JUSTICES OF THE PEACE FOR THE EASIER PERFORMANCE OF THEIR DUTY 224 (London, W. Rawlings, et al. eds., 2d ed. 1689) ("if any person whatsoever (except the Kings Servants and Ministers in his presence, or in executing his Precepts or other Officers, or such as shall assist them, and except it be upon the Hue-and-cry make to keep the peace, &c.) shall be so bold as to go or ride Armed, by night or by day, in Fairs, Markets, or any other places ... then any Constable, or any of the said Officers may take such Armour from him for the Kings use, and may also commit him to the Goal; and therefore it shall be good in this behalf for these Offices to stay and Arrest all such persons as they shall find to carry Dags or Pistols, or to be appareled with Privy-Coats or Doublets"); WILLIAM LAMBARDE, THE DUTIES OF CONSTABLES, BORSHOLDERS, TYTHINGMEN, AND SUCH OTHER LOW AND LAY MINISTERS OF THE PEACE 12-13 (1602) ("if any person whatsoever (except the king's servants and ministers in her presence, or in executing her precepts, or other offices, or such as shall assist them and except it be upon Hue and Crie made to keep the peace, and that in places where acts against the Peace do happen) shall be so bold, as to goe, or ride armed, by night, or by day, in Fairs, Markets, or any other places: ... then any Constable, or any of the said Officers may take such Armour from him, for the Queenes use, & may also commit him to the Gaole. And therefore, it shall be good in this behalf, for the Officers to stay and arrest all such persons as they shall find to carry Dags or Pistols, or to be appareled with privie coats, or doublets: as by the proclamation (of Queen Eliz.)."; FERDINANDO PULTON, DE PACE REGIS ET REGNI VIZ 4 (London, Printed for the Companie of Stationers, 1609) (writing the Statute of Northampton served "not onely to preserve peace, & to eschew quarrels, but also to take away the instruments of fighting and batterie, and to cut off all means that may tend in affraie or feare of the people.").

193  *Peruta I*, 742 F.3d at 1156–60.

194  *See*, e.g., State v. Reid, 1 Ala. 612, 622 (1840); Nunn v. State, 1 Ga 243, 259 (1846); State v. Chandler, 5 La. Ann. 489, 490 (1850).

195  *Id.*

196  *See*, e.g., State v. Buzzard, 4 Ark. 18, 27 (1842) (rejecting the open carriage-concealed carriage distinction unless the armed carriage was in support of the common defense); Aymette v. State, 21 Tenn. 154, 159 (1840) (same).

Herein lies the chief history-in-law problem with O'Scannlain's opinion—it is an early to mid-nineteenth century reflection of only a portion of the United States.\textsuperscript{198} The attitudes of the rest of the United States are cast aside as insignificant.\textsuperscript{199} This is not to say that it is never acceptable for jurists to choose one historical narrative over another. For the law, unlike history, requires providing definitive answers to questions, even when the evidence does not speak with one voice.\textsuperscript{200} But, when choosing one historical narrative over another, a jurist should at a minimum explain why the historical narrative chosen is more historically persuasive or jurisprudentially acceptable than the other.\textsuperscript{201} O'Scannlain failed to do this, and he further failed to explore the historical background of the open carriage-concealed carriage distinction. If O'Scannlain would have done this, he would have learned it was largely based on southern notions of vengeance and honor through dueling, as well as maintaining the institution of slavery.\textsuperscript{202}

Unbeknownst to O'Scannlain, his failure to historically expound upon the open carriage-concealed carriage distinction set the stage for one of the most historically inverse court opinions in modern history. This is because, in surveying the Antebellum Era, O'Scannlain embraced a historical narrative tied to the institution of slavery. Yet, when surveying the post-Civil War Era, O'Scannlain selected a historical narrative tied to the abolition of slavery. In particular, O'Scannlain morally defended recognizing broad Second Amendment rights outside the home by holding up the historical example of the Black Codes, which were sets of laws adopted after the Civil War, primarily in the South, with the intent of subjugating free blacks.\textsuperscript{203} In a number of states, the Black Codes included prohibitions on free blacks owning, using, or carrying firearms in private or public.\textsuperscript{204}

\textsuperscript{198} There are other history-in-law problems with O'Scannlain's use of nineteenth-century case law, particularly O'Scannlain's coverage of Bliss v. Commonwealth, 2 Litt. 90 (1822). O'Scannlain frames the case as being "especially significant" to the nineteenth-century understanding of the Second Amendment. \textit{Peruta I}, 742 F.3d at 1156 (quoting Lund, \textit{The Second Amendment}, supra note 161, at 1360). What O'Scannlain overlooks is that Bliss was a complete outlier in constitutional law. See Patrick J. Charles, \textit{Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History}, 20 \textit{N.Y.U.L. REV.} 457, 502-17 (2011) (examining late eighteenth-century conceptions of constitutional interpretation). Moreover, the Bliss opinion was uniformly rejected by every nineteenth-century court that followed, as well as by the Kentucky legislature. See Cornell, \textit{The Early American Origins of the Modern Gun Control Debate}, supra note 61, at 586.

\textsuperscript{199} \textit{Peruta I}, 742 F.3d at 1182 (Thomas, J., dissenting) (noting that "[c]are is . . . required to avoid the danger inherent in any exercise of historiography; that we assemble history to fit a pre-conceived theory.").

\textsuperscript{200} Charles, Historicism, supra note 13, at 9; see also Barry Friedman, \textit{Book Review: The Turn to History}, 72 N.Y.U.L. REV. 928, 947 (1997) ("Lawyers are different from historians: historians ask questions out of curiosity of the past, lawyers use the past to score advocacy points in the present.").

\textsuperscript{201} Charles, Historicism, supra note 13, at 116–18 (discussing the objectivity and legitimacy considerations when choosing between two historical narratives).


\textsuperscript{203} \textit{Peruta I}, 742 F.3d at 1161–63.

\textsuperscript{204} For more on the history of Black Codes, see Barry A. Crouch, \textit{“All the Vile Passions”}: \textit{The Texas Black Code of 1866}, 97 \textit{The Southwestern Historical Q.} 12 (1993); Joe M.
Placing the inverse nature of O'Scannlain's choice of history aside, there is also a factual issue with O'Scannlain's historical reliance on the Black Codes. While O'Scannlain is correct that the Black Codes were indeed racially motivated and an atrocious violation of civil rights, it is quite the historical leap of faith for O'Scannlain to assume that the Black Codes, and all nineteenth-century armed carriage laws, are somehow one and the same. There is no substantiated evidence, at least not in historical context, to support such a theory. To be clear, racism was not the impetus for the overwhelming majority of nineteenth-century armed carriage laws. Quelling violence, preventing crime, and mitigating public injury were, however. The overall point to be made is, despite O'Scannlain flaunting his historical analysis on the Second Amendment outside the home as being both "complete" and "in-depth," his analysis is anything but. As noted earlier, O'Scannlain's opinion ignores that much of the United States did not subscribe to the open carriage-concealed carriage distinction. Rather, these parts of the United States viewed preparatory armed carriage in public places, whether done openly or concealed, to be a disturbance of the public peace. But, what is most concerning regarding O'Scannlain's choice of history is it would essentially undo nearly two centuries of constitutional jurisprudence on armed carriage.

The fact of the matter is, by the close of the nineteenth-century, the Antebellum South's open carriage-concealed carriage distinction was no longer jurisprudentially prevalent. Even in much of the South, the open carriage-concealed carriage distinction was gradually replaced with a national standard on the law and armed carriage, a standard that provided state and local governments broad police powers to


For the relevance of the Black Codes and understanding the nineteenth-century conception of the Second Amendment, see Charles, Armed in America, supra note 5, at 136–39.


Peruta I, 742 F.3d at 1173, 1175.

See id. at 1171.

Charles, Armed in America, supra note 5, at 150–56.
regulate dangerous weapons, particularly in public places, so long as they did not utterly destroy the armed citizenry model of the right to arms or fail to allow for self-defense in extreme cases.\textsuperscript{211} As the eminent jurist John Forrest Dillon summarized in the first law review article addressing this subject:

> It is within common experience that there are circumstances under which to disarm a citizen would be to leave his life at the mercy of a treacherous and plotting enemy. If such a state of facts were clearly proven, it is obvious it would be contrary to all our notions of right and justice to punish the carrying of arms [in that instance], although it may have infringed the letter of some statute.\textsuperscript{212}

In all other cases, however, Dillon noted that state and local governments were acting within their authority "to regulate the bearing of arms in such manner as [they] may see fit, or to restrain it altogether."\textsuperscript{213} This national standard on the law and armed carriage carried over into the twentieth-century and, as outlined earlier, remained largely undisputed until the late 1970s.\textsuperscript{214}

Understanding the broader history of armed carriage is important because it once again illustrates how one's choice of history can lead to very different outcomes, both as a matter of law and history. The first illustration of this was outlined in discussing Posner's opinion in \textit{Moore}.\textsuperscript{215} O'Scannlain followed suit in \textit{Peruta I} by choosing one historical time and era (and geographic region) above others.\textsuperscript{216} In so finding,

\textsuperscript{211} \textit{Id.}

\textsuperscript{212} John Forrest Dillon, \textit{The Right to Keep and Bear Arms for Public and Private Defence}, 1 CENT. L.J. 259, 286 (1874).

\textsuperscript{213} \textit{Id.} at 296; see also THOMAS M. COOLEY, \textit{A TREATISE ON THE LAW OF TORTS: OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT} 301 (Callaghan 1879) ("Neither military nor civil law can take from the citizen the right to bear arms for the common defense. This is an inherited and traditio

\textsuperscript{214} See supra pp. 25–29.

\textsuperscript{215} See supra pp. 23–25.

\textsuperscript{216} See \textit{Peruta v. Cty. of San Diego} (\textit{Peruta I}), 742 F. 3d 1144, 1156 (9th Cir. 2014).
O’Scannlain effectively muted the bulk of the historical record relating to armed carriage.\textsuperscript{217}

The ramifications of O’Scannlain’s opinion, however, were short-lived. \textit{Peruta I} was granted a rehearing en banc (hereinafter \textit{Peruta II}), where a consensus history approach defeated O’Scannlain’s choice of history approach.\textsuperscript{218} What tilted the scales for the Ninth Circuit en banc court to side in favor of the consensus history approach was the manner the constitutional issue was framed. While O’Scannlain had framed the issue as whether a responsible, law-abiding citizen has a right under the Second Amendment to carry a firearm in public for self-defense,\textsuperscript{219} the en banc court took a much narrower approach, and instead framed the issue as to whether the Second Amendment protects the ability to carry concealed firearms in public.\textsuperscript{220}

On their face, the difference in how the court framed the issue may seem negligible. But, as seen in the Eleventh Circuit’s opinion in \textit{GeorgiaCarry.org} and the Tenth Circuit’s opinion in \textit{Peterson}, the difference is quite significant as a matter of history-in-law.\textsuperscript{221} The reason for this is rather straightforward. The more abstract one frames a legal question, the more complex, and often times contradicting, the answer will be.\textsuperscript{222} This rule also applies to any historical question.\textsuperscript{223} The broader one frames the historical question, the more likely it is that one will find conflicting or competing narratives. This then places the person framing the historical question with one of two options.\textsuperscript{224} The first option would be to choose one historical narrative over the other(s).\textsuperscript{225} In doing so, however, to ensure historical objectivity, accuracy, and transparency, it is important that the person making the choice explain why the historical narrative chosen is correct, or, at a minimum, the better alternative. This requires conducting a thorough, contextual analysis of the different, competing historical narratives.\textsuperscript{226} But, as noted earlier, this is a task that few in the legal profession are equipped to undertake.\textsuperscript{227}

\textsuperscript{217} Id. at 1182–91 (Thomas, J., dissenting).

\textsuperscript{218} Peruta v. Cty. of San Diego (\textit{Peruta II}), 824 F.3d 919, 924–42 (9th Cir. 2016) (en banc).

\textsuperscript{219} \textit{Peruta I}, 742 F.3d at 1150.

\textsuperscript{220} \textit{Peruta II}, 824 F.3d at 927.

\textsuperscript{221} \textit{GeorgiaCarry.Org}, Inc. v. Georgia, 687 F.3d 1244, 1261–64 (11th Cir. 2012); \textit{Peterson} v. Martinez, 707 F.3d 1197, 1207–12 (10th Cir. 2013).


\textsuperscript{223} Nelson, \textit{History and Neutrality}, supra note 34, at 1247 (noting that a “historian’s account of the past” are “colored by the questions” asked of it, and “different interpretations of the past are possible if different questions are asked of it.--.--.--.--.”).

\textsuperscript{224} \textit{CHARLES}, \textit{HISTORICISM}, supra note 13, at 115–16.

\textsuperscript{225} \textit{Id.} at 116.

\textsuperscript{226} \textit{Id.} at 87–98, 109–18.

\textsuperscript{227} \textit{See supra} pp. 7–9; \textit{see also} Sutton, \textit{The Role of History}, supra note 34, at 119 (noting it is a difficult task for jurists to “distinguish the scholar who has devoted a career to a historical
This leaves us with the second of the two options when faced with conflicting or competing historical narratives—to find a consensus within the conflict. This involves relying only on those broader facets of history that are not up for dispute. Here, history remains relevant in finding an answer, but to a lesser degree, and in a way, is more viewpoint neutral. In light of these considerations, the *Peruta II* court felt the second option was the better choice. Not only was the case an applied challenge to a denial of a California concealed carry license (and not an applied challenge to open carriage), but, by selecting the second option, the en banc court was able to forgo the dilemma of having to choose between dueling histories. Instead, the court was able to rely on copious amounts of the historical evidence showing that the concealed carriage of dangerous weapons fell outside the scope of the Second Amendment.

In coming to this determination, it is worth noting that *Peruta II* purposefully sidestepped the broader question of how, if at all, the Second Amendment applied outside the home. This has subjected the *Peruta II* decision to some criticism. But, what this criticism overlooks is the jurisprudential benefits of courts, like the *Peruta II* court, from adopting a restrained history-in-law approach. First and foremost, if past is prologue, the track records of courts employing history-in-law

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228 CHARLES, HISTORICISM, supra note 13, at 116.

229 Nelson, History and Neutrality, supra note 34, at 1280 (“There will be times . . . when two [historical] arguments are genuinely in conflict. On these occasions, a neutral judge must strive to resolve the conflict by searching for a broader principle of consensus that embraces the two competing ones and explains their apparent inconsistencies. Because a judge will not be preferring one conflicting position over another but simply identifying a larger one that identifies both, his neutrality will be preserved.”).

230 *Peruta v. County of San Diego: Ninth Circuit Holds Concealed Carry Is Not Protected by the Second Amendment*, 130 HARV. L. REV. 1024, 1029 (2017) (“The court’s historical conclusions and subsequent disagreement with the dissent also rely heavily on the premise of narrow framing.”).

231 *Peruta v. Cty. of San Diego (Peruta II)*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) (“The historical materials . . . are remarkably consistent . . . the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public.”).

232 *Id.* at 927 (“We do not reach the question whether the Second Amendment protects some ability to carry firearms in public, such as open carry.”); *id.* at 939 (“There may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public. The Supreme Court has not answered that question, and we do not answer it here.”).


234 See, e.g., Kelly, Clio and the Court, supra note 36, at 157–58; Wyzanski, History and Law, supra note 13, at 239.
shows us that a restrained approach minimizes the potential for mythmaking.\textsuperscript{235} Second, and more importantly, because the potential for mythmaking is sufficiently diminished under a restrained approach, the accuracy, and therefore the legitimacy of the court's opinion, will more likely withstand future scrutiny. The opposite holds true if a court's history-in-law analysis is inaccurate or omits important information that could alter the opinion's conclusion. This is because in such instances, lower courts are precedentially bound to rely on this inaccurate or deficient history. This in turn creates a self-perpetuating chain of ill-founded jurisprudence.\textsuperscript{236}

\textit{F. Wrenn v. District of Columbia—Explaining Away History}

By the close of 2016, with \textit{Peruta II} having upheld California's "proper cause" concealed carriage law, the circuit courts agreed that armed carriage laws requiring a "proper cause" or "justifiable need" were a constitutional exercise of state and local government's police power.\textsuperscript{237} This unanimity, however, was short-lived. In a split opinion, the District of Columbia (DC) Circuit held in \textit{Wrenn v. District of Columbia} that the carrying of firearms "beyond the home, even in populated areas, even without special need, falls within" the "core" of the Second Amendment.\textsuperscript{238} The key to the DC Circuit arriving at this conclusion was framing the constitutional issue much in the same way Judge O'Scannlain had in \textit{Peruta I}.\textsuperscript{239} Rather than frame the issue narrowly as a challenge to a concealed carriage law, the DC Circuit inquired whether there was, in some form or another, a Second Amendment right to armed self-defense outside the home.\textsuperscript{240}

In a number of respects, the \textit{Wrenn} opinion mirrors that of \textit{Peruta I}. This includes the history-in-law analysis.\textsuperscript{241} For instance, like the Ninth Circuit in \textit{Peruta I}, the DC Circuit in \textit{Wrenn} focused intently on the Antebellum Era.\textsuperscript{242} In addition, the DC Circuit categorically dismissed any conflicting historical evidence as having no jurisprudential weight.\textsuperscript{243} However, the DC Circuit did distinguish itself from \textit{Peruta I} in its willingness to explain away history.\textsuperscript{244} What explaining away history entails is


\textsuperscript{236} \textit{Charles, Historicism}, supra note 13, at 90; \textit{see also} Konig, \textit{Heller, Guns, and History}, supra note 35, at 177–78.

\textsuperscript{237} \textit{Charles, Historicism}, supra note 13, at 90.

\textsuperscript{238} \textit{Wrenn v. District of Columbia}, 864 F.3d 650, 664 (D.C. Cir. 2016); \textit{see also id.} at 661 ("the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment protections.").

\textsuperscript{239} \textit{Compare} \textit{Peruta v. Cty. of San Diego (Peruta II),} 824 F.3d 919, 939 (9th Cir. 2016) (en banc), \textit{with Wrenn}, 864 F.3d at 664.

\textsuperscript{240} \textit{Wrenn}, 864 F.3d at 657–59, 662.

\textsuperscript{241} \textit{Compare} \textit{Peruta v. Cty. of San Diego (Peruta I),} 742 F.3d 1144, 1156 (9th Cir. 2014), \textit{with Wrenn}, 864 F.3d at 664.

\textsuperscript{242} \textit{Wrenn}, 864 F.3d at 658.

\textsuperscript{243} \textit{Id.} at 658–61.

\textsuperscript{244} \textit{Id.}
lawyering the content of historical texts to bolster a particular legal argument, rather than providing substantiated historical evidence that actually substantiates it.\textsuperscript{245}

As it pertains to the \textit{Wrenn} decision in particular, two examples stand out. The first example of the DC Circuit explaining away history involves the law and armed carriage from the enactment of the 1328 Statute of Northampton to the ratification of the Bill of Rights in 1791.\textsuperscript{246} Initially, the DC Circuit declined the invitation to examine the "dense historical weeds" of four centuries of armed carriage laws.\textsuperscript{247} The rationale for this being the legal perils of engaging in conflicting history-in-law analysis outweighed the benefits.\textsuperscript{248} But the DC Circuit then suddenly reversed course and accepted a reading of history in which the Statute of Northampton was understood as only banning the of carrying of weapons in a dangerous or threatening manner.\textsuperscript{249} As historical support for this narrow interpretation, the DC Circuit relied on two eighteenth-century legal treatises that incorporate the language "terrify the people" when addressing the prosecutorial scope of the Statute of Northampton; language the court felt proved the peaceable carrying of dangerous weapons in public was deemed to be legally permissive.\textsuperscript{250}

However, in coming to this historical conclusion, the DC Circuit failed to address how such language was most often used in Anglo-American law, particularly in cases of armed carriage. If the DC Circuit would have explored this matter further, they would have learned that any "terrify" or "fear" language was mere boilerplate language referring to an affray, or what was otherwise known as a public (not private) offense, that would be a breach of the public peace.\textsuperscript{251} Additionally, the DC Circuit would have learned that, in most instances, the act of carrying dangerous weapons in the public concourse was deemed legally sufficient in amounting to a violation of the Statute of Northampton.\textsuperscript{252}

\begin{itemize}
\item \textsuperscript{245} See CHARLES, HISTORICISM, supra note 13, at 87–90.
\item \textsuperscript{246} \textit{Wrenn}, 864 F.3d at 659.
\item \textsuperscript{247} Id.
\item \textsuperscript{248} Id. at 660 ("The District offers its replies, to which the plaintiffs issue sur-replies, and on and on, until for every point there is an equal and opposite counterpoint.").
\item \textsuperscript{249} Id.
\item \textsuperscript{250} See \textsc{1 William Hawkins, A Treatise of the Pleas of the Crown} 1716–1721 136 (Prof. Books Ltd. 1973) ("no wearing of Arms is within the meaning of this Statute, unless it be accompanied with such circumstances as are apt to terrify the People."); 3 JAMES WILSON, \textsc{The Works of the Honourable James Wilson}, L.L.D. 79 (Bird Wilson ed., Lorenzo Press 1804) ("In some cases, there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrouer among the people.").
\item \textsuperscript{251} See, e.g., 4 \textsc{William Blackstone, Commentaries on the Laws of England} 145 (photo reprint 1979) (1769); \textsc{Hawkins, supra} note 250, at 134. \textit{See also} Mark Anthony Frassetto, \textsc{To the Terror of the People: Public Disorder Crimes and the Original Public Understanding of the Second Amendment}, 43 S. Ill. U. L.J. 61 (2018).
\item \textsuperscript{252} See, e.g., DALTON, \textsc{The Countrey Justice}, supra note 192, at 129; \textsc{Harris, The Right to Bear Arms, supra} note 187, at 4; \textsc{William Lambard, Eirenarcha; Or of the Office of the Justices in Foure Books} 135 (Thomas Wright & Bonham Norton 1599).
\end{itemize}
Placing these historical facts aside, even if we isolate the history-in-law inquiry and focus solely on the content within the two legal treatises, a thorough, more contextual reading rebuts the DC Circuit's historical conclusion. First, it is important to point out that the two legal treatises are virtually one in the same as it pertains to the Statute of Northampton. This is because one of the legal treatises—James Wilson's lectures on the law—is merely paraphrasing of the other, William Hawkins' A Treatise of the Pleas of the Crown. Second, in reading Hawkins's section on the Statute of Northampton, it becomes clear that the portion the DC Circuit cites is only part of a narrow exception to the general rule, not the general rule itself. Thus, accepting the DC Circuit's historical interpretation requires deleting most of Hawkins's other passages on the matter. Simply put, to accept the DC Circuit's historical interpretation would mean that Hawkins intended to make his other legal exceptions to the Statute of Northampton superfluous. Third, the DC Circuit's historical conclusion ignores that Hawkins clearly distinguished between self-defense in private and public. In private—that is at one's dwelling or home—the common law permitted the assembling of friends for self-defense, whether armed or unarmed. In public, however, this was not the case:

[A]n Assembly of a Man's Friends for the Defence of his Person, against those who threaten to beat him if he go to such a Market is unlawful; for he who is in Fear of such Insults, must provide for his Safety, by demanding the Surety of the Peace against the Persons by whom he is threatened, and not make use of such violent Methods, which cannot but be attended with the Danger of raising Tumults and Disorders to the Disturbance of the Publick Peace: Yet an Assembly of a Man's Friends in his own House, for the Defence of the Possession thereof, against those who threaten to make an unlawful Entry thereinto, or for the Defence of his Person against those

253 James Wilson not only paraphrases Hawkins, but also cites to him. See 3 Wilson, supra note 250, at 79 (citing 1 Hawkins, supra note 250, at 135). This is also the case in the original notebooks maintained by Wilson's son, Bird Wilson, from which The Works of the Honourable James Wilson was published in 1804. See James Wilson, Notebook 45, at 14 (Free Library of Philadelphia) (on file with author).

254 Wrenn, 864 F.3d at 660.


256 Charles, Armed in America, supra note 5, at 115–16.

257 See Charles, Statute of Northampton, supra note 4, at 24–25 (discussing the development of the castle doctrine in English common law).

258 Hawkins, supra note 250, at 136 ("That a Man cannot excuse the wearing such Armour in Publick, by alledging that such a one threatened him, and that he wears it for the Safety of his Person from his Assault; but it hath been resolved, That no one shall incur the Penalty of the said Statute [of Northampton] for assembling his Neighbors and Friends in his own House, against those who threaten to do him any Violence therein, because a Man's House is his Castle.")
who threaten to beat him therein, is indulged by Law; for a Man’s House is
looked upon as his Castle.\textsuperscript{259}

Another problem with the DC Circuit’s historical conclusion is its attempt to equate
the Statute of Northampton with the crime of assault with a deadly weapon.\textsuperscript{260} Yet, as
the treatises of Hawkins, Wilson, Michael Dalton, and William Blackstone outline,
the two acts were legally distinguishable. The former—assault—required the act of
force and violence; the latter—the Statute of Northampton—did not.\textsuperscript{261} In light of
these observations, it is flabbergasting how the DC Circuit came to the historical
conclusion that it did. The DC Circuit essentially accepted historical myth over
historical fact, all because of an ahistorical, twenty-first century reading of the
boilerplate language “terrify the people.”

This brings us to the second example of the DC Circuit explaining away history,
specifically, nineteenth-century variants of the Statute of Northampton, or what the

\textsuperscript{259} Id. at 158. The legal distinction between public and private self-defense up through the
eighteenth-century is also outlined in the duty to retreat. In public, before exercising the right of self-defense, one was required to first retreat. This was not the case in one’s home. See Charles, Statute of Northampton, supra note 4, at 25–26.


\textsuperscript{261} Compare 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 120
(photo. report 1979) (1768) (describing an assault as “an attempt or offer to beat another, without
touching him: as if one lifts up his cane, or his fist, in a threatening manner at another”), with 4
BLACKSTONE, supra note 251, at 148–49 (“of riding or going armed, with dangerous or unusual
weapons, is a crime against the public peace, by terrifying the good people of the land; and is
particularly prohibited by the Statute of Northampton . . . in like manner as, by the laws of
Solon, every Athenian was finable who walked about the city in armour.”); compare DALTON,
THE COUNTRY JUSTICE, supra note 192, at 128 (stating sureties for the peace may be enforced
“if any Constable shall perceive any other persons (in his presence) to be about to break the
peace, either by drawing weapons, or by striking, or assaulting one another . . . he may take
assistance, carriage them all before the Justice to find sureties for the peace . . . .”), with id.
(stating sureties of the peace may be enforced by a constable “of such as in his presence shall
go or ride Armed offensively, . . . for these are committed to be in affray and fear of the
people, and a means of the breach of the Peace . . . .”); compare HAWKINS, supra note 250, at
133–34 (including in the definition of assault as “an Attempt, or Offer, with Force and Violence
to do a corporal Hurt to another; as by striking at him with, or without, a Weapon, or presenting
a Gun at him, at such a Distance to which the Gun will carry, or pointing a Pitch-fork at him,
standing within the Reach of it, or by holding up one’s Fist at him, or by any other such Act
done in an angry threatening Manner”), with id. at 135 (citing the Statute of Northampton in
writing, “in some Cases there may be an Affray where there is no actual Violence; as where a
Man arms himself with dangerous and unusual Weapons, in such a Manner as will naturally
cause a Terror to the People”); compare Wilson, supra note 253, Notebook 45, at 10–11 (“An
Assault is an Attempt or Offer, with Force and Violence, to do a corporal Hurt to another; as
by striking at him . . . by pointing a Pitch Fork at him, if he be within its Reach, by presenting a
Gun at him, if he be within the Distance, to which it will carry, or by any other Act of a similar
Kind done in an angry and threatening Manner.”) (citing HAWKINS, supra note 250, at 133 and
3 BLACKSTONE, supra note 261, at 120), with id. at 13–14 (“In some cases, there may be an
affray [or “Fighting of Persons in a public Place to the Terror of the Citizens”], where there is
no actual Violence, as where a Man arms himself with dangerous and unusual Weapons, in such
a Manner, as will naturally diffuse Terror among the People.”) (citing HAWKINS, supra note 250,
at 135).

\textsuperscript{43} Published by EngagedScholarship@CSU, 2019
DC Circuit referred to as "surety laws." As outlined in Part II.B, these laws were less restrictive than the concealed carry prohibitions that existed in other jurisdictions. Although these laws indeed prohibited the act of preparatory armed carriage in public, they afforded individuals the ability to carry weapons if they were faced with a "reasonable" fear of assault or injury to their person, family or property. In such instances, the burden fell on the person carrying the weapon to demonstrate that their fear of assault or injury was "imminent." If the fear was not found to be imminent, the court would require surety of the peace or surety of good behavior, which involved posting a bond (which could be substituted with real property, goods and/or chattel) for such a period of time as directed. Those that could post the bond were left free to their own recognizance and the bond would be returned only if the person did not breach the peace again for the time specified. However, those who were unable to post the required bond could be placed in the gaol, fined, or both. And given that the bond could be as high as $200 (roughly the monetary equivalent of $5,400 today), many, if not most persons living in the nineteenth-century would have been forced to suffer the latter punishment.

Also, a plain reading of these nineteenth-century variants of the Statute of Northampton show their intent and purpose is rather straightforward—to prevent the habitual carrying of arms, as well as ensure the peace, safety, health, and welfare of the public. The DC Circuit, however, arrived at a much different conclusion.


263 See supra pp. 17–19.

264 Historically, the reason for this was the English common law required a person to first seek surety of the peace, rather than go armed in public, if they maintained reasonable fear of assault or injury from another. See Keble, supra note 62, at 646; see also id. at 410 (Justices "will not grant any Writ for Surety of the Peace, without making an Oath that he is in fear of bodily harm. Nor the Justices of the Peace ought not to Grant any Warrant to cause a man to find Surety of the Peace, at the request of any Person, unless the Party who requireth it, will make an Oath, that he requireth it for safety of his Body, and not for malice.").


266 See Waterman, supra note 265, at 621.

267 See id. at 616.

268 See id. at 621.

269 See, e.g., 1870 W. Va. Laws ch. 153, § 8; accord The Revised Statutes of West Virginia in Force December, 1878, Alphabetically Arranged (John F. Kelly ed., W.J. Gilbert 1879) ("If a justice shall, from his own observation, or upon information of others, have good reason to believe that any person in his county is habitually carrying about his person concealed weapons, such as dirks, bowie-knives, pistols, or other dangerous weapons, it shall
According to the DC Circuit, the nineteenth-century variants of the Statute of Northampton did nothing to "deny a responsible person carrying rights" unless the person posed a public threat. And even in those instances, at least according to the DC Circuit, the person "could go on carrying without criminal penalty" so long as the person posted a monetary bond. In other words, the DC Circuit interpreted the nineteenth century variants of the Statute of Northampton as only shrinking the carrying rights of the "(allegedly) reckless." What evidence or authority did the DC Circuit provide in support to this historical conclusion? The answer is nothing, not one historical source. It is one thing for a court to choose one competing or conflicting historical narrative over another. It is quite another to make up history altogether. This is essentially what the DC Circuit did. Granted, only few historical examples of the nineteenth-century variants of the Statute of Northampton being enforced have survived the test of time. However, for whatever reason, the DC Circuit thought it was prudent to set these historical examples aside, without any explanation as to why, and then replace them with an interpretation that is historically unsubstantiated.

In addition to having no historical evidence, the DC Circuit's reading of nineteenth-century variants of the Statute of Northampton fails for other reasons. For one, it ignores the fact that these laws evolved in one of two ways; both of which were meant to expressly limit armed carriage unless it was absolutely necessary. One preferred evolution was for cities and localities to enact armed carriage licensing laws. As outlined in Part II.B, these laws required individuals to first obtain a license before carrying dangerous weapons in public. In most cases, the granting of these licenses was at the discretion of a local government official, and the person applying for the license had to demonstrate a justifiable need to do so, as well as provide proof of their good character. The other evolution of nineteenth-century variants of the Statute of Northampton involved eliminating the surety of the peace process altogether, and replacing it with fine, forfeiture of weapon, or both. This evolution is rather...
significant, for it contradicts the DC Circuit’s belief that the sole purpose of the nineteenth-century variants of the Statute of Northampton was to only burden the "reckless."

Another reason the DC Circuit’s reading of the nineteenth-century variants of the Statute of Northampton falters, and perhaps the most obvious, is a completely backwards reading of the law. In most, if not all of these laws, they are merely one

furnish any such weapon as is hereinafter mentioned to a person whom he knows, or has reason, from his appearance or otherwise, to believe to be under the age of twenty-one years, he shall be punished as hereinafter provided; but nothing herein contained shall be so construed as to prevent any person from keeping or carrying about his dwelling house or premises, any such revolver or other pistol, or from carrying the same from the place of purchase to his dwelling house, or from his dwelling house to any place where repairing is done, to have it repaired and back again. And if upon the trial of an indictment for carrying any such pistol, dirk, razor or bowie knife, the defendant shall prove to the satisfaction of the jury that he is a quiet and peaceable citizen, of good character and standing in the community in which he lives, and at the time he was found with such pistol, dirk, razor or bowie knife, as charged in the indictment he had good cause to believe and did believe that he was in danger of death or great bodily harm at the hands of another person, and that he was in good faith, carrying such weapon for self-defense and for no other purpose, the jury shall find him not guilty. But nothing in this section contained shall be so construed as to prevent any officer charged with the execution of the laws of the State, from carrying a revolver or other pistol, dirk or bowie knife.”); Ordinance No. 22: An Ordinance Relating to the Promotion of the Public Peace, (passed Feb. 7, 1888), THE CHARTER AND ORDINANCES OF THE CITY OF NEW ULM, MINNESOTA 110–11 (Jos. A. Eckstein ed., New Ulm Post Print 1887) (“It shall be unlawful for any person, within the limits of this city to carry or wear under his clothes or concealed about his person, any pistol, dirk, slung-shot, or knuckle of brass or other metal, or any other dangerous or deadly weapon. Any such weapon duly adjudged by any justice court of said city to have been worn or carried by any person in violation of this section, shall be adjudged and declared forfeited or confiscated to the city of New Ulm; and every such person so offending, on conviction, in addition to the penalty hereinafter described, be required to furnish sureties for keeping the peace for a term not exceeding six months . . . . The prohibition in the preceding section shall not apply to police, peace, and other officers of courts, whose duty may be to secure warrants or make arrests, nor to persons whose business or occupation may require the carrying of weapons for protection. Nothing in the ordinances of this city shall be construed to prohibit within the city limits any firing of a gun, pistol or other firearm when done in the lawful defense of person, property or family, or in the necessary enforcement of the laws.”); Ordinance No. 74: An Ordinance Relating to Breaches of the Peace, Disorderly Conduct and the Carrying of Concealed Weapons (passed May 24, 1870), 1884 CITY CHARTER OF THE CITY OF HASTINGS: TOGETHER WITH ORDINANCES OF SAID CITY 75 (Hastings Daily News Printers, 1884) (“Any person who shall go armed within the incorporated limits of said city of Hastings with a dirk, dagger, sword, pistol or pistols, or shall carry a slung-shot or metal knuckles or other offensive or dangerous weapon, without reasonable cause to fear an assault or other injury to his person or to his family or property, shall, upon conviction before said justice, be punished by a fine not exceeding one hundred dollars, or by imprisonment not exceeding three months, or both, in the discretion of the justice.”); Ordinances of the Village of Bottineau, Bottineau Co., Dakota (adopted Dec. 7, 1888), BOTTINEAU PIONEER, Dec. 13, 1888 (“Any person found armed within the corporate limits of the village of Bottineau with a dirk, dagger, sword, pistol or pistols, or other offensive or dangerous weapons, without reasonable cause to fear an assault or other injury of violence to his person or to his family or property, shall, upon conviction before said justice, be punished by a fine not exceeding ten dollars, or by imprisonment in the village jail not exceeding term of thirty days.”); see also State v. Workman, 35 W. Va. 367 (1891).

280 Wrenn, 864 F.3d at 661.
part of a larger statute on surety of the peace. According to the DC Circuit, despite the law expressly prohibiting going publicly armed except under limited circumstances, the law must be read in reverse and affording everyone "robust carry rights." If the DC Circuit's reading is indeed historically valid, then the other "breaches of the peace" referred to in the surety laws must also be recognized as constitutionally protected behavior. This would mean affrays, threatening to "kill or beat another, or to commit any violence or outrage" against another's person or property, are all constitutionally protected behavior unless done in a reckless or threatening manner. But, this would be a rather backwards reading of the law. The point being, that the DC Circuit committed one of the greatest history-in-law sins—it interpreted a historical text without any historical context whatsoever, and further failed to provide an even rudimentary understanding of how the surety of the peace functioned for centuries.

These two examples of the DC Circuit explaining away history are rather significant. Both proved crucial in striking down the District of Columbia's "proper cause" or "justifiable need" licensing requirement as unconstitutional, yet neither example is historically substantiated. This sufficiently calls into question the overall legitimacy of the DC Circuit's opinion. And the history-in-law problems do not end there. The DC Circuit also ignored the fact that "proper cause" or "justifiable need" licensing laws are arguably longstanding and therefore presumptively constitutional under Heller—that is, if laws dating back to the mid to late nineteenth-century qualify as longstanding.

In the case of the District of Columbia, the first armed carriage licensing law appeared in 1892. It stipulated that concealed carry licenses were to be granted by a judge only after "satisfactory proof" was provided and a monetary bond was posted. The law remained in force for decades. Then, in 1922, at a time when rising gang violence prompted public outcry for additional firearms restrictions, it appeared that the 1892 law may be amended or replaced by what was known as the

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281 Id. at 659.
282 Id. at 661.
285 See Charles, Faces, Take Two, supra note 4, at 419–22 n.245.
287 Id. at 753.
288 There were attempts, however, to amend the law in hopes of further deterring the carrying of dangerous weapons within the District. See, e.g., 1 REPORT OF THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA 376–77 (Gov't Prtg. Office, 1904).
Capper Bill. Named after its sponsor, Kansas Senator Arthur Capper, the Capper Bill would have substantially overhauled the District's firearms laws. As it pertained to armed carriage, however, the Capper Bill was not all that different from the 1892 law. The Capper Bill required applicants to be "suitable," a "bona fide" resident of the jurisdiction reviewing the license, as well as provide a "good reason" for being granted an armed carriage license. If a respective applicant provided false information to retrieve the license, the applicant would be imprisoned for "not less than five nor more than ten years." The Capper Bill also provided a penalty of one year imprisonment for anyone that carried a concealed weapon without a license.

Here is where the story gets interesting. The Capper Bill was not drafted by Senator Capper, or even by gun control advocates, but by the United States Revolver Association (USRA)—the first organization to advance the cause of gun rights. The USRA referred the Capper Bill, to include its proper cause licensing regime, as "sane" and "reasonable" firearms legislation. The fact that any person found carrying a concealed weapon without a license would be subject to a mandatory sentence of not less than a year in prison, instead of a moderate fine, would practically do away with the carrying of arms by any but those entitled to do so," touted the USRA.

Congress decided to pass on enacting the Capper Bill for the District of Columbia. It was, however, enthusiastically received elsewhere in the United States by proponents of gun rights and gun control alike.

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289 CHARLES, ARMED IN AMERICA, supra note 5, at 192.
290 Id. at 193.
291 The one exception to this being the armed carriage provisions were extended to transportation in motor vehicles. See A Bill to Provide for Uniform Revolver Sales: Based Upon Senate Bill 4012 Introduced in the U.S. Senate Sept. 20, 1922, §§ 7–8, in Charles Lewis Gilman Papers Box 2, Gun Law Correspondence (St. Paul, MN: Minnesota Historical Society) [hereinafter Gilman Papers]. Other versions of the Capper Bill can be found in the following sources. See The California Law, Assembly Bill No. 263, Ch. 339 (approved June 13, 1923), HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIF. STATE LAWS AND THE PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING (Aug. 25–31, 1925), at 854.
292 A Bill to Provide for Uniform Revolver Sales, supra note 291, at §§ 6–8.
293 Id. at § 13.
294 Id. at § 2.
295 CHARLES, ARMED IN AMERICA, supra note 5, at 189–90.
296 Id.; see also U.S. Revolver Ass'n, Sane Revolver Regulation, Bulletin No. 1, undated, in Gilman Papers, box 2, folder Gun Law Correspondence ("Such a measure as this embodies sane and effective Revolver Regulation, and it might well be adopted as a model for similar legislation throughout the nation.").
299 CHARLES, ARMED IN AMERICA, supra note 5, at 192–93.
the time, the largest overhaul of firearms law in American history. Additionally, the popularity of the Capper Bill prompted the National Conference of Commissioners (NCC) to explore its own model firearms legislation: the Uniform Firearms Act (UFA).

It was at this juncture that today's most prominent gun rights advocacy organization, the NRA, entered the political fray. The NCC's first draft of the UFA was deemed unacceptable to the NRA. What the NRA specifically disdained was the provision requiring a license to purchase a pistol. The other provisions, however, were agreeable—that is so long as the NRA was able to tweak the language in a manner that was more favorable to sportsmen, hunters, and gun owners. In the end, the NCC agreed to virtually all of the NRA's changes, and in 1930, the NCC adopted the final version by a vote of 28–4. As it pertained to armed carriage, the UFA was almost identical to the Capper Bill. It too required an applicant to show proper cause before being granted a concealed carry license.

In the years that followed, the NRA touted the UFA as model firearms legislation that every state should adopt. This included lobbying Congress to enact the UFA for the District of Columbia. Before the Senate, NRA Executive Vice President Milton A. Reckord testified in favor of the UFA's "proper cause" armed carriage licensing provision, stating:

You need a law to get to the crooks and to the fellow who is carrying a pistol down the street and shooting somebody. This bill will provide for the dealer being licensed and a record of every pistol that is sold, and it requires that every person, whether he is an honest citizen or not—and we are all supposed to be honest citizens—who gets a pistol, must get a license to carry it. You are required to get a license, if you desire, for any purpose at

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303 Charles, Armed in America, supra note 5, at 195.


305 Charles, Armed in America, supra note 5, at 195.

306 Id.

307 See Uniform Firearms Act: Drafted by the Nat'l Conf. of Comm'rs on Uniform State Laws 4 (1930). For the NCC's explanation as to why it drafted the armed carriage provisions the way that it did, see id. at 10–12.

308 With the NRA's backing, the UFA was adopted in many states, including Alabama, Arkansas, Indiana, Maryland, Montana, Pennsylvania, South Dakota, Virginia, Washington, and Wisconsin. See Winkler, supra note 300, at 209.

309 See generally Charles, Armed in America, supra note 5, at 197.
all, to carry a pistol concealed, in the District of Columbia, and we believe that is all you need. If I am an honest citizen, you do not need to have my gun registered, if I have it at my home; but if, for any purpose, for any reason, I want to carry that pistol on the street, then under this bill I have to go down to the police commissioner and be licensed to carry it. If I shoot anything on the street with that pistol and I am licensed, they have all the records of the gun, and there is no question about it.\textsuperscript{310}

With the NRA onboard, the UFA faced little, if any, pushback from the gun rights community, and easily passed Congress.\textsuperscript{311} For the next four decades, the "proper cause" provision remained in force within the District.\textsuperscript{312} The only significant change occurred in 1943, when Congress passed a law extending the armed carriage licensing requirement to cover the open carriage of pistols.\textsuperscript{313} Much like in 1932, the NRA did not oppose its passage, and even issued a statement stating that such a law was necessary to close a legal loophole that criminals exploit:

The amendment will merely make it easier to secure convictions in the case of criminals carrying a concealed weapon who, upon the approach of the police, remove the weapon from its concealed position and place it in the open. Courts in some jurisdictions have held that a person could not be convicted under a concealed-weapons statute if the weapon was carried openly in a holster or in the hand or if it was openly exposed in a vehicle. The amendment is designed to close this loophole. . . .

It is the conclusion of the NRA that there is no objection from the standpoint of sportsmen to the existing bill or to the amendment.\textsuperscript{314}

\textsuperscript{310} Control of Firearms Sales: Hearing Before the Committee on the District of Columbia United States Senate on S. 2751, 72nd Cong., 12, 13 (1932). It should be noted that the NRA opposed an earlier draft requiring the posting of a $500 bond as a condition of obtaining an armed carriage license. See Anti-Firearms Legislation Endangered By Dissensions, EVENING STAR (D.C.), Nov. 12, 1931, at B1; Punny Laws on Weapons, EVENING STAR (DC), Oct. 29, 1931, at A2.

\textsuperscript{311} See Capital Adopts Pistol Law as National Model: Hope to See States Copy Restrictions on Purchase of Firearms, BROOK DAILY EAGLE, July 14, 1932, at 18; N.R.A. Directors Hold Sixty-First Annual Meeting, AM. RIFLEMAN, Mar. 1932, at 7, 8 (noting that "after many conferences" the NRA reached an agreement with Congress and the District's commissioners on the passage of the UFA).

\textsuperscript{312} Wrenn v. District of Columbia, 864 F.3d 650, 667 (D.C. Cir. 2017).

\textsuperscript{313} D.C. Pub. L. No. 182, ch. 296, 57 Stat. 586 (1943) ("No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land, possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed.").

\textsuperscript{314} D.C. Legislation, AM. RIFLEMAN, Dec. 1943, at 37. The NRA made sure to note that the amendment would not apply to long guns, such as shotguns. This was intentional as to not interfere with the carrying of long guns for shooting and hunting. See CHARLES, ARMED IN AMERICA, supra note 5, at 202. In 1951, when the District of Columbia commissioners once more pushed for an amendment to the law that would have required a license to purchase a handgun, the NRA was presented with an opportunity to testify. Hereto though, the NRA did
It was not until 1976 that the District's armed carriage licensing provision was repealed and replaced with what was virtually a complete ban on both the purchasing and the carrying of handguns. In 2008, Heller struck down the purchasing ban, but the armed carriage ban remained—that is until 2014, when a federal district court struck it down as unconstitutional. Subsequently, the District enacted a new armed carriage law, one that effectively returned to the pre-1976 "proper cause" or "justifiable need" standard.

The history of the District's "proper cause" armed carriage law is important in two respects. First, it confirms that contrary to Wrenn, the District's "proper cause" law was longstanding—at least more longstanding than many of the firearms laws on the statute books today, to include firearms laws that the DC Circuit has upheld as constitutionally permissive under intermediate scrutiny. In fact, the District’s "proper cause" law is significantly more longstanding than the historical example of firearms licensing, which the DC Circuit in Wrenn cited in striking down the law. Firearms licensing laws were not a common fixture in statute and ordinance books

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315 D.C. Code §§ 7-2502.01(a), 7-2502.02(a)(4) (2001); Frassetto, The First Congressional Debate on Public Carry, supra note 4, at 352.


318 Two examples are laws regulating the mail order of firearms and laws regulating machine guns. The first law regulating the mail order sale of firearms was enacted in 1927. See CHARLES, ARMED IN AMERICA, supra note 5, at 212. The first laws regulating machine guns appeared not long after with the spread of the Uniform Machine Gun Act, which was subsequently canonized in federal law with the passage of the 1934 National Firearms Act. Id. at 215.

319 See, e.g., Heller v. District of Columbia, 801 F.3d 264, 280–81 (D.C. Cir. 2015) (upholding fingerprint, registration, and registration fee requirements to purchase a firearm, as well as training requirements); Schrader v. Holder, 704 F.3d 980, 981 (D.C. Cir. 2013) (upholding a ban on common-law misdemeanants owning firearms); Heller v. District of Columbia, 670 F.3d 1244, 1262–64 (2011) (upholding DC's ban on assault weapons and large capacity magazines).

320 Wrenn v. District of Columbia, 864 F.3d 650, 667 (D.C. Cir. 2017) ("As the Second Amendment's core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home, subject to longstanding restrictions. These traditional limits include, for instance, licensing requirements, but not bans on carrying in urban areas like D.C. or bans on carrying absent a special need for self-defense.").
until the early twentieth-century, that is, decades after the spread of the first "proper cause" armed carriage licensing laws.321

The second reason the history of the District's "proper cause" armed carriage law is important is because it shines a light on the historical irony of Wrenn. The irony being that the very organization that was responsible for the District maintaining a "proper cause" licensing law for decades—the NRA—was the very same organization that constitutionally derailed it.322 Given this fact, it is fair to say that Wrenn is not so much about getting history right, as it is misremembering the past to fit a preconceived historical narrative, or reverse engineering the past in a way that sets aside the valuable lessons of history.

It is historically irrefutable that for most of the twentieth century the NRA did not dispute the constitutionality of "proper cause" armed carriage licensing laws.323 The NRA, much like the USRA, encouraged state and local governments to enact such laws as "sane" legislation.324 Certainly, the NRA was of the opinion that having more

321 See CHARLES, ARMED IN AMERICA, supra note 5, at 157–58, 174–76.
323 See supra pp. 25–29 and accompanying footnotes; see also Edson, The Right to Bear Arms, supra note 145, at 14 ("We [the NRA] do not hold, nor have we ever held, that the right to keep and bear arms carries with it the right to go about armed without reason . . . or the right of the law-abiding citizen to do whatever he wants whenever he wants without control of any kind.") (emphasis added); id. ("Going about armed with a concealed weapon is a privilege which the community properly reserves for those possessed of good reason. The fact that we are required to show reason for being granted the privilege of going armed with a concealed weapon should not be interpreted as an infringement upon the right to keep and bear arms.") (emphasis added). The only instance this author could find where the NRA published an article calling into question the constitutionality of armed carriage licensing laws was written by Washington Judge Bartlett Rummel, who would later go on to serve as NRA President. See Bartlett Rummel, Pistol Licensing Laws: Do They Deny Your Right to Self-Defense? AM. RIFLEMAN, Apr. 1961, at 23–24. In the article, at no point did Rummel expressly state that armed carriage licensing laws are facially unconstitutional. Rummel did, however, propose the question to readers that it may be unconstitutional to penalize someone under such laws if the firearm was in fact carried and used in justifiable self-defense. Id. at 24 ("Although a person has a right to defend his family, himself, or his property, even to the extent of taking a life, it appears that . . . what might be justifiable homicide could still be a violation of the licensing law. Reconciling these two conceptions presents a difficult intellectual problem, and one which would be hard to explain to those who believe in the right of the citizen to bear arms for the purpose of legitimate defense.").
324 See, e.g., Pioneer Co-operation, 1931 Model, AM. RIFLEMAN, June 1931, at 6; Sportsmen Plan 'Sane' Law Substitute for Sullivan Act, N.Y. HERALD TRIBUNE, Jan. 19, 1932, at 6; Sportsmen's Victory, AM. RIFLEMAN, Aug. 1930, at 4; Congratulations Gentlemen, AM. RIFLEMAN, May 1930, at 6; see also There Ought to Be a Law, supra note 145, at 16 (noting it is "generally accepted fact that some degree of control over the use of firearms is both proper and necessary . . . . Today, few would assert that no control whatever would be practical and proper."). Additionally, it is worth noting that in 1937 editions of American Rifleman, the NRA ran advertisements asking sportsmen, hunters, and gun owners to "back" the organization's "fight for sane gun laws." For some examples, see NRA Membership Advertisement, AM. RIFLEMAN, Apr. 1937, at 68; NRA Membership Advertisement, AM. RIFLEMAN, Mar. 1937, at 72.
armed citizens was preferred to having less as a criminal deterrent. This policy preference was frequently conveyed within the pages of the NRA’s flagship magazine *American Rifleman,* The NRA, however, made sure to hedge its preference of having more publicly armed citizens on the conditions that the person be law-abiding, properly trained in the use and handling of firearms, and have a justifiable reason for doing so. The NRA denounced, with particular force, the promiscuous or habitual

325 In the mid-1930s, the NRA touted how it worked to assist NRA members in obtaining carrying licenses to and from firing ranges. See, e.g., *N.R.A. Service, AM. RIFLEMAN,* Jan. 1936, at 3 (stating the NRA’s legislative division “carries on the organized fight against unsound anti-gun laws, encourages legislation for the aid of civilian rifle practice and assists members to obtain permits to carry firearms to and from a range in states requiring such permits.”); *N.R.A. Service, AM. RIFLEMAN,* Jan. 1934, at 3 (same).

326 The NRA’s preference for having more citizens armed appeared in frequently the in *American Rifleman* going back to the 1920s. See, e.g., *Shades of the Pioneers?*, *AM. RIFLEMAN,* Sept. 1934, at 4 (informing NRA members to recall the “days when the pioneer vigilantes with the aid of the Peacemaker established law and order” to the see the “value” of having a “pistol in the hands of an honest citizen”); *The Attorney General Is Inconsistent,* *AM. RIFLEMAN,* Jan. 1934, at 4 (claiming crime would be effectively “stamped out by an aroused armed citizenry, either called to the aid of the police as possemen, or, as in the days of the Old West, disgusted with corrupt police officials and organized into their own law-enforcement groups—the Vigilantes.”); *Bandits Fear Armed Resistance,* *AM. RIFLEMAN,* Dec. 1931, at 36; *Who Says Armed Resistance Is Futile?*, *AM. RIFLEMAN,* Dec. 1931, at 34; F. Theodore Dexter, *Facing an Armed Citizen,* *AM. RIFLEMAN,* Jan. 1930, at 24; *—And They Thought He Wouldn’t Fight!* *AM. RIFLEMAN,* Mar. 1928, at 18; Jack Rohan, *No Freedom for Crooks,* *AM. RIFLEMAN,* Jan. 1, 1927, at 9–11; Philip B. Sharpe, *Thug Medicine,* *AM. RIFLEMAN,* Nov. 15, 1926, at 5; *Page Magistrate McAdoo,* *AM. RIFLEMAN,* Aug. 1, 1926, at 8. Beginning in 1932, the NRA conveyed its preference of arming more citizens in a reoccurring *American Rifleman* column titled "Guns vs. Bandits." See, e.g., *Guns vs. Bandits,* *AM. RIFLEMAN,* Mar. 1941, at 36; *Guns vs. Bandits,* *AM. RIFLEMAN,* May. 1936, at 38; *Guns vs. Bandits,* *AM. RIFLEMAN,* Jan. 1934, at 40; *Guns vs. Bandits,* *AM. RIFLEMAN,* Mar. 1933, at 28; *Guns vs. Bandits,* *AM. RIFLEMAN,* May 1932, at 31. Later, in 1958, the NRA once more advanced this view in the *American Rifleman* column titled "The Armed Citizen." See Walter J. Howe, *The Armed Citizen,* *AM. RIFLEMAN,* Sept. 1958, at 32. The NRA felt the column showed that "law enforcement officers cannot at all times be where they are needed to protect life or property in danger of serious violation," and thus there were "many instances" where "the citizen has no choice but to defend himself with a gun." *Id.*

Years later, the NRA slightly modified its defense of "The Armed Citizen" column on the grounds that there are "instances in which the mere presence of a firearm in the hands of a resolute citizen prevented crime without bloodshed." *The Silent Protectors,* *AM. RIFLEMAN,* Jan. 1971, at 28; see also *The Armed Citizen,* *AM. RIFLEMAN,* Nov. 1965, at 16 ("To the law-abiding gun owner," being an armed citizen "means the wherewithal to protect himself, his family, and his property . . . . The law-abiding citizen who elects to defend himself and his loved ones, in the case of need arises, should learn proper gun handling and also, should establish in his own mind the exact conditions under which his firearms will be used. By so doing, he better prepares himself to apply the fundamental right of self-defense and joins the ranks of the armed citizen.").

327 See, e.g., *A Day in Chicago,* *AM. RIFLEMAN,* Oct. 15, 1926, at 8; *You Can't Fool the Editors All the Time,* *AM. RIFLEMAN,* May 15, 1925, at 14 ("The American Rifleman does not oppose wise regulatory measures with regard to powerful weapons in crowded communities. No body of men in the country understands the need for wise regulation better than this staff."); *The Question of Intent,* *AM. RIFLEMAN,* Mar. 15, 1925, at 13; see also *Laws Won't Cut Hunting Deaths, Officials Agree,* *San Bernardino Cty. Sun,* Oct. 29, 1949, at 8 (NRA Executive Director C.B. Lister stressing that "a man who isn't familiar with his gun has no right to be out among hundreds of hunters."); C.B. Lister, *The Nazi Deadline,* *AM. RIFLEMAN,* Feb. 1942, at 7
toting of firearms.\textsuperscript{328} This, by and large, remained the status quo until 1985, when the NRA, after having conducted a member "straw poll," made the political decision to advocate for more liberalized armed carriage laws—laws that statutorily required government officials to issue concealed carry licenses regardless of the applicant’s need or purpose.\textsuperscript{329}

("The only person who can be trusted to handle a gun safely in an emergency is a person who has learned to subconsciously handle that gun safely through practice when no emergency existed."); see also Our Friends—The Policemen, AM. RIFLEMAN, July 1931, at 6 ("Regulate the sale of arms, and license those who wish to carry them. That, in a nutshell, is the N.R.A. point of view."); Firearms Legislation, AM. RIFLEMAN, Mar. 1941, at 22 (endorsing a Massachusetts bill as "desirable" that imposed a penalty on anyone who carried a firearm while intoxicated). Other firearms or criminal experts agreed with the NRA on this point. See, e.g., Calvin Goddard, The Pistol Bogey, 1 AM. J. POLICE SCI. 178, 187 (1930); H.C. Ridgely, Why Not Carry Firearms? OUTDOOR LIFE, Dec. 1926, at 464; The Talk of the Day, N.Y. TRIB., July 29, 1912, at 6 (detective William J. Burns, who later became head of the FBI, stating, "It is no exaggeration to claim that three-fourths of our pistol homicides can be prevented by checking ‘gun-toting.’ Pass laws enabling responsible citizens who can show cause for arming themselves to obtain licenses to carry revolvers."). This included sporting and hunting editor Charles L. Gilman, who frequently wrote against "anti-gun" or "anti-ammunition" legislation. See "Uniform Law—Purchase License," undated, in Gilman Papers, box 2, folder Gun Law Correspondence (Gilman, a sporting and hunting writer, and NRA supporter, noting that a "license to carry should be granted only upon satisfactory proof of necessity"); Letter from Charles L. Gilman to Minnesota State Representative Nels T. Moen, Mar. 17, 1923, in Gilman Papers, box 2, folder Gun Law Correspondence (discouraging gun-toting and noting that the "novice gun-owner had better be left where he will keep his gun at home and get acquainted with it."). For some of Gilman's writings critical of firearms legislation, see Charles L. Gilman, Forest, Stream, and Target: Safety—For Crooks, MINNEAPOLIS STAR, Apr. 7, 1928, at 22; Charles L. Gilman, Forest, Stream, and Target: Anti-Gun Drive On, MINNEAPOLIS STAR, June 18, 1928, at 16; Charles L. Gilman, Forest, Stream, and Target: Anti-Pistol Legislation, MINNEAPOLIS STAR, Apr. 17, 1926, at 9. What the NRA did not support were armed carriage licensing laws where state or local authorities exercised unbound discretion to grant or deny armed carriage licenses, without any right to appeal. See, e.g., C.B. Lister, The Shooter's No. 1 Problem: An Editorial on Anti-Firearms Legislation of Vital Importance to Every True Sportsman, OFFICIAL GUN BOOK 4, 5 (Charles L. Jacobs ed., CROWN 1950); NATIONAL RIFLE ASSOCIATION, THE PRO AND CON OF FIREARMS LEGISLATION 4 (1940).

\textsuperscript{328} See, e.g., National Firearms Act: Hearing Before the Committee on Ways and Means on H.R. 9066, 73rd Cong., 59 (1934) (statement of NRA President Karl T. Frederick) ("I have never believed in the general practice of carrying weapons . . . I do not believe in the general promiscuous totting of guns. I think it should be sharply restricted and only under licenses."); Reckord, The Truth About the Firearms Situation, supra note 304, at 4 (noting that "[f]ew citizens" need to "go armed except under unusual circumstances involving grave responsibilities"); see also Lister, The Shooter's No. 1 Problem, supra note 327, at 5 (acknowledging that the uniform firearms laws being pushed by the NRA and USRA were considered to be a "reasonable method of discouraging promiscuous gun-toting," which did not "interfere with the reputable citizen who wanted a pistol for protection or target shooting.").

\textsuperscript{329} David Conover, To Keep and Bear Arms, AM. RIFLEMAN, Sept. 1985, at 40–41; see also CHARLES, ARMED IN AMERICA, supra note 5, at 283, 308. As early as the mid-1960s, the NRA expressed a preference for such laws. See, e.g., NATIONAL RIFLE ASSOCIATION, THE GUN LAW PROBLEM 14 (1967) (expressing a policy preference for armed carriage laws that make the issuance of a carry license "mandatory" once all "conditions" have been met). However, it was not until 1987 that the NRA began pushing state legislature to pass these types of armed carriage laws. See Charles, Faces, Take Two, supra note 4, at 473.
The overall point to be made is simply this—contrary to the DC Circuit’s opinion in Wrenn, history-in-law does not command courts to conclude that "proper cause" armed carriage licensing laws are unconstitutional. Such laws have been in American statute and ordinance books far longer than most firearms restrictions—restrictions that an overwhelming majority of courts find constitutional today. Moreover, for many years the constitutionality of these laws was unquestioned, not even by gun rights advocacy organizations, which held them up as reasonable and constitutionally sound for decades.

G. Young v. Hawaii—Choice of History Strikes Back

In the 2018 case Hawaii v. Young, the Ninth Circuit was once again presented with a Second Amendment outside the home claim. This time, the issue was the constitutionality of Hawaii’s "proper cause" licensing requirement for the open carriage of firearms in public, an issue that Peruta II left open. In line with previous Second Amendment outside the home challenges, the plaintiffs argued that any "proper cause" or "justifiable need" requirement to publicly carry firearms burdened the "core" of the Second Amendment, and was therefore unconstitutional. Meanwhile, the defendants argued that Hawaii’s "proper cause" requirement was longstanding, upheld by a majority of circuit courts, and therefore constitutionally permissive. A divided Ninth Circuit panel ultimately agreed with the defendants, holding, "while the concealed carry of firearms categorically falls outside [the protection] of the Second Amendment . . . the Second Amendment encompasses a right to carry a firearm openly in public for self-defense.

Much like Peruta II, the Ninth Circuit’s opinion in Young is primarily rooted in history. For court watchers and legal commentators, this was to be expected. What was surprising was Young’s rejection of Peruta II’s approach to history-in-law. Rather than adhere to consensus history, the Young majority embraced choice of history. The reason for the reversal can be attributed to the author of the Young.

331 See Young v. Hawaii, 896 F.3d 1044, 1048 (9th Cir. 2018).
332 Haw. Rev. Stat. § 134-9(a) (2018) (“In an exceptional case . . . where the urgency or the need has been sufficiently indicated, the respective chief of police may grant to an applicant of good moral character who . . . is engaged in the protection of life and property, and is not prohibited under section 134-7 from the ownership or possession of a firearm, a license to carry a pistol or revolver and ammunition therefor unconcealed on the person within the county where the license is granted.”) (emphasis added).
333 Young, 896 F.3d at 1049–51; Peruta v. Cty. of San Diego (Peruta II) 824 F.3d 919, 927, 939 (9th Cir. 2016) (en banc).
334 Young, 896 F.3d at 1049.
335 Id. at 1051.
336 Id. at 1068.
338 See Young, 896 F.3d at 1048.
opinion. Judge Diarmuid O'Scanlonlain, whose choice of history approach in *Peruta I* was rejected and overruled by *Peruta II*.339

What is also surprising about *Young* was the court’s refusal to accept history-in-law as precedent. One of the first lessons any first-year law student learns is that precedent is precedent, regardless of the interpretational tools that produced it, history-in-law included.340 Yet, *Young* appears to reject this very basic principle, as can be seen upon comparing *Young* with the *Peruta II*’s treatment of certain historical events and eras.341 For example, despite *Peruta II* finding the English history of armed carriage to be instructive, the *Young* court dismissed this history on the grounds that the English right to arms was more restrictive than the Second Amendment.342 Similar history-in-law conflicts appear in other sections of *Young*.343 While comparing and contrasting these conflicts is certainly worthwhile, this article addresses most of them in other sections within this article.344 Therefore, rather than rehash these conflicts, this section will focus on critiquing the *Young* court’s central historical pronouncement. This being that history shows the "right to carry a firearm openly for self-defense falls within the core of the Second Amendment."345

The *Young* court is indeed on solid historical footing if the history-in-law inquiry is limited to a particular historical era—the Antebellum Era—and a certain geographic area—the historical South.346 This is undisputed. There are, however, a number of objectivity and transparency problems with the *Young* court’s choice of history. First, such a choice of history ignores the law, cultural norms, and attitudes of the rest of the United States. Second, it negates all the history that followed, particularly how, from the mid to late-nineteenth century, southern lawmakers worked to reverse the culture

339 See *Peruta II*, 824 F.3d at 939.


341 *Young*, 896 F.3d at 1050.

342 Additionally, in coming to this history-in-law conclusion, the *Young* court adopted a history of English armed carriage that expressly contradicts with the findings of the *Peruta* en banc court. *Compare Peruta II*, 824 F.3d at 929–32, with *Young*, 896 F.3d at 1063–65.

343 For some examples, *compare Peruta II*, 824 F.3d at 931 (finding that Sir John Knight was acquitted from prosecution under the Statute of Northampton because he was a government official), with *Young*, 896 F.3d at 1064 (finding that Sir John Knight was acquitted from prosecution under the Statute of Northampton because he did not carry arms in a terrifying manner); *compare Peruta II*, 824 F.3d at 935–36 (negatively treating Bliss v. Commonwealth, 2 Litt. 90 (1822)), with *Young*, 896 F.3d at 1055 (positively treating Bliss v. Commonwealth).

344 For some examples, *compare infra* pp. 17–19, 48–50, with *Young*, 896 F.3d at 1061–62 (examining surety laws); *compare supra* pp. 18–22, with *Young*, 896 F.3d at 1059–61, 1063 n.14 (examining the relevance of post-Civil War armed carriage laws); *compare infra* pp. 46–49, with *Young*, 896 F.3d at 1065–66 (examining late eighteenth and early nineteenth century legal treatises on armed carriage).

345 *Young*, 896 F.3d at 1070; see also id. at 1068 (“Concluding our analysis of text and review of history . . . [o]nce [the Second Amendment is] identified as an individual right focused on self-defense, the right to bear arms must guarantee some right to self-defense in public.”).

of violence, vengeance, and dueling that permeated the Antebellum Era. To categorically dismiss this history, as the Young court did, would mean that most lessons, norms, and traditions borne from the past are irrelevant. The Young court would have been on much better historical footing if it would have concluded that, throughout the nineteenth century, regulations pertaining to the concealed carriage of firearms were far more prevalent than their open carriage, and therefore laws pertaining to the open carriage of firearms, unlike the concealed carriage of firearms, should be examined under some heightened level of means-ends scrutiny. The Young court, however, failed to engage in any historical nuance. Instead, the Young court made a conscious effort to present the historical evidence in a one-sided manner. In doing so, the Young court summarily dismissed any and all historical evidence that did not align with the Antebellum South’s open carriage-concealed carriage conception of the right to arms.

The observation that the Young court would have been on much better historical footing by noting the prevalence of concealed carriage regulations in the nineteenth century should not be interpreted as meaning the Young court would be on the best, most contextual historical footing. The reason for this is two-fold. First, as gun violence became more prevalent from the late nineteenth-century through the early twentieth century, state and local governments began enacting new restrictions on all facets of armed carriage, particularly in places of public assembly. Second, the

347 See Charles, Armed in America, supra note 5, at 150–55; see also H.V. Redfield, Homicide, North and South: Being a Comparative View of Crime Against the Person in Several Parts of the United States 193–207 (J.B. Lippincott & Co., 1880) (discussing the cultural and legal differences on the law and armed carriage between the North and South, and urging the latter to come in line with the former).

348 See, e.g., Ordinance No. 88, Wilson Cty. Citizen (Fredonia, KS), Mar. 16, 1888, at 3 (passed on Mar. 8, 1888) (“Every person who shall be guilty of carrying any revolver, pistol, dirk, bowie knife or other deadly weapon upon his person, concealed or otherwise, except ministerial officers in the discharge of their duties, and travelers who do not remain more than twenty-four hours in the city aforesaid, shall be deemed guilty of a misdemeanor.”); Ordinance No. 2, Galena Miner (KS), July 2, 1881, at 2 (passed on June 27, 1881) (“Any person who shall carry a pistol, dirk or other deadly weapon within the limits of this city shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined in any sum not less than five nor more than fifty dollars.”). Beginning in the late nineteenth-century, cities were at the forefront in regulating the open carriage of firearms in public places, and a number of state legislatures afforded these cities the legal authority to do so. See, e.g., Charter of the City of Dallas 42 (John F. Worby, 1899) (authorizing the city council to “regulate, control, and prohibit the carrying of firearms and other weapons within the city limits.”); 1 Gen. Statutes of the State of Kan. 1897, at 421 (W. C. Webb, 1897) (authorizing cities to “prohibit and punish the carrying of firearms, or other deadly weapons, concealed or otherwise”); The Statutes of Oklahoma 1890, at 161 (State Capitol Printing Co., 1897) (authorizing cities to “prohibit and punish the carrying of firearms, or other deadly weapons, concealed or otherwise”); Laws of Mo., Passed at the Regular Sess. of the Twenty-Ninth Gen. Assemb. 166 (Regan & Carter, 187) (authorizing cities to “prohibit and punish the carrying of firearms and other deadly weapons, concealed or otherwise”).

349 The Young court did ultimately analyze Hawaii’s “proper cause” law under intermediate scrutiny in striking down the law as unconstitutional. See Young, 896 F.3d at 1064–72.

350 See generally Young, 896 F.3d at 1044.

351 See Charles, Faces, Take Two, supra note 4, at 415–23 see also infra note 400.
constitutionality of these laws, although disputed by some, was never sufficiently called into legal question. Not even gun rights advocates disputed the constitutionality of armed carriage restrictions.

This history is rather important because it set into motion, and ultimately cemented, the legal norm that the right to arms was subject to reasonable regulation. And one such category of reasonable regulation was restricting, or preventing altogether, the preparatory carriage of firearms in public places. This reasonable regulation understanding of armed carriage restrictions remained unabated until the


353 See, e.g., J. Weston Allen, "Firearms: An Address," in Homer Stille Cummings, Proceedings of the Attorney General's Conference on Crime: Held December 10-13, 1934 in Memorial Continental Hall, Washington, D.C. 254, 261–62 (1934) ("The requirement of a license to carry concealed weapons, which has long been enforced in many jurisdictions, is a direct limitation upon the right to bear arms, but no one will claim that it is in violation of the constitution.") (emphasis); John Brabner-Smith, Firearm Regulation, 1 L. & Contemp. Probs. 400, 413 (1933) ("in . . . the United States . . . it is recognized that, in the proper exercise of the police power, the carrying of weapons by the individual may be regulated, restricted, and even prohibited by statute."); Daniel J. McKenna, The Right to Keep and Bear Arms, 12 Marq. L. Rev. 138, 143–44 (1928) ("There are certain forms of weapon regulation so proper and necessary that they are universally conceded . . . [such as] against wearing arms in church, court, polling-place, etc."); Lucilius A. Emery, The Constitutional Right to Keep and Bear Arms, 28 Harv. L. Rev. 473, 476 (1914) ("The single individual or the unorganized crowd, in carrying weapons, is not spoke of or thought of as 'bearing arms.'"); Presser v. Illinois, 116 U.S. 252, 267–68 (1886) ("It cannot be successfully questioned that the state governments, unless restrained by their own constitutions, have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States, and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations, are authorized by the militia laws of the United States. The exercise of this power by the states is necessary to the public peace, safety, and good order."); State Authority Over Assemblages—Various Decisions by the U.S. Supreme Court, N.Y. Tribune, Jan. 5, 1886, at 2 (summarizing the holding in Presser as "the right of the State to prevent the armed assembly of its citizens and their parading as military companies when not organized as such under the laws of the State or the United States"). But see In re Brickey, 8 Idaho 597, 599 (1902) (holding that the government cannot prohibit every manner of armed carriage in public).

354 See supra pp. 25–29 and accompanying notes.


356 See, e.g., Glassen, Right to Bear Arms Is Older than the Second Amendment, supra note 145, at 23 ("all the State courts of last resort, insofar as I know without exception, have recognized that the constitutional right of the people, of the individual, to keep and bear arms is subject to the police power of the States. "Police power" simply means that the State has the right of reasonable regulation for the general health, welfare and safety of its citizens. The key word here is "reasonable" and this has been quite universally interpreted to include within such police power tight regulations on the carrying of concealed firearms, the carrying thereof in public places and the carrying of firearms in automobiles . . ."); see also supra pp. 25–29 and accompanying notes.
advent of the Standard Model Second Amendment in the late-twentieth century. The first was that the Founding Fathers inherently understood the Second Amendment to protect the "peaceable" carrying of arms in public. The second was development of the open carriage-concealed carriage distinction in the nineteenth century. The first claim is historical hyperbole at best, and the second often omits the historical how and why the open carriage-concealed carriage distinction fell into disrepute.

Once again, it is worth stating that, throughout much of the twentieth century, no one, not even gun rights advocates, objected to the demise of the open carriage-concealed carriage distinction. As a matter of law, it was essentially a non-issue. In a 1950 editorial, F.C. Daniel, the head of the NRA's Legislative Reporting Service, which was the organizational predecessor the NRA's Institute for Legislative Action admitted as much. While Daniel acknowledged there was some "academic" debate as to whether the Second Amendment protected an individual or collective right, he conceded it was "well established" that it was the "right of each state to impose police regulations on the distribution and carrying of lethal weapons[]."

Indeed, much like in the nineteenth century, throughout much of the twentieth century, if one were to examine all the armed carriage regulations in the United States, regulations pertaining to the concealed carriage of firearms were far more prevalent than open carriage regulations. But, this was not because the preparatory open carriage of arms was viewed as constitutionally protected. Rather, it was at the request of the gun rights community to ensure that armed carriage licensing provisions would not hamper

357 See Charles, Faces, Take Two, supra note 4, at 466–78.
358 Id. at 467.
359 See, e.g., Kopel, The First Century of Right to Arms Litigation, supra note 4, at 130–40 (advancing that the Founding Fathers enshrined the "peaceable" carrying of arms when ratifying the Second Amendment); David I. Caplan, Restoring the Balance: The Second Amendment Revisited, 5 Fordham Urb. L.J. 31, 34 (1976) (advancing that the Second Amendment was understood as enshrining the right to "carry arms in a quiet and peaceful manner").
361 Compare Charles, Faces, Take Two, supra note 4, at 378–401, with Kopel, The First Century of Right to Arms Litigation, supra note 4, at 130–40.
362 Compare CHARLES, ARMED IN AMERICA, supra note 4, at 122–65, with Kopel, The First Century of Right to Arms Litigation, supra note 4, at 140–84.
364 Id. ("The purely legalistic questions of whether or not the Constitution protects the right of the citizen to possess and bear arms is of only academic concern. Indeed, the right of each state to impose police regulations on the distribution and carrying of lethal weapons is well established. To be realistic, then, we must concern ourselves with the practical rather than the legalistic aspects of firearms regulation."); see also William Fulton, Sullivan Law Boom to Thugs 40 Years Old, Chl. Daily Trib., Nov. 1, 1951, at 6F (former NRA President Karl T. Frederick conceding that the states maintained the police power to regulate firearms, including a "license to carry").
sportsmen, hunters, and target shooters when taking part in hunting, recreational shooting, or marksmanship competitions.365

In 1940, there was a nationwide attempt at model firearms legislation that would have changed the status quo, and regulate the open carriage of handguns in the same vein as their concealed carriage.366 Known as the Uniform Pistol Act (UPA), the model firearms legislation included a number of reforms, such as a license to purchase requirement and prohibiting known drunkards, drug addicts, and other undesirable classes from purchasing firearms.367 As it pertained to armed carriage, the UPA included two reforms. The first was extending the armed carriage licensing requirement to the open carriage of handguns.368 The second was the establishment of a target shooter's license.369

Unlike when the UFA was drafted, those responsible for drafting the UPA did not consult with the NRA.370 This was seemingly intentional, for the UPA's architects were aware that the NRA would oppose any firearms legislation that included a license to purchase requirement.371 Unsurprisingly, given the UPA's inclusion of a license to purchase requirement, once the UPA was presented to state legislatures for

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365 This legal exception for sportsmen, hunters, and target shooters was included in both the Capper Bill and UFA. See A Bill to Provide for Uniform Revolver Sales, supra note 292, at § 7 (noting the armed carriage licensing requirement "shall not apply to . . . organizations by law authorized to purchase or receive such weapons from the United States [i.e. NRA clubs and their members], or this State, nor to duly authorized military or civil organizations when parading, nor to the members therefor when at or going to or from their customary place of assembly."); UNIFORM FIREARMS ACT, supra note 308, at 4, § 6 (noting the armed carriage licensing requirement "shall not apply to…the regularly enrolled members of any organization duly authorized to purchase or receive such weapons from the United States or from this state, provided such members are at or are going to or from their places of assembly or target practice"); see also National Rifle Association, Legislative Bulletin: Georgia House Bill No. 683, 1958, in John James Flynt, Jr. Papers, series 5, box 218, folder 9, Federal Firearms Act, 1955–58 (Athens, GA: Richard B. Russell Library for Political Research and Studies) (criticizing H.B. 683's armed carriage licensing provision solely on the grounds that historically "shooters and sportsmen have not been required to be licensed in order to transport a pistol for target shooting purpose"); Art Knight, Sports of the Times, TIMES (San Mateo, CA), Mar. 1, 1949, at 10 (objecting to a proposed California law that would have required a license to carry firearms for sporting, target shooting, and hunting).


367 The Uniform Pistol Act, supra note 366, at 123–29.

368 Warner, The Uniform Pistol Act, supra note 147, at 539–40.

369 The Uniform Pistol Act, supra note 366, at 129.

370 Id.

371 For more on the UPA's drafting process, see generally Donald S. Leonard Papers, box 29, folder IACP Correspondence Firearms Legislation (Ann Arbor, MI: Bentley Historical Library-University of Michigan).
consideration, the NRA worked diligently to defeat it. Another reform within the UPA that the NRA opposed was the target shooter’s license. Although the NRA did not speak for every sportsman, hunter, and target shooter in this regard, most within the gun rights community were unsupportive on any firearms legislation that impeded on the sport of shooting, particularly extending the legal requirements pertaining to armed carriage licensing laws to hunting and target shooting. In such instances, the


373 See, e.g., What the Lawmakers Are Doing, AM. RIFLEMAN, Mar. 1955, at 17, 18 (urging NRA members to oppose the UPA); Auburn Gun Club Seeks the Defeat of Firearms Bills, PRESS-TRIB., (Roseville, CA), Mar. 5, 1941, at 5; see also ALEXANDER DECONDE, GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL 132 (Northeastern Univ. Press, 2001). The NRA largely succeeded in this effort by lumping together the UPA with the Department of Justice's campaign for firearms registration laws at the state level. In doing so, the NRA audaciously claimed such laws were supported by Nazis and fifth columnists. See Firearms Restrictions, PRESS-TRIBUNE, (Roseville, CA), Mar. 12, 1941, at 12 (op-ed from sportsman noting that he received an NRA legislative bulletin to oppose the UPA on the grounds it would put the law-abiding citizens at the mercy of the criminals and fifth columnists’); A.D. Rathbone IV, Let’s Fight, S.T., Feb. 1941, at 116; NATIONAL RIFLE ASSOCIATION, THE PRO AND CON OF FIREARMS LEGISLATION, supra note 327, at 15; Zero Hour, AM. RIFLEMAN, Dec. 1940, at 4; Politics and Propaganda, AM. RIFLEMAN, Sept. 1940, at 4.

374 See, e.g., NATIONAL RIFLE ASSOCIATION, THE GUN LAW PROBLEM, supra note 329, at 8; Frank C. Daniel, The Gun Law Problem, AM. RIFLEMAN, Feb. 1953, at 16, 18; Frank C. Daniel, Firearms Legislation, AM. RIFLEMAN, July 1951, at 15, 32. The UPA’s target shooting license would have negated both the UFA’s and Capper Bill’s legal exception for rifle and pistol club members engaged in target shooting—an exception that the NRA and USRA had lobbied for. See ”A Bill to Provide for Uniform Revolver Sales,” supra note 291, at § 7; UNIFORM FIREARMS ACT, supra note 301, at 4, § 6.

375 See What's Wrong with Gun Laws, GUNS MAG., Aug. 1955, at 28, 56 (making the argument for a target shooter's license).

376 See Letter from Bender Hash, Utah State Rifle & Pistol Association Legislative Chairman, to Wallace F. Bennett, Aug. 5, 1966, in Wallace F. Bennett Papers, box 322, folder 6, Firearms 1965-1966 (Salt Lake City, UT: University of Utah Special Collections) (encloses organizational statement of policy on firearms legislation, which opposes any law requiring an armed carriage license to carry a firearm at target ranges, hunting grounds, public shooting grounds, or to transport a firearm in an automobile); NRA Policy Statement on . . . Firearms Legislation, AM. RIFLEMAN, July 1958, at 35 (“The NRA is opposed to the theory that a target shooter, hunter, or collector, in order to transport a handgun for lawful purposes, should be required to meet the conditions for a permit to carry a weapon concealed on his person.”); NATIONAL RIFLE ASSOCIATION, THE GUN LAW PROBLEM, supra note 329, at 13 (same); NATIONAL RIFLE ASSOCIATION, AMERICANS AND THEIR GUNS 301 (James E. Serven ed., 1967) (same); Daniel, The Gun Law Problem, supra note 374, at 46 (objecting to "proposals . . . to license the privilege of bearing a firearm openly and unconcealed for legitimate purposes."). It is a point of historical emphasis that as a matter of public safety, the NRA was against the carrying of long guns loaded or uncased unless the person was at the firing range or in the act of hunting. See NATIONAL RIFLE ASSOCIATION, IS YOUR PET GUN HOUSEBROKE? 3 (1959) (encouraging gun owners, as a matter of "gun safety," to always transport their firearms "unloaded—uncocked" and "carry cased or wrapped"); NATIONAL RIFLE ASSOCIATION, HUNTER SAFETY HANDBOOK 8 (1957) ("Guns should be unloaded before being put in a car. It is even better to case them as well . . . . Hunters stopping for any purpose should unload and open their
gun rights community generally defaulted to the NRA’s mantra of education-over-legislation.\textsuperscript{377}

At no point, however, did the NRA express dissatisfaction with the UPA extending the armed carriage licensing requirement to the open carriage of firearms in public places. If anything, history tells us that the NRA consented to such laws, as can be seen in 1943 when the NRA offered no objections to the District of Columbia amending the UFA to encompass open carriage.\textsuperscript{378} The same was true in 1967 when California clamped down on the open carriage of firearms after a group of thirty Black Panthers appeared visibly armed at State Capital Building.\textsuperscript{379} The NRA not only took

\textsuperscript{377} See Charles, Armed in America, supra note 5, at 234–35. The NRA, however, was not opposed to requiring a person first completing hunter safety training before being issued a hunting license. See, e.g., 86th Annual Meetings, Am. Rifleman, May 1957, at 22; A Busy Year with Gun Laws, Am. Rifleman, July 1955, at 35, 36.

\textsuperscript{378} See D.C. Legislation, supra note 314, at 37; “To Amend the Law of the District of Columbia Relating to the Carrying of Concealed Weapons,” ch. 296, Nov. 4, 1943, 57 Stat. 586 (“No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land, possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed.”).

\textsuperscript{379} For more on the Black Panthers openly carrying arms, see Winkler, supra note 300, at 237–45. For broader historical context it is worth noting that it was not only the actions of the Black Panthers that were concerning to California lawmakers and government officials. There were also reports of white communities—fearful of the Black Panthers and rioting—instilling armed patrols without the consent of local government officials. See Letter from Jack Lindsay, Legislative Secretary to Ronald Reagan, to Don Mulford, May 19, 1967, in Don Mulford Papers, series 1, Bill Files, folder A.B. 1591 (Sacramento, CA: California State Archives) [hereinafter Mulford Papers]; Letter from Don Mulford to Ronald Reagan, Apr. 21, 1967, in Mulford Papers, series 1, Bill Files, folder A.B. 1591; Letter from John A. Nejedly, Contra Costa County District Attorney, to Ronald Reagan, Apr. 20, 1967, in Mulford Papers, series 1, Bill Files, folder A.B. 1591; “Peace Gradually Returning to the Community of Clyde,” Redlands Daily Facts (CA), Sep. 23, 1966, at 12; “Shots Boost Bay Tension on Vigilantes,” San Francisco Examiner, Sep. 21, 1966, at 3. See also Letter from Don Mulford to Arthur E. de la Barra, Jun. 22, 1967, in Mulford Papers, series 1, Bill Files, folder A.B. 1591 (“The National Rifle Association helped me write [this open carriage firearms legislation], keeping in mind that the constitutional protection of citizens to bear arms is very definitely protected in this measure. Let me assure you also that there are no racial overtones in this measure. There are many groups that have been active in Californian with loaded weapons in public places and this bill is directed against all of them.”); Notes of Don Mulford Meeting with E.F. Sloan, National Rifle Association Field Representative, on A.B. 1591, undated 1967, in Mulford Papers, series 1, Bill Files, folder A.B. 1591.
part in drafting California’s open carriage firearms legislation, but was also crucial to ensuring its passage. In the words of Don Mulford, the Oakland, California Assemblyman who sponsored it, "[t]his legislation was specifically designed with the help of the National Rifle Association to protect our constitutional right to bear arms and yet to assist the law enforcement people who asked for this bill do to something about the armed bands of citizens who are walking our public streets and in public places with loaded weapons."

The fact that the NRA supported and sponsored legislation restricting the open carriage of firearms is not at all surprising considering that the chief gun rights advocates up through the late 1960s conceded that armed carriage in public places, whether done openly or concealed, was both good policy and constitutional. What it particularly informs is that through most of American history there was no serious legal dispute as to whether the open carriage of firearms in public places was subject to reasonable regulation. It is only recently that an alternative view has surfaced—a view that is primarily driven by the polarizing gun rights politics of the late twentieth-century. Indeed, as mentioned earlier, there was a time and place in American history when the open carriage of firearms in public was perceived to be protected under the Second Amendment. But, this Antebellum Era conception of the right to keep and bear arms was not universally accepted, nor was it able to sustain itself into the late nineteenth century, and certainly not into the twentieth-century. Rather, the Antebellum Era open carriage-concealed carriage distinction in constitutional law was jurisprudentially upended by governmental police power.

As it pertains to Young specifically, this history calls into question the overall legitimacy of holding the open carriage of firearms for self-defense as being within the "core of the Second Amendment." Much like in Wrenn, to reach this outcome, the Young court essentially had to reverse engineer the past in a way that completely set aside the larger lessons of history. Also like Wrenn, there is an irony to Young—a more pervasive irony at that. Recall Justice Scalia’s three arguments in defense of Heller: history-in-law is preferred because it (1) intrudes far less on the "democratic

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380 See Jack J. Basil, Illinois, California, Connecticut Enact Gun Laws with Sportsmen’s Cooperation, Am. Rifleman, Aug. 1967, at 54; Jack Welter, Tightening Reagan’s Security Net, S. F. Examiner, May 12, 1967, at 10; Edwin S. Capps, Black Panthers’ Gun Waving Just Hurt Their Own Cause, Daily Indep. J. (Sacramento, CA), May 10, 1967, at 34; Letter from Don Mulford to Frank P. Adams, Jun. 21, 1967, in Mulford Papers, series 1, Bill Files, folder A.B. 1591 (“I am enclosing the most recent copy of the gun bill which was approved by the Assembly with the close cooperation and assistance of the NRA.”); Letter from Don Mulford to John K. Jamison, May 24, 1967, in Mulford Papers, series 1, Bill Files, folder A.B. 1591 (“I have reason to believe that my bill will be approved and enacted into law. It has the support of the National Rifle Association and Governor Reagan has publicly stated that he will sign the bill when it reaches his desk.”).


382 See supra pp. 25–29 and accompanying notes.

383 Young v. Hawaii, 896 F.3d 1044, 1070 (9th Cir. 2018); see also id. at 1068 ("Concluding our analysis of text and review of history . . . [n]ow [the Second Amendment is] identified as an individual right focused on self-defense, the right to bear arms must guarantee some right to self-defense in public.").

384 See id.
process”; (2) is built upon reasoned facts; and (3) produces "less subjective" outcomes. The judicial principle that underlies each of these arguments is judicial restraint. Yet, Young—given is reverse engineering of the past and choice of history approach to history-in-law—is the very antithesis of judicial restraint. It is judicial activism under the guise of history.

This criticism of Young is not meant to negate the fact that the Second Amendment must exist in some form outside the home, nor is it meant to undermine the fact that the open carriage of firearms for hunting, target shooting or on one’s own property has historically been given more legal deference than in the public concourse. What this criticism does strongly suggest, however, is that the Young court seems to have erred in striking down Hawaii’s open carriage law on Second Amendment grounds. There are two history-in-law reasons for this. First, Hawaii’s laws on armed carriage historically coincide with how gun rights advocates interpreted the Second Amendment for most of the twentieth-century—this being that any Second Amendment rights outside the home were limited to transporting weapons from home to business or from home to shooting recreation. There is nothing in Hawaii’s laws on armed carriage that outright prohibits such actions. Second, as pointed out earlier in critiquing the Wrenn court, the "proper cause" or "justifiable need" standard in armed carriage laws is historically longstanding, and therefore presumptively constitutional. In fact, "proper cause" or "justifiable need" armed carriage laws have been on the statute and ordinance books longer than other firearms laws that the Ninth Circuit has signaled would qualify as longstanding.

385 McDonald v. City of Chi., 561 U.S. 742, 804–05 (Scalia, J., concurring); SCALIA AND GARNER, supra note 30, at 402.

386 See, e.g., Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 863–64 (1989) (noting that "the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law," and that "originalism . . . establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself").

387 See, e.g., McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 371–85 (1995) (Scalia, J., dissenting) (noting that even in cases where history may be read to support one outcome, adhering to longstanding historical tradition is the better history-in-law approach).

388 In this respect, Young somewhat resembles new originalism, which, in contrast to original intent originalism, places less emphasis on the importance of judicial restraint. See Keith E. Whittington, Originalism: A Critical Introduction, 82 FORDHAM L. REV. 375, 391 (2017); Jamal Greene, Selling Originalism, 97 GEO. L.J. 657, 671–72 (2009). It should be noted, however, Young does not fully adhere to new originalist methodologies.

389 See supra note 146.

390 HAW. REV. STAT. ANN. §§ 134-5, 134-23, 134-24, 134-25, 134-26, 134-27 (allowing the transport of unloaded firearms in an enclosed container, to and from a place of repair, a target range, a licensed dealer, a firearms exhibit, a hunting ground, or a police station, and allowing the use of firearms for hunting and target shooting).

391 See supra pp. 17–22.

392 See Pena v. Lindley, 898 F.3d 969, 1003 (9th Cir. 2018) (noting that what qualifies as longstanding “may come from the early-twentieth century and need not trace their roots back to the Founding”); Fyock v. City of Sunnyvale, 779 F.3d 991, 997 (9th Cir. 2015) (stating that early twentieth-century laws “restricting the possession of firearms based on the number of rounds that the firearm could discharge” may qualify as longstanding); see also NRA of Am. v.
III. PRACTICAL ADVICE ON HISTORY-IN-LAW AND THE SECOND AMENDMENT
OUTSIDE THE HOME

As was seen in Part II, history-in-law, at least as courts generally practice it, is not always what it appears to be. What one may profess to be a contextual and factually-based history, can turn out to be incomplete, inaccurate, ahistorical, hyperbolic, or mythical. This was the case for many of the circuit courts that used history-in-law to examine the Second Amendment outside the home. These circuit courts committed a variety of errors and missteps, including the cherry-picking of historical evidence, the minimizing or discarding of conflicting historical evidence as insignificant and unpersuasive, and even making up history altogether. In some cases, the errors and missteps would not have impacted the outcome of the case. In other cases, however, the errors and missteps resulted in analysis that would have turned out differently if all the historical evidence was provided and weighed objectively.

The parade of errors and missteps on the Second Amendment outside the home is indeed a cautionary tale on the use of history-in-law. Some might even go so far as to say that this is proof that the consequences of using history-in-law outweigh the benefits. This line of argument appears legitimate until the realization sets in that the law and history are inseparably bound together. Precedent is history and history shapes precedent. The point to be made is that history-in-law is not going anywhere. Instead, we must try to overcome poor, inaccurate, and inadequate history-in-law with good, factual, and well-researched history-in-law. The question that remains is how does one produce the latter version of history-in-law rather than the former?

The answer to this question is both simple and complex. On the one hand, the answer to ensuring good, factual, and well-researched history-in-law is simple and straightforward—by conducting a thorough, transparent, and objective based historical assessment. On the other hand, the answer is complex because what one person may, in their heart of hearts, believe is a thorough, transparent, and objective based historical assessment is anything but. Based on this author’s experience, this is often the case because the legal professional or jurist conducting the history-in-law analysis is unable to delineate between what is academic history and what is junk or law-office history.

What also contributes to history-in-law errors and missteps among legal professionals and jurists is an unfamiliarity with historiography. Yet, understanding the reefs and shoals of historiography is essential, for historiography informs us where respective historical theories, theses, and claims come from, how they were formulated, and if they are still viable or if they have been rebutted. It is similar to shepardizing case law, but in the study of history there is no research database or tool that legal professionals or jurists can refer to. Rather, when it comes to historiography, one must conduct the old-fashioned practice of reading copious amounts of historical literature, understanding the historical methodology behind each historical writing, and subsequently checking, comparing, and contrasting the historical sources within them. This academic exercise is not for the fly-by-night historian. Grappling with the historiography of a particular subject or event can take a seasoned historian years, or even a decade, to sort through.393

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393 For more on historiography and the discipline of history, see JEREMY BLACK, CLIO’S BATTLES: HISTORIOGRAPHY IN PRACTICE (Indiana Univ. Press, 2015); GORDON S. WOOD, THE
Despite the complexities and the time involved with the conducting of a thorough, transparent, and objective based historical assessment, there are two approaches to history-in-law that simplify the task for legal professionals and jurists, and ensure the history is, at least more often than not, framed correctly. The first approach can be found in the examples of Peruta II and Peterson, where the Ninth Circuit and Tenth Circuit each relied on consensus history. This approach is rather self-explanatory and straightforward, and does not require much elaboration, except to say having a basic understanding of historiography is useful in ensuring the history-in-law analysis is accurate and therefore legitimate.

The second approach, however, involves a little more nuance and the maintaining of historical consciousness. The Second Circuit employed this approach in Kachalsky and involves using the past as a guidepost to inform the present. Here, history is not so much an outcome determinative tool as it is means to formulate an informed historical framework from which to legally reason. While this guidepost approach to history-in-law may appear straightforward, it too requires understanding historiography. This is because the law is rarely stagnant. Rather, it is gradually updating and changing to meet the challenges, problems, and demands of a particular period. This particularly bodes true for the law pertaining to armed carriage.

For centuries, the legal tenets of the 1328 Statute of Northampton and the flexible nature of the English common law was sufficient in dealing with armed carriage on both sides of the Atlantic. In the nineteenth-century, however, the law pertaining to armed carriage in the United States began to evolve and take on different forms. Initially, two enforcement models—concealed carriage prohibitions and nineteenth-century variants of the Statute of Northampton—dominated the statute and ordinance books. Over time, these enforcement models were adapted and transformed to meet the needs of the times, as well as the cultural and moral norms of the respective jurisdictions they operated in. Some jurisdictions adopted armed carriage licensing

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394 Peterson, 707 F.3d 1197, 1207–12 (10th Cir. 2013); Peruta v. Cty. of San Diego (Peruta II), 824 F.3d 919, 924–42 (9th Cir. 2016) (en banc).

395 For more on the consensus approach to history-in-law, see Nelson, History and Neutrality, supra note 34, at 1277–83; Charles, Historicism, supra note 13, at 20, 25, 85, 88, 114–21.

396 For more on using the past as a guidepost to inform the present, see Charles, Historicism, supra note 13, at 109–18.

397 Charles, Faces, Take Two, supra note 4, at 378–401.

398 Id. at 401–14.

399 Id. at 414–27.
Some prohibited armed carriage in public places and assemblies altogether. Meanwhile, other jurisdictions modernized the English common law in a way that provided individuals with an outlet for armed self-defense in public places should a threat or danger be imminent.

This wide array of armed carriage laws remained the norm until the gun rights movement of the early twentieth-century sought legal uniformity as a means to protect traveling sportsmen and target shooters from unknowingly violating local armed carriage laws, and, in the process, assist law enforcement with the combatting of interstate criminal activity. From this desire for legal uniformity spawned the Capper Bill and the UFA, both of which required individuals to show a "proper cause" or "justifiable need" before being able to legally go armed in public places. These armed carriage laws remained the norm for more than half a century, and their constitutionality was unquestioned, until the advent of the Standard Model Second Amendment in the late twentieth-century. From the Standard Model Second

400 Id. at 419–22.

401 See, e.g., An Act to Prevent the Carrying of Fire Arms and Other Deadly Weapons, Dec. 2, 1875, in THE COMP. LAWS OF WYOMING 352 (H. Glafcke ed., 1876) ("That hereafter it shall be unlawful for any resident of any city, town or village, or for any one not a resident of any city, town or village, in said territory, but a sojourner therein, to bear upon his person, concealed or openly, any fire arm or deadly weapon, within the limits of any city, town or village."); THE REVISED ORDINANCES OF PAYSON CITY 107 (1877) ("Every person who shall wear, or carry upon his person any pistol, or other firearm, slungshot, false knuckles, bowieknife, dagger, or any other dangerous or deadly weapon within the limits of this city is guilty of an offense, and liable to a fine in any sum not exceeding twenty-five dollars").

402 See, e.g., 1 THE PENAL CODE OF CRIMINAL PROCEDURE OF THE STATE OF TEXAS 120–24 (Sam Andrew Wilson ed., 1896) (prohibiting armed carriage at public places and gatherings, but not applying to frontier counties or "the carrying of arms on one's own premises or place of business, nor to persons traveling, nor to one who has reasonable ground for fearing an unlawful attack upon his person, and the danger is so imminent and threatening . . . ."); CHARTER AND REVISED ORDINANCES OF THE CITY OF GALVESTON 283–84 (1875) (passed Aug. 19, 1878) ("That any person carrying on or about his person, saddle or vehicle, within the corporate limits of the city of Galveston, any pistol, dirk, dagger, slung-shot, false knuckles, bowie-knife, or any other kind of knife manufactured or sold for the purposes of offense or defense, or carried for purposes of offense or defense, unless he has reasonable grounds for fearing an unlawful attack on his person, and that such attack shall be immediate and pressing . . . shall be fined in a sum of not less than twenty-five dollars, nor more than one hundred dollars, and in default of payment thereof shall be confined in the jail for a period of not less than ten days nor more than three months . . . That any person charged under the first section . . . who may offer to prove, by the way of defense, that he was in danger of attack on his person, or unlawful interference with his property, shall be required to show that such danger was immediate and pressing, and was of such a nature as to alarm a person of ordinary courage, and that such weapon so carried was borne openly and not concealed beneath the clothing; and if it shall appear that his danger had its origin in a difficulty first commenced by the accused, it shall not be considered as a legal defense.").

403 CHARLES, ARMED IN AMERICA, supra note 5, at 189–90.

404 Id. at 191–203.

405 Id. at 279–95.
Amendment spread the first "shall issue" armed carriage laws.\textsuperscript{406} And, more recently, using \textit{Heller} and \textit{McDonald} as a political springboard, a minority of jurisdictions have gone the way of eliminating armed carriage restrictions altogether.\textsuperscript{407}

There is one common thread that binds this history together, namely, armed carriage in public places has always been subject to some form of governmental regulation. Only the policies and politics guiding them have changed. This is especially true today. This common historical thread is the central guidepost from which the Second Circuit fashioned its analysis in \textit{Kachalsky}, and understandably so.\textsuperscript{408} For if the Second Circuit would have gone the route of Ninth Circuit in \textit{Young}, and adopted a choice of history approach, the Second Circuit would have had to explain why one particular time, geographic area, and set of cultural norms trumped all others. This is undoubtedly the chief deficiency with any choice of history approach. Even in those instances where one's choice of history is fully contextualized, the choice itself is biased to some degree. Perhaps the only exception is when the choice of history is contemporaneous with the law or constitutional provision being analyzed. Such a choice of history is generally excused and deemed acceptable among legal commentators because it seeks to shed light on how the drafters understood the law or constitutional provision in question. Conversely, any other choice of history is just that—a choice. And that choice can have unintended constitutional consequences if not fully weighed and considered.\textsuperscript{409}

This exception as to when the choice of history is proper will prompt some legal commentators to single out 1791, the year the Bill of Rights was ratified, as the right choice of history when examining the Second Amendment outside the home. This author is somewhat inclined to agree with this choice if, and only if, two important rules are followed.\textsuperscript{410} First, any choice of history approach \textit{should only} be used to form a \textit{jurisprudential baseline} from which to weigh the constitutionality of law. Choice of history \textit{should not} be used as an outcome determinative tool. There is a practical reason for this.\textsuperscript{411} The past and the present are not the same, nor can they ever be. No matter what two historical moments in time are selected, compared, and contrasted, there will always be substantial differences between the two, whether those differences are demographical, societal, cultural, political, or technological. The differences are most striking when trying to compare and contrast 1791 with the present day. As this relates to armed carriage, the most obvious difference is the social costs associated with modern firearms are substantially greater than their late eighteenth-century, single-

\begin{footnotes}
\item[406] Charles, \textit{Faces, Take Two}, \textit{supra} note 4, at 473.
\item[407] \textit{Id.} at 374.
\item[408] \textit{Kachalsky v. Cty. of Westchester}, 701 F.3d 81, 94–95 (2d Cir. 2012).
\item[410] Charles, \textit{Faces of the Second Amendment}, \textit{supra} note 4, at 1–6, 41–43.
\item[411] There is also a history-in-law reason for this rule. This reason being the Founding Fathers did not use history as an outcome determinative tool when adjudicating constitutional questions. \textit{See Charles, Historicism, supra note 13}, at 29–49; Toiler, et al., \textit{Pre-Originalism, supra note 14}, at 304; Marie Carolyn Klinkhamer, \textit{The Use of History in the Supreme Court, 1789–1835}, 36 \textit{U. DET. L.J.} 553, 554 (1959); Marie Carolyn Klinkhamer, \textit{John Marshall’s Use of History, 6 CATH. U. L. REV.} 78, 88–95 (1956).
\end{footnotes}
shot, muzzle-loading counterparts. A well-trained rifleman in 1791 would be able to fire off two, at most three, rounds per minute, and the rounds were only lethal up to one hundred yards. Meanwhile, today, as was seen in the case of the 2017 Las Vegas shooting, a modified semi-automatic rifle can be modified to fire nine rounds per second, and the rounds are lethal upwards of a mile. Needless to say, to make the laws governing armed carriage in 1791 the jurisprudential baseline when examining the constitutionality of today’s armed carriage restrictions would be an exercise in futility.

The same bodes true for weighing the constitutionality of other firearms laws. Consider that most firearms laws would not be on the statute and ordinance books today but for the increase in firearms related social costs. Yet, if 1791 is to be the jurisprudential baseline from which the constitutionality of all firearms laws are weighed—an approach that one sitting Supreme Court Justice has floated—many, if not most, of today’s firearms laws would be deemed unconstitutional, thus leaving federal, state, and local governments with nothing more than late eighteenth-century remedies to solve twenty-first century problems.

This brings us to the second rule that should be followed when adopting a choice of history approach—the history-in-law analysis must be contextual and thorough, not ad hoc or built upon historical hyperbole. One notable example of the latter—that is a hyperbolic version of history—is how some gun rights advocates have equated the Founding Fathers writing positively about carrying firearms for hunting and travels as proof positive that the Second Amendment protects the preparatory “carrying of ordinary arms” for self-defense almost anywhere and everywhere. What is most astonishing about this historical claim is that these Second Amendment commentators arrived at this conclusion despite the Second Amendment never being implicated in the writings being quoted. The outlandishness of this line of thinking is notable. Just because eighteenth-century persons owned and used firearms, and carried those firearms at times, does not mean those same persons perceived it as a constitutionally protected right, particularly in densely populated public places. For historians,

Charles, *Faces of the Second Amendment*, supra note 4, at 47.


Such a conclusion completely sidesteps the fact that the Founding Fathers maintained a number of firearms restrictions with the purpose of preserving the public peace, preventing
jurists, legal scholars, or, for that matter, anyone to accept such writings as constitutional proof positive that there was a right to preparatory armed carriage in public places would essentially mean that any statement, made by any of the Founding Fathers, attesting to any action must be interpreted as enshrining a constitutional right to do so. But, to accept this premise would be to flip the entire academic discipline of history on its head. It would essentially make myths and facts intellectual equals, when they are not. Moreover, from a jurisprudential standpoint, it would open up a Pandora’s Box of new rights and protections that the Constitution and Bill of Rights was never designed to remotely protect.

Herein is the problem with the choice of history approach. Thus far, not one circuit court to apply it to the Second Amendment outside the home has proved capable of conducting an accurate, contextual and thorough history-in-law analysis. Instead, those circuit courts that have applied a choice of history approach have broken virtually every accepted objectivity norm within history academia. This failure to examine history objectively tilts the scales of justice against using the choice of history approach altogether, and brings us full circle back to the two history-in-law approaches that are more likely to at least frame history correctly—the consensus history approach and the guidepost history approach. This author only hopes that moving forward, the Supreme Court will take note in taking up the first Second Amendment case in nearly a decade.