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The Fugazi Second Amendment: Bruen's Text, History, and Tradition Problem and How to Fix It

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THE FUGAZI SECOND AMENDMENT: *BRUEN*'S TEXT, HISTORY, AND TRADITION PROBLEM AND HOW TO FIX IT

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ABSTRACT

This Article critiques the Supreme Court's use of text, history, and tradition in *New York Rifle & Pistol Association, Inc. v. Bruen*. In doing so, not only is the Supreme Court's approach to history-in-law in *Bruen* called into question, but also the Article provides the courts with an historically objective and even-keeled 'way-ahead' for future Second Amendment cases and controversies.

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I. INTRODUCTION

In *New York State Rifle & Pistol Association v. Bruen*, by a vote of 6-3,[1] the Supreme Court held that the "Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home," and any state or local laws that condition the "issuance of a license to carry on a citizen's showing of . . . special need" are thereby unconstitutional.[2] The decision is remarkable in several respects. For one, *Bruen* upended a regulatory regime that has existed since the mid-to-late nineteenth century—a regime that was instituted and sustained by lawmakers to preserve the Second Amendment, not violate it.[3] What is also remarkable about *Bruen* is the manner historical evidence was marshalled, selected, and analyzed.[4] Rather than examine all the historical evidence objectively and at face value, *Bruen* made it quite clear that "not all history is created equal,"[5] and therefore conveniently cherry-picked whatever historical evidence supported broad carry rights and rejected or explained away any evidence that did not.[6]

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[1] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

[2] *Id.* at 2122.

[3] *See* PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY 158–63, 191–92 (2018); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEV. ST. L. REV. 373, 418–29 (2016).

[4] *Bruen*, 142 S. Ct. at 2127–28 (discussing the varying sources used to analyze history of the right to bear arms).

[5] *Id.* at 2136.

[6] *Id.*; *see also* Jake Charles, *Bruen, Analogies, and the Quest for Goldilocks History*, DUKE SECOND THOUGHTS BLOG (June 28, 2022), https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history/; Saul Cornell, *Cherry-Picked History and*

This criticism of *Bruen* should not be construed to mean that the Supreme Court was jurisprudentially wrong to strike down New York's "may issue" concealed carry regime. Far from it. As this author pointed out following oral argument, the Court could legitimately come out in favor of either party.[7] It all boiled down to how the Court framed the case—whether it be narrowly as a concealed carry case or broadly as a public carry case[8]—and which historical periods or pieces of historical evidence the Court perceived as being outcome determinative.[9] And given that the Court ultimately decided to frame the issue in *Bruen* broadly, the outcome is not all that surprising.[10] The reality is New York's "may issue" concealed carry regime was a tough pill to constitutionally swallow.[11] As the *Bruen* majority noted, outside the Second Amendment context, it is virtually unheard of today for government officials to have such wide discretion in doling out who may and may not exercise a constitutional right.[12]

Where *Bruen* severely falters, however, is in its use and application of history. It is difficult to say what history-based jurisprudential methodology *Bruen* employs. On

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Ideology-Driven Outcomes: Bruen's Originalist Distortions, SCOTUSBLOG (June 27, 2022), https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/.

[7] *See* Francis Wilkinson, *American's Long History of Gun Regulation*, BLOOMBERG (Nov. 3, 2021), https://www.bloomberg.com/opinion/articles/2021-11-03/supreme-court-gun-case-america-has-long-history-of-regulation.

[8] It is worth noting that the Court only granted certiorari on the narrow issue of concealed carry, not all public carry. *See* Questions Presented at 1, N.Y. State Rifle & Pistol Ass'n v. Beach, 818 F.App'x 99 (2020) (No. 20-843) ("Whether the State's denial of Petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.").

[9] *See generally* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Three: Critiquing the Circuit Courts Use of History-in-Law*, 67 CLEV. ST. L. REV. 197, 203–60 (2019).

[10] *See* Questions Presented at 1, N.Y. State Rifle & Pistol Ass'n v. Beach, 818 F.App'x 99 (2020) (No. 20-843) ("Whether the State's denial of Petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.").

[11] *See, e.g.*, Lydia Wheeler & Kimberly Robinson, *Kavanaugh Gun Case Opinion Could Help Uphold Future Regulations*, BLOOMBERG L. (June 24, 2022), https://news.bloomberglaw.com/us-law-week/kavanaugh-gun-case-opinion-could-help-uphold-future-regulations (explaining that the *Bruen* decision is a high profile constitutional ruling that will set the field of battle for future cases); Adam Liptak, *Supreme Court Strikes Down New York Law Limiting Guns in Public*, N.Y. TIMES (June 23, 2022), https://www.nytimes.com/2022/06/23/us/supreme-court-ny-open-carry-gun-law.html.

[12] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022) ("We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.").

its face, *Bruen* appears to be grounded in public meaning originalism.[13] Yet at several points the *Bruen* majority picks and chooses historical evidence on little more than a whim.[14] Yet no matter how *Bruen* is methodologically classified—whether it be originalist or some other history-based form of constitutional interpretation—the fact of the matter is that the 6-3 majority's historical approach is neither objective nor holistic.[15] To be blunt, *Bruen* fails to adhere to even basic academic standards.[16] The length in which the Court margin walks history and then claim that virtually all the relevant evidence points in one direction is particularly worrisome.[17] In this author's opinion, it proves once and for all that history is not so much a constitutional guardrail as it is a jurisprudential pawn in the larger ideological debate over the Constitution's meaning.[18] Equally concerning are the interpretative historical rules laid down in *Bruen*, for they appear to stack the constitutional deck against firearms regulations moving forward.[19] Even worse, these interpretative rules blatantly set aside even the appearance of historical accuracy, objectivity, and transparency, and therefore, if adopted by the lower courts wholesale, will assuredly undermine the legitimacy of Second Amendment jurisprudence moving forward.[20] The way this author sees it,

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[13] *Id*. at 2128, 2136, 2137–38 (noting the importance of the Second Amendment's "public understanding"). *But see* Randy E. Barnett & Lawrence B. Solum, *Originalism after* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, NW. L. REV. (forthcoming 2023) (manuscript at 23), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4338811 (noting that while the "core holding of *Bruen* rests on an originalist foundation . . . the historical analogue test is an implementing rule that is not justified by originalist reasoning.").

[14] *Bruen*, 142 S. Ct. at 2127–28; Cornell, *supra* note 6.

[15] *See* Eric Rubin, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 179 (2021) (showing how prior to *Bruen*, the Supreme Court analogized gun-related issues by inserting "arbitrary discretion, not objective certitude, into judicial analysis"); *Bruen*, 142 S. Ct. at 2122–28.

[16] *See* Lisa Vicens & Samuel Levander, *The Bruen Majority Ignores Decision's Empirical Effects*, SCOTUSBLOG (July 8, 2022), https://www.scotusblog.com/2022/07/the-bruen-majority-ignores-decisions-empirical-effects/.

[17] *See Bruen*, 142 S. Ct. at 2127–28.

[18] *See* Charles, *Bruen, Analogies, and the Quest for Goldilocks History*, *supra* note 6.

[19] *See* Jake Charles, *The Supreme Court's Big Second Amendment Decision is Wreaking Havoc on Gun Safety Laws*, SLATE (Oct. 7, 2022), https://slate.com/news-and-politics/2022/10/federal-judge-strikes-down-most-of-new-yorks-concealed-carry-limits-citing-the-supreme-court.html (discussing how some lower courts are striking down common sense firearms regulations in the wake of *Bruen*); Joseph Blocher & Darrell A.H. Miller, *A Supreme Court Head-Scratcher: Is a Colonial Musket 'Analogous' to an AR-15?*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/opinion/guns-supreme-court.html ("[T]he court's own application of its historical test threatens to create a one-way ratchet in favor of ever more expansive gun rights.").

[20] *See* Charles, *The Supreme Court's Big Second Amendment Decision is Wreaking Havoc on Gun Safety Laws*, *supra* note 19.

Bruen has created a new, fugazi Second Amendment.[21] And by fugazi, what is meant is that the Second Amendment, at least as articulated by *Bruen*, is historically ruined and fake.

More than a decade ago, in an article for the *Fordham Urban Law Journal* on the Supreme Court's opinion in *McDonald v. City of Chicago*, this author explained how the Second Amendment was facing a historiographical crisis of sorts.[22] The article detailed how the broad, gun-rights centric interpretation of the Second Amendment first came to historical prominence, subsequently latched itself onto our public, political, and legal discourse, and then continued to thrive in law reviews despite many highly respected historians having shown it to be an academic embarrassment.[23] In doing so, the article posited the following questions to the Supreme Court and wider federal judiciary: "Which end of the historical spectrum is to guide future [Second Amendment] opinions [following *McDonald*]? Does the evidence have to gain the support of the historical community? Does it have to be clear and convincing, or does it merely have to be circumstantial and plausible through hypothetical word association?"[24] Ultimately, the article contended that if the federal courts were serious about the legitimacy of Second Amendment jurisprudence moving forward, as well as the legitimacy of other history-based jurisprudence, it was crucial that historical consciousness be maintained.[25] And by historical consciousness, what was meant was that federal courts needed to first understand the Second Amendment's "historical origins and sins before importing the past for use in the present."[26] In other words, "the past must be understood by its own terms and on the face of the record, not what can be inferred or created."[27] And to be clear, the article noted that "historical consciousness" is not the same as using one's "historical imagination."[28] The former—historical consciousness—is presumed jurisprudentially legitimate because it is based on "total historical context, a substantiated evidentiary foundation, and being true as to what the historical record provides."[29] Conversely, the latter—historical imagination—is primarily "theoretical," and therefore "can be dangerous in

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21 *See* Nelson Lund, *Bruen's Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 280, 283 (2022).

22 *See generally* Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*, 39 FORDHAM URB. L.J. 1727, 1729–30 (2012).

23 *Id*. at 1733.

24 *Id.* at 1730.

25 *See id.* at 1749.

26 *Id*. at 1855.

27 *Id.*

28 *Id.*

29 *Id.*

terms of building a historically objective foundation" from which to jurisprudentially reason.[30]

This Article will expound on how the Supreme Court's opinion in *Bruen* ignored this author's plea for a historically conscious Second Amendment, and in doing so has created a fugazi historiographical crisis of its own making. To highlight *Bruen*'s historical flaws, this Article will first examine and unpack several of the majority's history-based arguments and justifications. This Article will then expound on why the majority's text, history, and tradition guidance create several problems for the lower courts moving forward, including the soon to be highly contested "sensitive places" doctrine. This Article is broken into three parts. Part II critically examines how and why the Supreme Court's opinion in *Bruen* is historical fugazi.[31] Part III then critically examines *Bruen*'s hypocritical approach to text, history, and tradition, and how said approach ultimately facilitates analytical double standards.[32] Lastly, Part IV offers the lower courts (and hopefully the Supreme Court) some guidance on objectively resolving the many unanswered text, history, and tradition questions left in the wake of *Bruen*, and then applies that guidance to the "sensitive places" doctrine.[33]

II. *BRUEN* AND THE SECOND AMENDMENT AS HISTORICAL FUGAZI

The intersection between history and the law is long and complicated. The ways in which lawyers, legal scholars, and jurists have used the former to interpret the latter are voluminous.[34] Of course, not all uses of history are equal.[35] There are countless instances of lawyers, legal scholars, and jurists using and abusing historical evidence

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30 *Id.*

31 *See infra* Part II.

32 *See infra* Part III.

33 *See infra* Part IV.

34 *See* Robert W. Gordon, *The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1023 (1997); Martin H. Redish, *Interpretivism and the Judicial Role in a Constitutional Democracy*, 19 HARV. J.L. & PUB. POL'Y 525, 531 (1996); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793 (1983); Raoul Berger, *Mark Tushnet's Critique of Interpretivism*, 51 GEO. WASH. L. REV. 532, 533 (1983); Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1024 (1981); John H. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 432 (1977); Roger S. Ruffin, *The Constitution and the Dilemma of Historicism*, 6 SAN DIEGO L. REV. 171, 171–82 (1969); John P. Reid, *Legal History*, 1966 ANN. SURV. AM. L. 669, 669–86 (1966); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 121–22 (1965); Paul Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 64–76 (1963).

35 For some of the earliest criticisms, *see* Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 556 (1938); Charles A. Beard, *The Act of Constitutional Interpretation*, 1 NAT'L L. GUILD Q. 9, 10–12, 16 (1937). For a larger discussion on the problems associated with history-in-law, PATRICK J. CHARLES, HISTORICISM, ORIGINALISM, AND THE CONSTITUTION: THE USE AND ABUSE OF THE PAST IN AMERICAN JURISPRUDENCE 5–28 (2014).

to achieve desired outcomes.[36] There are also plenty of instances where lawyers, legal scholars, and jurists, albeit in good faith, have misinterpreted or misapplied history.[37] The point to be made is that the simple act of invoking history to interpret the law does not in itself make an interpretation of the law legitimate.[38] Rather, as historians and legal scholars have consistently noted over the years, the legitimacy of utilizing history for law largely depends on how evidence is marshalled and invoked, whether the invocation is accurate, objective, and transparent, and there is indeed a relationship between the historical evidence being invoked and the law or legal question at hand.[39] And assuming that the historical evidence is being marshalled and invoked honorably, it is well-settled that the more historical facts and truths that are harnessed, the more accurate and legitimate any follow-on historical or legal analysis will be.[40]

Herein lies the problem with *Bruen*. History was not invoked honestly or honorably, and therefore the jurisprudence that will flow from it will be arguably illegitimate, particularly in the context of 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 when adjudicating legal questions.[41] This criticism of *Bruen* is not to suggest that this author does not support recognizing any Second Amendment rights outside the home.[42] This author does and has stated as much several times.[43] What this author takes serious issue with is the lengths in which

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36 *See, e.g.*, Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1180–82 (2009); Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legalists and Jurists*, 83 MINN. L. REV. 377, 384, 426 (1998); CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 192, 196 (1969).

37 *See* Kelly, *supra* note 34; *see also* Amanda L. Taylor et al., *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889, 1890 (2012).

38 *See, e.g.*, Patrick J. Charles, *History-in-Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEV. ST. L. REV. 23, 27–28 (2014); Helen Irving, *Constitutional Interpretation, the High Court, and the Discipline of History*, 41 FED. L. REV. 95, 101, 122 (2013).

39 *See, e.g.*, William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 266–67 (1987); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1243–47 (1986); PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 140 (1992).

40 Charles, *History-in-Law*, *supra* note 38, at 37–38; *see also* Julius Goebel, Jr., *Ex Parte Clio*, 54 COLUM. L. REV. 450, 451 (1954) ("The writing of history requires maximum effort in the discovery of evidence and the utmost candor in presentation, for in no other way can the interests of truth be served. Only when these obligations are first discharged should the art of the interpreter be exercised.").

41 *See* Charles, *History-in-Law*, *supra* note 38, at 42.

42 Charles, *The Faces of the Second Amendment Outside the Home, Take Two*, *supra* note 3, at 480.

43 *See, e.g.*, Patrick J. Charles, *The Second Amendment and the Basic Right to Transport Firearms for Lawful Purposes*, 13 CHARLESTON L. REV. 125, 143–71 (2019) (outlining how the law has generally allowed for transporting of weapons); Charles, *The Faces of the Second*

the *Bruen* majority went to embrace academically poor and unsubstantiated history, and then package and present it to the American people as viable.[44] It is clearly not.[45] And it is not as if the *Bruen* majority was unaware that it was putting forward what one would congenially refer to as 'questionable' history. There are reams of scholarship that show how for more than five decades, a small contingent of writers have willfully and repeatedly distorted historical evidence in the Second Amendment context and, in the process, put forth countless baseless historical claims—claims no less that *Bruen* accepted as historically viable.[46] By this author's count, there are more than a dozen examples in *Bruen*.[47] However, for the sake of brevity, this Article will only highlight the three that this author believes are the most egregious—the majority's analysis of 1328 Statute of Northampton, Massachusetts Model type armed carriage laws, and the alleged non-existence of discretionary licensing regimes come Reconstruction.[48]

A. Statute of Northampton Fugazi

According to the *Bruen* majority, "by the time Englishmen began to arrive in America in the early 1600s, the public carry of handguns was no longer widely proscribed."[49] Allegedly, come that time, the 1328 Statute of Northampton prohibition on going armed in public places, as well as several later in time royal proclamations

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Amendment Outside the Home, Take Three, *supra* note 9, at 223–24 (noting it was generally accepted in the nineteenth and early twentieth centuries that armed carriage laws "[c]ould not completely extinguish individuals from exercising their right to self-defense in extreme cases"); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 43, 35–36 (2012) (noting that the prosecutorial scope of the Statute of Northampton should not be construed "[a]s prohibiting the transport of arms . . . for lawful purposes," nor the transporting of firearms to the shooting range, to one's home or business, for government sanctioned militia service, and for purchase or sale); *id.* at 19 (noting that English prohibitions on "[g]oing armed did not extend to the realm's unpopulated and unprotected enclaves").

44 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122–28 (2022).

45 *See supra* note 6.

46 *See, e.g.*, Patrick J. Charles, *The Invention of the Right to 'Peaceable Carry' in Modern Second Amendment Scholarship*, 2021 U. ILL. L. REV. ONLINE 195, 209–10 (2021); Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel Under Anglo-American Law, 1688–1868*, 83 L. & CONTEMP. PROBS. 73, 74 (2020); A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT 3–12 (Jennifer Tucker et al. eds., 2019); Charles, *The Second Amendment in Historiographical Crisis*, *supra* note 22, at 1748–49; Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 193–96 (2008).

47 *See Bruen*, 142 S. Ct. at 2127–28.

48 *Id.* at 2139–54.

49 *Id.* at 2140.

reinforcing this rule of law, were effectively null and void.[50] In its place, a quasi-right to peaceably carry firearms was born.[51] What substantiated evidence did the *Bruen* majority provide to support its historical conclusion? Not much.[52] Just one obscure 1686 English case—*Rex v. Knight*—a case that was never interpreted as changing the law on armed carriage until the mid-1970s with the advent of the gun-rights centric Second Amendment.[53]

In 1328, English Parliament enacted the Statute of Northampton.[54] The Statute contained several legal reforms, including establishing the office of the Justice of the Peace, unifying the kingdom under one body of law, the purging of corruption within local government, and restoring peace and order.[55] And the principal means through which English peace and order were maintained was the Statute's general prohibition on armed carriage (with some exceptions) in the public concourse.[56] Not only does the Statute's text confirm this,[57] but so too does several centuries of royal proclamations.[58]

It is also worth noting that the Statute's prohibition on going armed in the public concourse was not legislatively fashioned out of thin air. It was borrowed from several preceding royal proclamations that sought to limit armed violence.[59] In 1320, for instance, a royal proclamation was issued in the town of Oxford following several armed assaults on the university's clerks, scholars, and masters.[60] The chancellor requested that the "King's peace" be enforced and the "bearing of arms . . . be completely forbidden, by the laity as well as clerks, and that the chancellor, in default

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[50] *Id*. at 2141–42.

[51] *Id.* at 2141.

[52] *Id.* at 2127–28.

[53] *Id.* at 2124.

[54] Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 L. & CONTEMP. PROBS. 11, 18 (2017).

[55] *See* Anthony Verduyn, *The Politics of Law and Order During the Early Years of Edward III*, 108 ENG. HIST. REV. 842, 849 (1993); Bertha H. Putnam, *The Transformation of the Keepers of the Peace into the Justices of the Peace 1327–1380*, 12 TRANSACTIONS ROYAL HIST. SOC'Y 19, 21–26 (1929).

[56] Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, *supra* note 54, at 18–19, 21.

[57] The Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.) (stipulating that no one shall bring "force in affray of peace, *nor* to go nor ride armed by day or night, in fairs, markets, *nor* in the presence of the King's Justices, or other ministers, *nor* in no part elsewhere") (emphasis added).

[58] Charles, *The Faces of the Second Amendment Outside the Home: History versus Ahistorical Standards of Review*, *supra* note 43, at 13–23 and accompanying notes.

[59] *Id.* at 27.

[60] Charles, *The Second Amendment in Historiographical Crisis*, *supra* note 22.

of the mayor, may punish them on all occasions which are necessary."[61] The King's Council replied and instructed the Mayor to "forbid any layman *except town officials* to wear arms in the town."[62] Six years later, on April 28, 1326, another royal proclamation was issued by Edward II "prohibiting any one going armed without his licence, except the keepers of his peace, sheriffs and other ministers, willing that any one doing the contrary should be taken by the sheriff or bailiffs or the keeps of his peace and delivered to the nearest gaols . . . ."[63]

Over the next three centuries, historians know that the tenets of Statute of Northampton survived both through royal proclamation and legal commentary.[64] As it pertains to the former, it was Elizabeth I who was responsible for extending the Statute's prohibition to modern weaponry, including firearms, pistols, and concealable

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61 *Id.* at 1806.

62 *Id.* (emphasis added); *see also* COLLECTANEA: THIRD SERIES 119 (Oxford, Clarendon Press 1896).

63 CALENDAR OF CLOSE ROLLS, EDWARD II, A.D. 1323-1327, 560 (April 28, 1326, Kenilworth) (H.C. Maxwell-Lyte ed., 1898). Edward II issued a similar proclamation a month earlier. *See id*. at 549 (March 6, 1326, Leicester) (ordering the sheriff of York to arrest "any man hereafter [that] go armed on foot or horseback, within liberties or without . . ."); *see also* 1 CALENDAR OF THE PLEA AND MEMORANDA ROLLS OF THE CITY OF LONDON, 1323-1364, at 15 (November 1326) (A.H. Thomas ed., 1926) ("[N]o man go armed by night or day, save officers and other good men of the City assigned by the Mayor and Aldermen in their wards to keep watch and preserve the peace, under penalty of forfeiture of arms and imprisonment . . . ."); *id.* ("The bearing of arms is forbidden, except to the officers of the City assigned by the Mayor and Alderman to keep watch in the Wards, and to the Hainaulters (*Henuers*) of the Queen, who are accustomed to go armed in the manner of their country.").

64 Consider for example the English translations of Anthony Fitzherbert's influential sixteenth-century legal treatises. Therein, the Statute of Northampton was always restated as being enforceable in broad terms. *See* ANTHONY FITZHERBERT, THE NEWE BOKE OF JUSTICES OF PEAS, MADE BY ANTHONY FITZHERBARD JUDGE, LATELY TRANSLATED OUT OF FRENCHE INTO ENGLYSHE 47 (1538) ("The Shyreffe may arrest men rydyng or goyng armyd, and comitte them to pryson, there to remayne at the kynges pleasure."); *see also* ANTHONY FITZHERBERT, THE NEWE BOKE OF JUSTYCES OF PEAS, BY A.F.K. LATELY TRANSLATED OUT OF FRENCHE INTO ENGLYSHE 64 (1541) ("None shal go nor ryd armid by day nor by nyght, and payne to lea[ve] their armour to the king"); *id.* at 346 ("Constables in the towne where they beare office, may arrest me[n] that go or ryde armed in rayres, or markettes by daye or by nyght, and take their armour as forfayt to the kyng, and empryson them at the kynges pleasure."); ANTHONY FITZHERBERT, IN THIS BOKE IS CONTEYNED THE OFFYCES OF SHYREFFES, BAILLYFFES, OF LIBERTYES, ESCHETOURS, COSTABLES AND CORONERS 2 (1543) ("The shyreffe may arreste men rydynge or goyng armyd, and comyte them to pryson, there to remayne at the kynges pleasure."); *id*. at 101 ("Constables in the townes where they beare office may arreste me[n] that go or ryde armed in fayres, or markettes by daye or by nyght, and take theyr armour as forfayte to the kyng and imprison them at the kiges pleasure."); ANTHONY FITZHERBERT, IN THIS BOKE IS CONTEYNED THE OFFYCE OF SHYREFFES, BAILLIFFES OF LIBERTIES, ESCHETOURS, COSTABLES AND CORONERS 2 (1545) ("The Shyreffe may arreste men rydynge or goying armyed, and comyte them to pryson, there to remayne at the kynges pleasure."); *id*. at 100 ("Constables in the townes where they beare office, may arreste me[n] that go or ryde armed in fayres, or markettes by daye or by nyght, and take theyre armour as forfayte to the kyng and imprison them at the kings pleasure.").

weapons.[65] Elizabeth I's successor, James I reinforced this rule of law,[66] but it was Elizabeth I's amendment that legal commentators took notice of from the late sixteenth-century through the eighteenth-century. For instance, William Lambarde, arguably the most prominent lawyer of the Elizabethan period, described the Statute of Northampton in the following terms:

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65 *See* CALENDAR OF STATE PAPERS DOMESTIC: ELIZABETH, 1601-3, WITH ADDENDA 1547–65, at 214 (June 1602) (Mary Anne Everett Green ed., 1870); BY THE QUENNE ELIZABETH I: A PROCLAMATION AGAINST THE CARRIAGE OF DAGS, AND FOR REFORMATION OF SOME OTHER GREAT DISORDERS 1 (Christopher Barker, London 1594); BY THE QUENNE ELIZABETH I: A PROCLAMATION AGAINST THE COMMON USE OF DAGGES, HANDGUNNES, HARQUEBUZES, CALLIUERS, 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 COATS 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 EXPRESSED LAWES MADE BY PARLIAMENTE IN THE XXXIII YERE OF THE RAIGNE OF THE QUENES MAJESTIES MOST NOBLE FATHER OF WORTHY MEMORY KYNG HENRY THE EIGHT 1 (1559) ("Many men do dayly . . . ryde with Handgonnes & Dagges, under the length of three quarters of a yarde, whereupon have folowed occasions for sundrye lewde and evyll persons, with such unlawfull Gonnes and Dagges now in time of peace to execute greate and notable Robberies, and horrible murders . . . Her Majestie consyderying, with the advyse of her Counsayle, howe beneficiall a lawe the same is, and specially at this tyme moste nedefull of dewe execution, and howe negligently it is of late observed: Strayghtly therefore chargeth and commandeth, not onely all maner her loving subjects fro[m] henceforth to have good and specyall regarde to the due execution of the same Statute, and of every part thereof . . . .").

66 BY THE [KING JAMES I]: A PROCLAMATION AGAINST THE USE OF POCKET DAGS 1 (Robert Barker, London 1612) ("Whereas the bearing of Weapons covertly, and specially of short Dagges, and Pistols . . . hath ever beene, and yet is by the Lawes and polic[y] of this Realme straitly forbidden as car[r]ying with it ine[v]itable danger in the hands of desperate persons . . . And some persons being questioned for bearing of such about them, ha[v]e made their excuse, That being decayed in their estates, and indebted; and therefore fearing continually to be Arrested, they weare the same for their defence against such Arrests. A case so farre from just excuse, as it is of itselfe a grie[v]ous offence for any man to arme himselfe against Justice, and therefore deser[v]es . . . sharpe and se[v]ere punishment. But besides this e[v]ill consequence . . . we have just cause to pro[v]ide also against those de[v]ilish spirits, that maligning the quiet and happiness of this Estate, may [u]se the same to more execrable endes. And therefore by this [Due] Proclamation, We doe straitly charge and commaund all Our subjects and other persons whatsoever, that they neither make, nor bring into this Realme, any Dagges, Pistols, or other like short Gunnes."); BY THE KING [JAMES I], A PROCLAMATION AGAINST STEELETS, POCKET DAGGERS, POCKET DAGGES AND PISTOLS 1 (Robert Barker, London 1616) ("Wherefore it being alwayes the more principall in Our intention to pre[v]ent, then to punish, being gi[v]en to [u]nderstand the [u]se of *Steelets*, pocket Daggers, and Pocket Dags and Pistols, which are weapons vtterly [u]nser[v]iceable for defence, Militarie practice, or other lawfull [u]se, but odious, and noted Instruments of murther, and mischiefe; We doe straightly will and command all persons whatsoe[v]er, that they doe not hencefoorth presume to weare or carie about them any such *Steelet* or pocket Dagger, pocket Dagge or Pistoll . . . .").

> [I]f any person whatsoever (except the Queenes 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 go, or ride armed, by night, or by day, in Faires, Markets, or any other places: then any Constable, or any other of the saide 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 coates, or doublets: as by the proclamation [of Queen Elizabeth I] . . . .[67]

Lambarde's understanding of the Statute of Northampton proved influential.[68] He was cited, reprinted or paraphrased by a number of prominent commentators to include Abraham Fraunce, Michael Dalton, Edward Coke, William Hawkins and others.[69] In the case of Michael Dalton's *The Countrey Justice*, it was the first restatement to use the word "offensively."[70] The word aptly spoke to how the Statute of Northampton encompassed both bringing force in affray and carrying dangerous weapons in the public concourse, to include pistols and firearms.[71] As Dalton put it:

> [The peace may be enforced to] All such as shall go or ryde armed (offensively) in Fayres, Markets, or elsewhere; or shall weare or carry any

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67 WILLIAM LAMBARDE, THE DUTIES OF CONSTABLES, BORSHOLDERS, TYTHINGMEN, AND SUCH OTHER LOWE AND LAY MINISTERS OF THE PEACE 13–14 (1602). For Lambarde's earlier restatement, *see* WILLIAM LAMBARDE, EIRENARCHA: OR THE OFFICE OF THE JUSTICES OF THE PEACE, IN TWO BOOKES 134 (1582). For more on William Lambarde, *see generally* Wilfrid Prest, *William Lambarde, Elizabethan Law Reform, and Early Stuart Politics*, 34 J. BRITISH STUD. 464, 464 (1995).

68 Patrick J. Charles, *The Statute of Northampton by the Late Eighteenth Century: Clarifying the Intellectual Legacy*, 41 FORDHAM URB. L.J. CITY SQUARE 10, 13–19 (2013).

69 *Id.*

70 MICHAEL DALTON, THE COUNTREY JUSTICE, CONTAINING THE PRACTICES OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 142 (1618). For the influence of Dalton's writings, *see* THOMAS GARDEN BARNES, SHAPING THE COMMON LAW 136– 51 (2008).

71 *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 155 (1769) (lumping "fire arms" with "offensive weapons"). In the 1619 edition of Dalton's treatise the word "Gunns" was added to the list of dangerous weapons as to read "Gunns, Daggs, or Pistols." MICHAEL DALTON, THE COUNTREY JUSTICE, CONTAINING THE PRACTICES OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 31 (1619). Dalton's treatise *Officium Vicecomitum* does not mention firearms in its Statute of Northampton restatement. *See* MICHAEL DALTON, OFFICIUM VICECOMITUM: THE OFFICE AND AUTHORITIE OF SHERIFS 14 (1623) ("Also everie sherife . . . may and ought to arrest all such persons as goe or ride armed offensively, either in the presence of the sherife, or in Faires or Markets or elsewhere in affray of the Kings people, and may commit them to prison, to remaine at the king's pleasure . . . and also the Sherife may seize and take away their armour to the Kinds use, and prize the same by the oaths of some present . . . And yet they themselves (fcz. The Sherife and his officers) may lawfully beare armour and weapons . . . ."). However, Dalton did cite to his treatise *The Countrey Justice* where firearms are listed as prohibited. *Id.*

> Dagges or Pistolls charged: it seemeth any Constable seeing this, may arrest them and may carrie 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.[72]

What Dalton and Lambarde's restatements inform is that by the early-to-mid-seventeenth century, England's preeminent legal minds understood that the act of carrying dangerous weapons was sufficient to amount an affray, "strike a feare"[73] or "striketh a feare."[74] As Ferdinando Pulton, the prominent Elizabethan legal editor put it, the Statute of Northampton intended "that he which in a peaceable time doth ride or goe armed, without sufficient warrant or authoritie so to doe, doth meane to breake the peace, and to doe some outrage" because the law will "always [be] ready to defend every member of the common weal[th], from taking or receiving of force or violence from others . . . ."[75] In other words, 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 meanes that may tend in affray or feare of the people."[76]

According to several English legal treatises, this understanding of the Statute of Northampton as a prohibition on going armed in the public concourse continued into the early eighteenth century.[77] *Bruen*, however, failed to acknowledge most of this history.[78] The *Bruen* majority accomplished this by casting aside inconvenient, contrarian historical evidence as irrelevant or a historical bridge too far, and then pronouncing that a right to peaceable carry firearms was generally understood by Englishmen far and wide.[79]

How could the *Bruen* majority, or any observer for that matter, be so sure of this historical pronouncement when there are several legal commentaries that inform otherwise? According to *Bruen*, the answer principally lies with the 1686 case *Rex v. Knight*, wherein Sir John Knight was prosecuted for both walking about the streets of Bristol and entering a church carrying a firearm.[80] Knight was ultimately acquitted by

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72 DALTON, *supra* note 70 (emphasis added).

73 LAMBARDE, *supra* note 67, at 134.

74 DALTON, *supra* note 70.

75 FERDINANDO PULTON, DE PACE REGIS ET REGNI VIZ 4 (1609).

76 *Id.* at 5.

77 WILLIAM FORBES, THE DUTY AND POWERS OF JUSTICES OF PEACE, IN THIS PART OF GREAT-BRITAIN CALLED SCOTLAND 26 (1707); JAMES BOND, A COMPLEAT GUIDE FOR JUSTICES OF PEACE 42, 181 (3d ed., London 1707); JOSEPH KEBLE, AN ASSISTANCE TO THE JUSTICES OF THE PEACE FOR THE EASIER PERFORMANCE OF THEIR DUTY 147, 410, 646 (2d ed., 1689).

78 N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2140 (2021).

79 *Id.*

80 *Id.* at 2141–42; Sir John Knight's Case, 87 Eng. Rep. 75 (1686); Rex v. Knight, 90 Eng. Rep. 330 (1686).

a jury.[81] As to why Knight was acquitted remains a mystery.[82] Knight was, however, placed on a bond in accordance with the surety of the peace process.[83] Yet despite historians being unable to piece together why exactly Knight was acquitted, the *Bruen* majority saw no issue with historically concluding that *Rex v. Knight* forever changed the prosecutorial scope of the Statute of Northampton by requiring a person to carry arms with "evil-intent."[84] And the *Bruen* majority arrived at this conclusion not because there was any post-1686 historical evidence of the founders—or anyone for that matter up through the mid-nineteenth century—interpreting *Rex v. Knight* in this fashion or declaring the existence of a right to peaceably carry firearms.[85] No, the *Bruen* majority arrived at its "evil-intent" interpretation because it was deemed historically "plausible"—that is in line with how they wanted to interpret the Second Amendment.[86] In the *Bruen* majority's own words: "To the extent that there are multiple *plausible* interpretations of *Sir John Knight's Case*, we will favor the one that is more consistent with the Second Amendment's command."[87]

Pause and consider the Court's pronouncement for a moment. What the *Bruen* majority is essentially saying is that whenever a federal court is faced with a question concerning the historical scope of a constitutional right, and the respective parties to the case advance competing interpretations of a past event that *may* or *may not* shed light on said right, the interpretation that the court thinks best compliments the

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81 For a full history, *see* Tim Harris, *The Right to Bear Arms in English and Irish Historical Context*, A RIGHT TO BEAR ARMS? 23–27 (2019).

82 *Bruen*, 142 S. Ct. at 2183 (Breyer, J., dissenting).

83 NARCISSUS LUTTRELL, A BRIEF HISTORICAL RELATION OF STATE OF AFFAIRS FROM SEPTEMBER 1678 TO APRIL 1714 389 (1857); 3 THE ENTRING BOOK OF ROGER MORRICE 1677-1691: REIGN OF JAMES II 311 (Mark Goldie et al. eds., 2007). For some useful history on development of the surety of peace process, *see* Susanne Jenks, *Writs De Minis and Supplicavit: The History of Surety of the Peace*, *in* LAWS, LAWYERS AND TEXTS: STUDIES IN MEDIEVAL LEGAL HISTORY IN HONOR OF PAUL BRAND 253–77 (2012); David Feldman, *The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binging Over Powers*, 47 CAMBRIDGE. L.J. 101 (1988).

84 *Bruen*, 142 S. Ct. at 2141, n.11 (2021). Two years earlier, Justice Clarence Thomas, the *Bruen* majority opinion's author, had already hinted his support for this "evil-intent" interpretation of *Rex v. Knight*. *See* Rogers v. Grewal, 140 S. Ct. 1865, 1870–71 (2020) (Thomas, J., dissenting).

85 From the time *Rex v. Knight* was decided in 1686 until the mid-nineteenth century, there exists no substantiated evidence of anyone interpreting the case as a watershed moment in arms bearing history, including within the American Colonies and subsequent United States. The earliest that *Knight's Case* appears in American legal literature is 1843. *See* State v. Huntly, 25 N.C. 418, 421 (1843) (citing *Knight's Case* only for the non-controversial proposition that "the Statute of Northampton was made in affirmance of the common law"); *see also* JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAWS OF STATUTORY CRIMES § 784 (1873) (citing *Knight's Case* in 1873 only for the non-controversial proposition that the "offence created by this statute is said in England to have been such also by the earlier common law").

86 *Bruen*, 142 S. Ct. at 2141 n.11.

87 *Id.* (emphasis added).

professed original meaning or understanding of the right is declared the historical winner.[88] This is neither an objective nor honest approach to history-in-law. It is utter fugazi. And what makes it particularly cringeworthy—as a matter of both historical and constitutional interpretation—is that the *Bruen* majority did not express the slightest reservation in laying down this rule.[89] Not even the historical fact that the Second Amendment was debated, adopted, and ratified more than a century after *Rex v. Knight* dissuaded them. This is *the* textbook definition of what is known as "Whiggish' history"—that is advancing a historical interpretation of events primarily for the sake of supporting one's modern ideological predisposition.[90] As the twentieth-century English historian Herbert Butterfield put it, "the most fallacious thing in the world is to organize our historical knowledge upon an assumption without realizing what we are doing, and then to make inferences from that organization and claim that these are the voice of history."[91]

And what makes *Bruen*'s interpretation of *Rex v. Knight* especially Whiggish is the fact that historians have repeatedly shown it to be completely and utterly fabricated.[92] It cannot be emphasized enough that from the time *Rex v. Knight* was decided in 1686 to the mid-nineteenth century there is not one instance to be found—not one case, legal summary, legal commentary, newspaper or journal article, nor correspondence—where the case was discussed or cited as changing the law of armed carriage, and certainly not for establishing a common law or constitutional right to peaceable armed carriage in the public concourse.[93] Even worse is the fact that the interpretation of *Rex v. Knight* advanced in *Bruen* was completely engineered by gun rights advocates in the mid-1970s[94] based on nothing more than the parsing and

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88 *See id.*

89 *Id.* at 2156.

90 *See generally* HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (1950).

91 *Id.* at 23–24.

92 *See* Harris, *supra* note 81, at 22–27.

93 *Rex v. Knight* is indeed cited in William Hawkins' 1716 *A Treatise of the Pleas of the Crown*. 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136, ch. 63, § 9 (1716). However, Hawkins' text accompanying this citation does not remotely endorse a right to carry dangerous weapons in public place. *Id*. Moreover, although some of the founding fathers maintained copies of the *English Reports* and Hawkins' treatise, the fact remains that there is no evidence of anyone interpreting either *Rex v. Knight* or Hawkins' treatise as embodying a right to peaceable carry.

94 National Rifle Association (NRA) lawyer David I. Caplan was the first to advance this interpretation. *See* David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31, 32 (1976); DAVID I. CAPLAN, THE SECOND AMENDMENT: A BASIC UNDERPINNING IN THE CONSTITUTIONAL SYSTEM OF CHECKS AND BALANCES 2 (1975) (on file with author). Other gun rights advocates were quick to parrot this interpretation. *See, e.g.*, David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J. L. & PUB. POL'Y 559, 565 (1986); Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 255, 311 (1985); Richard E. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63, 71–72 (1982); Robert Dowlut & Janet A. Knoop,

explaining away of text from the incomplete *English Reports*.[95] And what makes this so historically problematic is that until the mid-eighteenth century the *English Reports* were only partial legal summaries,[96] and therefore unreliable when reconstructing cases.[97] In other words, prior to the mid-eighteenth century, the *English Reports* were never intended to be comprehensive case studies and were never used as such.[98] Rather, they served merely to instruct legal practitioners and students on the intricacies of pleading.[99]

To be clear, *Bruen*'s poor choice of history in *Rex v. Knight* proved every originalism critic that they were right. For decades, ever since originalism began blossoming in conservative legal circles, countless critics—jurists, legal scholars, and historians alike—have warned that originalism would ultimately result in subjective, ahistorical, and ideologically driven legal outcomes.[100] *Bruen*'s interpretation of *Rex v. Knight* is now forever Exhibit A. It demonstrates that for originalists like Associate Justice Clarence Thomas, and assuredly many others of the bench and bar, originalism is not so much about getting history right or preserving the past.[101] It never was.[102] It is about selectively invoking the authoritative power of history in a manner that justifies one's own ideological predilections.[103] The irony of a 6-3 conservative

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State Constitutions and the Right to Keep and Bear Arms, 7 OKLA. CITY U. L. REV. 177, 202 (1982); Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1, 7 (1981).

95 *See* Charles, *The Invention of the Right to 'Peaceable Carry' in Modern Second Amendment Scholarship*, *supra* note 46, at 202–06.

96 *Id.* at 206.

97 *See* NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 53–54 (2008).

98 *Id.* at 51.

99 *Id.* at 52–56 (2008). For more on law reporting in England up through the seventeenth century, *see* L.W. ABBOTT, LAW REPORTING IN ENGLAND 1485-1585 1 (1973); LAW REPORTING IN BRITAIN: PROCEEDINGS OF THE ELEVENTH BRITISH LEGAL HISTORY CONFERENCE (Chantal Stebbings ed., 1995).

100 *See, e.g.*, Bret Boyce, *The Magic Mirror of "Original Meaning": Recent Approaches to the Fourteenth Amendment*, 66 ME. L. REV. 29, 36 (2013); Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 335–36 (2013); Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 980 (2012); Jack Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 582 (2011); Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J. L. & HUMAN. 295, 335 (2011).

101 *See generally* Berger, *Originalism's Pretenses*, *supra* note 100.

102 Kelly, *supra* note 34, at 131–32 (noting back in 1963 how courts will begin to argue for a "return to historically discovered 'original meaning'" as "an almost perfect excuse for breaking precedent," but that the professed "discovery," upon examination, will ultimately "prove to be illusory or to involve distinct elements of law-office history in its creation").

103 *See generally* Patrick J. Charles, *The 'Originalism is Not History' Disclaimer: A Historian's Rebuttal*, 63 CLEV. ST. L. REV. ET CETERA 1 (2015).

majority, which leans heavily in support of religious freedom,[104] positively citing a 1686 case where the defendant, Sir John Knight, was exercising and advocating for the religious intolerance of Catholics[105] only confirms that history is nothing more than a pawn, a jurisprudential football if you will, in the debate over the Constitution's meaning.[106]

And the *Bruen* majority did not even have to historically weigh in on *Rex v. Knight*.[107] They could have easily gone the way of the Ninth Circuit Court of Appeals and punted on the subject,[108] all without calling into question the legitimacy of their follow-on analysis.[109] In other words, the *Bruen* majority could have laid out the parties' competing historical interpretations of *Rex v. Knight*, deemed both somewhat plausible, and then refused to weigh in.[110] But no, the *Bruen* majority thought it was jurisprudentially wise to choose one historical interpretation over the other, and then build on that choice by bending even more history, to include the events surrounding the 1689 English Declaration of Rights,[111] Williams Hawkins's 1716 treatise *Pleas of the Crown*,[112] and then selectively citing one, rather obscure legal treatise to support the unsubstantiated "evil-intent" interpretation of the Statute of Northampton.[113]

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104 *See* Carson v. Makin, 142 S. Ct. 1987 (2022); Kennedy v. Bremerton School District, 142 S. Ct. 2407 (2022).

105 *See* Harris, *supra* note 81, at 22–27.

106 The same could be said of the Supreme Court's recent opinion overturning *Roe v. Wade*, wherein the 5-4 conservative majority positively cite Matthew Hale's and Henry Bracton's treatises, yet in *Bruen*, the same five justices outright dismissed any pre-1686 evidence of the 1328 Statute of Northampton as non-persuasive. *Compare* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2249–50 (2022), *with* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2139–41 (2021).

107 *See, e.g.*, Young v. Hawaii, 992 F.3d 765 (9th Cir. 2021) (en banc).

108 *Id.* at 791.

109 Patrick J. Charles, *Judging the Ninth Circuit's Use of History in* Young v. Hawaii, DUKE SECOND THOUGHTS BLOG (Apr. 16, 2021), https://firearmslaw.duke.edu/2021/04/judging-the-ninth-circuits-use-of-history-in-young-v-hawaii/.

110 *See, e.g.*, *Young*, 992 F.3d at 790–91.

111 *Compare Bruen*, 142 S. Ct. at 2141–42 (selectively quoting the work of historian Lois G. Schwoerer), *with* LOIS SCHWOERER, GUN CULTURE IN EARLY MODERN ENGLAND 156–70 (2016); Lois G. Schwoerer, *English and American Gun Rights*, A RIGHT TO BEAR ARMS? 139–44 (2019). *See also* Harris, *supra* note 81, at 27–33; CHARLES, ARMED IN AMERICA, *supra* note 3, at 44–62.

112 *Compare Bruen*, 142 S. Ct. at 2142 (selectively quoting Hawkins's treatise to conclude that the Statute of Northampton maintained a terrifying or evil-intent requirement), *with* CHARLES, ARMED IN AMERICA, *supra* note 3, at 115–16 (examining Hawkins's analysis of the Statute of Northampton wholistically). *See also* Brief of Patrick J. Charles as Amicus Curiae in Support of Neither Party, N.Y. State Rifle & Pistol Ass'n, Inc., Inc. v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843), at 27–29.

113 *See Bruen*, 142 S. Ct. at 2142 (citing Theodore Barlow, THE JUSTICE OF PEACE 12 (1745)). This "evil-intent" interpretation is upended by several late seventeenth to mid eighteenth-

Except for fabricating a historical event, meaning, or interpretation out of thin air, or falsely claiming a historical event, meaning, or interpretation never took place or existed, deliberately building one historical inference or unsupported interpretation upon another is the worst, most illegitimate form of Whiggish,[114] "law office history"[115] there is. As this author wrote nearly a decade ago:

> To commit a minor violation of 'law office history' is acceptable [given that we are all human and make mistakes], but to [deliberately] create a domino chain of conflicting [or unsubstantiated] history can have far reaching [jurisprudential and societal] consequences . . . To state it another way, when [an] interpreter chooses one conflicting [or unsubstantiated] account over another the [interpretive] enterprise should not continue. To do otherwise is to [actively] participate in illegitimate mythmaking.[116]

Defenders of *Bruen* will argue that the Court's parade of errors regarding the Statute of Northampton's history and enforcement is irrelevant given that the founding generation's understanding of the right to arms was much different than their English forbears. Indeed, there is no disputing that the founders' view and understanding of the right to arms was different from their English forbears. Such is the natural path of the law. Just consider how much different contemporary Americans view and understand the constitutional rights of marriage, equality, and privacy compared to their late twentieth-century counterparts. Truth be told, the law, particularly society's understanding of the law, almost always changes over time. The history surrounding the abolition of slavery, the push for equal rights and privileges for Freedman, and the subsequent push for women's equality and rights are all historical cases in point.

This is why an honest and objective approach to 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 when adjudicating legal questions—is so important. It is equally, if not more important than performing a historical examination of any rule, statute, or constitutional provision at the time of its inception.[117] Certainly, examining any law at the time of its inception is relevant.[118] It assists lawmakers, government officials, lawyers, jurists, and the people in

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century legal treatises. *See* Charles, *The Statute of Northampton by the Late Eighteenth Century*, *supra* note 68, at 18–20. One such treatise was the 1746 edition of Michael Dalton's widely read *The Country Justice*, which was owned by none other than John Adams. *See* MICHAEL DALTON, THE COUNTREY JUSTICE 30, 265, 268 (1746), https://archive.org/details/countryjusticeco00dalt.

114 *See* BUTTERFIELD, *supra* note 90, at 6–7, 23–24, 100–02.

115 Kelly, *supra* note 34, at 122, 125, 156.

116 Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEV. ST. L. REV. ET CETERA 48 (2015). *See also* CHARLES, HISTORICISM, ORIGINALISM, AND THE CONSTITUTION, *supra* note 35, at 116–17.

117 *See, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 472 (1897).

118 *Legal History*, COLUM. L. SCH., https://www.law.columbia.edu/areas-of-study/legal-history (last visited Jan. 30, 2023).

determining a law's purpose, meaning, and parameters.[119] However, without a true and proper historical understanding of a law's path, how can anyone accurately unpack and understand any law at the time of its legislative inception? The answer is it is almost impossible, yet this is what most textually based originalism, as well as ad hoc 'text, history, and tradition' tests—including those advanced in *Bruen*—seek to do. They generate fugazi history.

Bruen's analysis of the Statute of Northampton is just one example.[120] The majority's interpretation of the Massachusetts Model, as it turns out, is remarkably worse.

B. Massachusetts Model Fugazi

From the early to mid-nineteenth century, several state and local jurisdictions enacted laws that were essentially an updated version of the Statute of Northampton.[121] Known by historians as Massachusetts Model type armed carriage laws, and by some lawyers as "surety laws," each stipulated something to the effect:

> 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.[122]

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[119] *Id.*

[120] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2139–40 (2021).

[121] *Compare* 2 Edw. 3, c. 3 (1328) (Eng.), *with* 1835 Mass. Acts 750.

[122] 1835 Mass. Acts 750 (emphasis added); *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 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 a reasonable cause to fear an assault on himself."); 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

The laws were intended to restrict the habitual carrying of dangerous weapons in public places except in very narrow, imminent justifiable self-defense circumstances.[123] Yet, the *Bruen* majority interpreted them as essentially right to carry laws.[124] According to the majority, *only* if "another could make out a specific showing of 'reasonable cause to fear an injury, or breach of the peace'" could an individual be restricted in their right to armed carriage.[125] What historical evidence did the *Bruen* majority provide to support this conclusion? Nothing of historical substance. Rather, as will be outlined below, the *Bruen* majority principally resorted to "law office history," *i.e.*, the lawyering of historical evidence outside of its intended historical context.[126]

Anyone who practices or studies the law knows that it is fluid and constantly changing. As a society progresses and changes so does the law. This is how the law has functioned since its inception and will continue to function for as long as governments exist. This is particularly true for the history of the law pertaining to armed carriage. For nearly five centuries, on both sides of the Atlantic, the 1328 Statute of Northampton, the common law, and localized adaptations of both were the law of the land.[127] However, beginning in the early nineteenth century, this adaptable and discretionary form of preventing people from going armed in the public concourse began to develop into more tangible, concrete forms. And two types of armed carriage laws dominated the statute and ordinance books up until the mid-to-late nineteenth century—concealed carry prohibitions and the Massachusetts Model.[128]

As it pertains to the former—concealed carry prohibitions—this type of armed carriage law was primarily adopted in the Antebellum South.[129] Concealed carry prohibitions sought to curb the precipitous rise in armed crime, assaults, and murders by eliminating the dangerous practice of individuals carrying concealed weapons.[130] The carrying of dangerous weapons openly, however, was generally permitted.[131] Antebellum South lawmakers' reasoning for prohibiting the carriage of concealed

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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.

123 David B. Kopel & George A. Mocsary, *Errors of Omission: Words Missing from the Ninth Circuit's* Young v. Hawaii, 2021 U. ILL. L. REV. 172, 183 (2021).

124 *See Bruen*, 142 S. Ct. at 2120.

125 *Id.* at 2148 (quoting Mass. Rev. Stat., ch. 134, § 16 (1836)).

126 *Id.* at 2177.

127 *See* Charles, *The Faces of the Second Amendment Outside the Home, Take Two*, *supra* note 3, at 384–92; Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence*, *supra* note 46, at 82–83.

128 Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L. J. 1695, 1719–20 (2012).

129 *Id.* at 1716–17.

130 *Id.* at 1716.

131 *Id.* at 1717.

weapons in public, yet permitting their open carriage was essentially two-fold. The first was that the open carriage of arms in public aided in subjugating people of color, both free and slave.[132] The second was one of perceived morality.[133] It was reasoned that only the criminal and unvirtuous elements within society carried concealed weapons.[134] In contrast, those that carried arms openly were viewed as being respectable and transparent.[135] This is not to say that the open carriage of arms was unanimously deemed an acceptable societal norm.[136] In some areas, the practice was common, but not applauded. Still, there was a perception among many that those that carried arms openly would at least place others on notice of the potential danger that

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132 *See* RANDOLPH ROTH, AMERICAN HOMICIDE 218 (2009); RICHARD HILDRETH, DESPOTISM IN AMERICA: AN INQUIRY INTO THE NATURE, RESULTS, AND LEGAL BASIS OF THE SLAVE-HOLDING SYSTEM IN THE UNITED STATES 90 (1854); *see also* Eric M. Ruben & Saul Cornell, *Firearm Regulation and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121, 124–28 (2015).

133 *See* ROTH, *supra* note 132, at 218. *See, e.g.*, *Prevention of Crime*, CHARLESTON MERCURY (S.C.), Oct. 8, 1857, at 2 ("The only conceivable object, of course, in thus carrying these dangerous instruments of death, is to kill; the violent, that they may perpetrate their misdeeds with impunity; the peaceful, under the plea that the habit, though originally reprehensible, has become a dire necessity under the reign of license and disorder.").

134 General orders issued by the Union Army in the Reconstruction Era South weigh this out. *See The Carrying of Firearms Forbidden*, NEW ORLEANS CRESCENT (L.A.), Apr. 15, 1868, at 1 (April 14, 1868 special order calling attention to an earlier military order "forbidding the carrying of firearms" in the New Orleans military district); *Headquarters, Third Sub District . . . General Order No. 1*, ANDERSON INTELLIGENCER (S.C.), Mar. 8, 1866, at 2 (March 1, 1865 general order stipulating that "ALL citizens, white and colored, in this Sub District, comprising the Separate Districts of Anderson, Abbeville, Greenville and Pickens, are hereby forbidden to carry concealed Firearms or deadly weapons of any kind upon their persons; and all disorderly persons, vagrants or disturbers of the peace, are forbidden to carry such weapons, either openly or concealed."); *HD-QRS SND SUB-DISTRICT . . . General Order No. 6*, YORKVILLE ENQUIRER (S.C.), Mar. 8, 1866, at 3 (February 19, 1866 general order stipulating that "ALL citizens, white and colored, in this Sub-District, comprising the separate Districts of Chester, Union, Spartanburg, Lancaster, York and Laurens, are hereby forbidden to carry concealed fire-arms, or deadly weapons of any kind, upon their persons; and all disorderly persons, vagrants or disturbers of the peace are forbidden to carry such weapons either openly or concealed."); *see also* Joseph Blocher & Darrell A.H. Miller, *The Positive Second Amendment as Positive Law*, 13 CHARLESTON L. REV. 103, 105 (2018) (discussing a similar general order issued by General Daniel Sickles in South Carolina).

135 *See, e.g.*, *Concealed Weapons*, ALTA CALIFORNIA (S.F.), June 1, 1854, at 2 ("[L]et them [carry weapons] openly, so that those with whom they come in contact may know with whom and what they are dealing."); *Carrying Concealed Weapons*, DAILY EVENING BULL. (S.F.), Jan. 26, 1866, at 3 ("If a man carries arms openly he is seldom dangerous. Those whom he may intend to attack are soon notified and prepared. If he intends to prevent a crime, it may be prevented.").

136 *See, e.g.*, *Concealed Weapons*, DAILY CLEVELAND HERALD (Ohio), Apr. 19, 1859, at 3 ("There is little or no necessity for going armed. Not one person in a hundred does it. The class that goes habitually armed are themselves men of violence or associates with those who are. The state of society that demands peaceable citizens to go armed for self-protection, is indeed deplorable.").

awaited them. As historian Robert Ireland has put it, in the South the "truly brave man either wore his weapons openly or [wore] none at all and certainly did not resort to sneak attacks that more resembled assassinations than fair and honorable confrontations."[137]

Some, particularly in the Western frontier, viewed the open carriage of arms as being protected by the Second Amendment.[138] For these individuals, while the carriage of concealed weapons fell outside the Second Amendment's scope, open carriage was within it. As a San Francisco, California correspondent with the *Alta California* rationalized: "If the people consider it necessary for their safety and protection to carry pistols or bowie knives, or muskets, or even six pound brass field pieces, let them carry them [openly], for the Constitution of the United States guarantees to the people the right to keep and bear arms."[139]

What helped facilitate the rise of the Southern "open carry" view were two notable changes in American law: (1) a shift in constitutional language and (2) the first American courts to address the constitutionality of armed carriage regulations. Starting with the shift in constitutional language, in the Antebellum Era, Second Amendment analogues in new state constitutions began to reflect a more individualized perception of the right.[140] Consider that at the time of the Constitution's ratification only four of the thirteen state constitutions retained Second Amendment analogues, each of which reflected more of a communal view of the right to "bear arms,"[141] and five state constitutions included analogues highlighting the significance of a constitutional "well-regulated militia."[142] Early on this trend

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137 Robert M. Ireland, *The Problem of Concealed Weapons in Nineteenth-Century Kentucky*, 91 REG. KY. HIST. SOC'Y 370, 384 (1993).

138 *See, e.g.*, *Carrying Concealed Weapons*, *supra* note 135, at 3 (showing political debate in California where Democrats objected to a concealed carry law on Second Amendment grounds); *On Wearing Concealed Arms*, DAILY NAT'L INTELLIGENCER (D.C.), Sept. 9, 1820, at 2 (a grand jury supporting the "right of carrying arms," yet questioning the practice of carrying concealed weapons).

139 *Concealed Weapons*, *supra* note 135.

140 *See, e.g.*, *Prevention of Crime*, *supra* note 133 ("The moral causes of this cheap contempt of which human life is held among us, lie upon the surface, and are seen in the extravagant notions of personal rights and independence . . . And out of this extravagant theory of personal independence, thus perverted by early contact with vice and violence, has grown an equally extravagant notion respecting the right of self-defence . . . .").

141 PA. CONST. OF 1776, DECLARATION OF RIGHTS, art. XIII ("That the people have a right to bear arms for the defence of themselves and the State . . . ."); VT. CONST. OF 1786, DECLARATION OF RIGHTS, art. XVIII ("That the people have a right to bear arms, for defence of themselves and the State . . . ."); MASS. CONST. OF 1780, DECLARATION OF RIGHTS, art. XVII ("The people have a right to keep and bear arms for the common defence"); N.C. CONST. of 1776, DECLARATION OF RIGHTS, art. XVII ("That the people have a right to bear arms, for the defence of the State . . . .").

142 MD. CONST. OF 1776, DECLARATION OF RIGHTS, art. XXV ("That a well-regulated militia is the proper and natural defence of a free government."); N.H. CONST. OF 1784, DECLARATION OF RIGHTS, art. XXIV ("A well regulated militia is the proper, natural, and sure defence of a state."); DEL. CONST. OF 1776, DECLARATION OF RIGHTS, art. XVIII ("That a well regulated

continued as new states joined the Union and adopted their first constitutions and old states modified existing ones.[143] The states of Kentucky, Tennessee, and Ohio all included more communal language in their respective Second Amendment analogues.[144] It was not until 1817 that the more individualized provisions were adopted. The first was Mississippi, followed by Connecticut and Alabama.[145] This is not to say that every follow-on state Second Amendment analogue adopted the more individualized language.[146] However, by the mid-nineteenth century the shift was clearly noticeable.[147]

Militia is the proper, natural and safe Defense of a free government."); VA. CONT. OF 1776, DECLARATION OF RIGHTS art. XIII ("That a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free State."); N.Y. CONST. OF 1777 ("And whereas it is of the utmost importance to the safety of every State that it should always be in a condition of defence; and it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it; this convention therefore, in the name and by the authority of the good people of this State, doth ordain, determine, and declare that the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness for service.").

143 *See, e.g.*, OHIO CONST. OF 1802 art. VIII, § 20 ("That the people have a right to bear arms for the defense of themselves and the state: and as standing armies in time of peace, are dangerous to liberty, they shall not be kept up; and that the military shall be kept under strict subordination to the civil power."); KY. CONST. OF 1799 art. X, § 23 ("That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned."); TENN. CONST. OF 1796 art. XI, § 26 ("That the freemen of this State have a right to keep and bear arms for their common defence.").

144 *See* OHIO CONST. OF 1802 art. VIII, § 20; *see* KY. CONST. of 1799 art. X, § 23; *see* TENN. CONST. OF 1796 art. XI, § 26.

145 *See, e.g.*, MISS. CONST. of 1817 art. I, § 23 ("The right of every citizen to keep and bear arms in defense of his home, person, or property, or in the aid of the civil power when thereto legally summoned, shall not be called into question, but the legislature may regulate or forbid the carrying of concealed weapons."); CONN. CONST. of 1818 art. I, § 17 ("Every citizen has a right to bear arms in defence of himself and the State."); ALA. CONST. OF 1819 art. I, § 23 ("Every citizen has a right to bear arms in defence of himself and the State.").

146 *See* LA. CONST. OF 1812 art. III, § 22 ("The free white men of this State, shall be armed and disciplined for its defence; but those who belong to religious societies, whose tenets forbid them to carry arms, shall not be compelled so to do, but shall pay an equivalent for personal service."); IND. CONST. OF 1816 art. I, § 20 ("That the people have a right to bear arms for the defence of themselves, and the state; and that military shall be kept in strict subordination to the civil power.").

147 By 1868, seven of the thirty-six state constitutions retained such analogues. *See, e.g.*, ALA. CONST. OF 1867 art. I, § 28 ("That every citizen has a right to bear arms in defence of himself and the state."); CONN. CONST. OF 1818 art. I, § 17 ("Every citizen has a right to bear arms in defence of himself and the state."); KAN. CONST. OF 1859, BILL OF RIGHTS, § 4 ("The people have the right to bear arms for their defence and security; but standing armies in times of peace are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power."); MICH. CONST. OF 1850 art. XVIII, § 7 ("Every person has a right to bear arms for the defence of himself and the state."); MISS. CONST. OF 1868 art. I, § 15 ("All persons shall have a right to keep and bear arms for their defence."); OHIO CONST. OF 1851 art. I, § 4 ("The people have the right to bear arms for their defense and security; but standing

Coinciding with the shift in constitutional language were the first legal challenges questioning the authority of lawmakers to regulate armed carriage. The first was *Bliss v. Commonwealth*, a constitutional challenge to Kentucky's concealed carry law,[148] where it was argued the law was unconstitutional on the grounds it violated Article X, Section 2 of the 1799 Kentucky Constitution.[149] Ultimately, the Kentucky Supreme Court ruled the concealed carry law was unconstitutional, but with rather unorthodox legal reasoning.[150] Throughout the Early Republic the judiciary examined the constitutionality of laws under a presumption of constitutionality.[151] It was only in those instances where the law conflicted with the core of the constitutional right that it was struck down.[152] The Kentucky Supreme Court in *Bliss*, however, applied a presumption of unconstitutionality.[153] From the Court's perspective, whenever the legislature passes a law that "imposes any restraint on the right, immaterial what appellation may be given to the act, whether it be an act regulating the manner of bearing arms or any other, the consequence, in reference to the constitution, is precisely the same, and its collision with that instrument equally obvious."[154] In other words, although Kentucky's concealed carry law did not actually prohibit armed carriage altogether, the fact that it regulated any aspect of carrying arms required that it be struck down.[155]

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armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power."); TEX. CONST. OF 1868 art. I, § 13 ("Every person shall have the right to keep and bear arms, in the lawful defence of himself or the government, under such regulation as the Legislature may prescribe."). For a full breakdown of every state's "bear arms" provision in 1868, *see* Patrick J. Charles, *The Second Amendment Standard of Review After* McDonald, *"Historical Guideposts" and the Missing Arguments in* McDonald v. City of Chicago, 2 AKRON J. CONST. L. & POL'Y 7, 51–52 (2011).

148 Bliss v. Commonwealth, 2 Litt. 90 (1822).

149 KY. CONST. OF 1799 art. X, § 23.

150 *Bliss*, 2 Litt. at 90.

151 Patrick J. Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457, 502–17 (2011).

152 *Id.* For a late eighteenth-century example showing the presumption of constitutionality being applied to the right to arms, *see* Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. L. REV. 1821, 1822–29 (2011).

153 *Bliss*, 2 Litt. at 92.

154 *Id.*

155 *Id.* at 91–92 ("But to be in conflict with the constitution, it is not essential that the act should contain a prohibition against bearing arms in every possible form—it is the *right* to bear arms in defence of the citizens and the state, that is secured by the constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution.") (emphasis added). The court's rationale coincided with a treatise on the Kentucky common law published in the same year. *See* CHARLES HUMPRHEYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822).

Subsequent Antebellum courts that examined the authority of legislatures to regulate armed carriage felt compelled to square their analysis with that of *Bliss*, and in every instance the court undertook a different approach. From this arose the Southern open carry-concealed carry distinction in armed carriage jurisprudence.[156] For instance in the Alabama case of *State v. Reid*, while the plaintiff relied on *Bliss*, the Attorney General countered that the State's concealed carry law was constitutional on the grounds "[e]very man was still left free to carry arms openly . . . ."[157] In its decision, the Alabama Supreme Court rejected *Bliss* and agreed with the Attorney General, stating:

> Under the ["bear arms"] provision of [the Alabama] constitution, we incline to the opinion that the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence.[158]

What undoubtedly aided the Alabama Supreme Court in coming to its decision was the individualistic nature of Article I, Section 23 of the 1819 Alabama Constitution, which guaranteed: "Every citizen has a right to bear arms in defence of *himself* and the State."[159] At the same time history-in-law played a persuasive role. Relying on the text and structure of Article VII of the 1689 Declaration of Rights, the Alabama Supreme Court reasoned that since Parliament was permitted to "determine what arms shall be borne and how," it was within the purview of the Alabama legislature to regulate the manner arms are worn and borne—that is so long as it did not amount to a complete destruction of the right.[160]

In line with *Reid*, both the Georgia Supreme Court, in *Nunn v. State*, and Louisiana Supreme Court, in *State v. Chandler*, determined that their respective State legislatures may regulate the concealed carriage of dangerous weapons, but that open carry was protected.[161] Meanwhile, both the Tennessee Supreme Court, in *Aymette v. State*, and the Arkansas Supreme Court, in *State v. Buzzard*, outright rejected any notion of such a right, whether it was concealed or open, unless it was in support of the common defense.[162] From both courts' perspective, to recognize a right to armed carriage in the public concourse was an affront to the right's intended purpose and ran counter to the principle of law and order.[163]

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156 State v. Reid, 1 Ala. 612, 614 (1840).

157 *Id.*

158 *Id*. at 619.

159 ALA. CONST. of 1819 art. I, § 23 (emphasis added).

160 *Reid*, 1 Ala. at 616.

161 Nunn v. State, 1 Ga. 243, 251 (1846); State v. Chandler, La.Ann. 489, 490 (1850).

162 Aymette v. State, 21 Tenn. 154, 158 (1840); State v. Buzzard, 4 Ark. 18, 27 (1842).

163 *Aymette*, 21 Tenn. at 159; *Buzzard*, 4 Ark. at 24.

In contrast to the Southern, concealed carry prohibition approach to the law of armed carriage was that of the Northern Massachusetts Model. Again, Massachusetts Model type laws were essentially an updated version of the Statute of Northampton.[164] Each stipulated that if an individual could sufficiently demonstrate an "imminent" or "reasonable" fear of assault or injury to their person, family, or property, they would be permitted to carry dangerous weapons in public places, either openly or concealed.[165] In such cases, the legal burden fell on the individual carrying the weapon to demonstrate that their carriage was necessary due to an imminent threat.[166] If no imminent threat was shown, either a government official or the court could 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.[167] 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.[168] However, those who were unable to post the required bond could be placed in the gaol, fined, or both.[169] And given that the bond could be as high as $200 (roughly the monetary equivalent of $5,400 today), many, if not most persons

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164 *Compare* 2 Edw. 3, c. 3 (1328) (Eng.), *with* 1835 Mass. Acts 750.

165 *See* A PRACTICAL TREATISE, OR AN ABRIDGEMENT OF THE LAW APPERTAINING TO THE OFFICE OF JUSTICE OF THE PEACE 184 (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 27–28 (1837).

166 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 77, at 646; *see also id.* at 410 (stating 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.").

167 *See, e.g.*, JOHN C. B. DAVIS, THE MASSACHUSETTS JUSTICE: A TREATISE UPON THE POWERS AND DUTIES OF JUSTICES OF THE PEACE 199–203 (1847); GENERAL LAWS, AND MEMORIAL RESOLUTIONS OF THE TERRITORY OF DAKOTA, PASSED AT THE SECOND SESSION OF THE LEGISLATIVE ASSEMBLY, COMMENCED AT THE TOWN OF YANKTON DECEMBER 1, 1862 AND CONCLUDED JANUARY 8, 1863 95–96 (1863); JOSHUA WATERMAN, THE WISCONSIN AND IOWA JUSTICE, BEING A TREATISE ON THE CIVIL AND CRIMINAL JURISDICTION OF JUSTICES OF THE PEACE, WRITTEN EXPRESSLY FOR THE STATES OF WISCONSIN AND IOWA, CONTAINING DIRECTIONS AND PRACTICAL FORMS FOR EVERY CASE WHICH CAN ARISE BEFORE A JUSTICE 619–21 (1853). For the intricacies of the common law surety of the peace, *see* BLACKSTONE, *supra* note 71, at 150. MICHAEL DALTON, THE COUNTREY JUSTICE: CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 183 (1661); HAWKINS, *supra* note 93, at 126–33.

168 *See* WATERMAN, *supra* note 167, at 621.

169 *See id.* at 616.

living in the nineteenth-century would have been forced to suffer the latter punishment.[170]

Although a plain reading of Massachusetts Model type armed carriage laws shows 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[171]—the *Bruen* majority interpreted them as essentially right to carry laws.[172] In support of this interpretation, the *Bruen* majority cites William Rawle's *A View of the Constitution of the United States*.[173] Therein, Rawle noted that the Second Amendment right to keep and bear arms "ought not . . . in any government . . . be abused to the disturbance of the public peace."[174] Rawle then proceeded to give two examples that he deemed would constitute a disturbance.[175] The first was the assembling "of persons with arms, for an unlawful purpose . . . ."[176] The second was "the carrying of arms abroad by a single individual, attended with circumstances giving just reason to fear that the purposes to make an unlawful use of them . . . ."[177] Both of these examples, according to Rawle, were sufficient for government officials to require "surety of the peace."[178]

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170 *See id.* at 621.

171 *See, e.g.*, 1870 W. VA. LAWS ch. 153, § 8; *accord* THE REVISED STATUTES OF WEST VIRGINIA IN FORCE DECEMBER, 1878, ALPHABETICALLY ARRANGED 720 (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 be the duty of such justice to cause such person to be arrested and brought before him, and if such person upon trial shall be guilty, he shall be fined not exceeding ten dollars."). *See also* BENJAMIN OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 177–78 (1832) ("The provision of the constitution, declaring the right of the people to keep and bear arms, & . . . [was not intended to] prevent congress or the legislatures of the different states from enacting laws to prevent the citizens from always going armed . . . There are without doubt circumstances, which may justify a man for going armed; as, if he has valuable property in his custody; or, if he is travelling in a dangerous part of the country; or, if his life has been threatened. But under other circumstances it ought not to be tolerated or countenanced; because the presence of such weapons has frequently turned a quarrel into a bloody affray, which otherwise would have terminated in angry words, or at most an inconsiderable breach of the peace.").

172 N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2148 (2021) (quoting Mass. Rev. Stat., ch. 134, § 16 (1836)).

173 *Id*.

174 WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 126 (2d ed., 1829).

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.*

For whatever reason, whether it be historical arrogance or ignorance, the *Bruen* majority interpreted Rawle's two examples as being exhaustive.[179] But they are not. A plain reading of Rawle's treatise contradicts such an interpretation.[180] Moreover, if the *Bruen* majority would have done even basic historical research on the origins and development of the surety of the peace process, they would have learned that Justices of the Peace and other government officials generally maintained the authority to not only stop an individual from committing an affray—which could include the carrying of dangerous weapons in the public concourse—but also bind them under the surety process.[181] This fact alone historically upends *Bruen*'s claim that Massachusetts Model type laws "did not *prohibit* public carry in locations frequented by the general community."[182]

What the *Bruen* majority failed to historically grasp is the reason that the surety of the peace process was ever accepted by the founders and subsequent generations of Americans in the first place.[183] It is a point of historical emphasis that throughout the late eighteenth century and much of the nineteenth century, with the noted exception of slave patrols, there were no localized police or law enforcement agencies—at least not comparable with that of today.[184] The offices of the Justice of the Peace, constable, and sheriff—all of which was borrowed from England—were alive and well.[185] Therefore, it was through this handful of government officials that local laws were enforced, and the safety and security of the people were maintained.[186] And an important component of the Justice of the Peace, constable, and sheriff offices was the surety of the peace process.[187] In the words of William Blackstone, the surety of the peace process provided these government officials the authority of "preventive justice"—that is the "means of preventing the commission of crimes and misdemeanors," to include "preventing future crimes," often with nothing more than a "probable suspicion, that some crime is intended or likely to happen . . . ."[188] Furthermore, executing "preventive justice" was heavily dependent upon community

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179 N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2148 (2021).

180 *See generally* RAWLE, *supra* note 174.

181 *See, e.g.*, WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 49–55 (1795); RICHARD BURN, 3 THE JUSTICE OF THE PEACE AND PARISH OFFICER 5 (1772); RICHARD BURN, 1 THE JUSTICE OF THE PEACE AND PARISH OFFICER 18 (1772); BOND, *supra* note 77, at 14, 42–43,180–83 (1707).

182 *Bruen*, 142 S. Ct. at 2147.

183 *See generally id.*

184 CAROL A. ARCHBOLD, POLICING: A TEXT/READER 16–17, 30 (2013).

185 *Id.* at 3, 21, 25–26.

186 *Id.* at 26.

187 BLACKSTONE, *supra* note 71, at 248–49.

188 *Id.* at 148.

involvement.[189] As James Wilson noted in his lectures on the law, in order for the surety of the peace process to work as intended, the "active and authoritative interposition of every citizen, much more every publick officer of the peace" was needed "for preventing the commission of threatened, and the completion of inchoate crimes":[190]

> In every citizen, much more in every publick officer of peace and justice, the whole authority of the law is vested—to every citizen, much more to every publick officer of peace and justice, the whole protection of the law is extended, for the all-important purpose of preventing crimes. From every citizen, much more from every publick officer of peace and justice, the law demands the performance of that duty, in performing which they are clothed with legal authority, and shielded by legal protection.[191]

Simply put, what Wilson was saying is that *the* key to maintaining the safety and security of the people circa the late eighteenth century was the combination of local custom and community honor, integrity, and the preventive enforcement of crimes, to include affrays such as the carrying of dangerous weapons in public places.[192] This is not to say, of course, that the surety of the peace process was without its faults. Prior to the Justice of the Peace, constable, and sheriff offices ever making their way across the Atlantic to the American Colonies and subsequent United States, the surety of the peace process was subject to abuse.[193] Again, the entire process was built on individual and communal integrity and honor.[194] But as anyone knows, integrity and honor are not virtues that everyone in a community subscribes and adheres to.[195] Therefore, naturally, there were times where the surety of the peace process was used for "vexation, especially since an arrest [of the accused] was often made until sureties were found."[196] There were also times where the process was abused to threaten or compel others to follow another's wishes.[197] Conversely, the process could be abused by an accused by simply providing the authorities the "wrong personal data or

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189 *See* Jenks, *supra* note 83, at 261, 270.

190 2 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 1171–72 (Kermit L. Hall & Mark David Hall eds., 2007).

191 *Id.* at 1172.

192 *Id.* at 1138, 1170–71; *see also* BLACKSTONE, *supra* note 71, at 148–49, 252.

193 ARCHBOLD, *supra* note 184, at 3.

194 *Id.*

195 *See, e.g.*, Jenks, *supra* note 83, at 274.

196 *Id.*

197 *Id.* at 276.

fictitious sureties."[198] This was particularly common when sureties were required from an outsider or traveler.[199]

Yet despite these faults, the surety of the peace process remained a staple in the American legal system until just after the Civil War. At that point in time, the process quickly waned due to changes in demographics.[200] What became increasingly clear to lawmakers is that the surety of the peace process, as well as many of the highly flexible, common-law aspects of eighteenth-century law enforcement were no longer working as intended. The reason for this was essentially two-fold. First and foremost, from 1830 to 1870, the population of the United States had tripled to 38,558,371.[201] Second, advances in technology—particularly the advent of trains—made mobility across the country much easier, and therefore populations less localized and communal, and more transient.[202]

These demographic changes prompted a transformation in the chief pillars of America law. For nearly two centuries, the chief pillars were largely built upon the common law.[203] But from the mid-nineteenth century until the turn of the twentieth century, the law rapidly became more reliant upon tangible, state-centric statutory principles.[204] The impact of this legal transformation was particularly acute within those jurisdictions that subscribed to Massachusetts Model type armed carriage laws.[205] Gradually, these laws were phased out in favor of two legal alternatives; both of which were intended to be a more tangible means of preventing the habitual or promiscuous preparatory carrying of dangerous weapons in public places. The first legal alternative was discretionary armed carriage licensing laws.[206] These laws, as their title suggests, required individuals to first obtain a license before carrying

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198 *Id.*

199 Feldman, *supra* note 83, at 112.

200 *Id.* at 111–12 (noting that in thirteenth century England the surety of the peace process worked well "within a reasonably small area, but the system was bound to face problems if there were people in an area who did not belong to the hundred or the town").

201 CHARLES, ARMED IN AMERICA, *supra* note 3, at 141.

202 *See* RAY ALLEN BILLINGTON, WESTWARD EXPANSION: A HISTORY OF THE AMERICAN FRONTIER 633–50 (1949).

203 *See, e.g.*, Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 11–15, 20 (1936); William Draper Lewis, *The Study of the Common Law*, 46 AMER. L. REG. 465, 469–70 (1898).

204 Stone, *supra* note 203; Lewis, *supra* note 203. One does not have to be a seasoned historian to observe this important development in American law. A casual perusal of any law library's state or local law section will show how the number of state statute and local ordinances grew exponentially starting in the late nineteenth-century.

205 *See, e.g.*, Charles, *The Faces of the Second Amendment Outside the Home, Take Two*, *supra* note 3, at 419–22 n.245.

206 *See id.*

dangerous weapons in public.[207] In most cases, the granting and revoking of these licenses was at the sole discretion of a local government official, and the person applying for the license had to demonstrate a good cause or justifiable need to do so,[208] as well as provide proof that they were a "peaceable citizen"[209] or "law abiding" and of good moral character.[210] The second legal alternative was to maintain the basic statutory language of the Massachusetts Model, yet eliminate the discretionary, surety of the peace process altogether, and replace it with a fine, forfeiture of weapon, or both.[211]

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[207] *Id.*

[208] *Id.*

[209] For some examples, *see Ordinance No. 84: Prohibiting the Carrying of Concealed Deadly Weapons* (Apr. 24, 1876), *reprinted in* CHARTER AND ORDINANCES OF THE CITY OF SACRAMENTO (1896); *see also An Ordinance: Prohibiting the Carrying of Concealed Deadly Weapons* (Feb. 3, 1891), *reprinted in* MARYSVILLE DAILY APPEAL (Cal.), Mar. 8, 1891; *Ordinance No. 1141: An Ordinance to Prohibit the Carrying of Concealed Weapons* (May 15, 1890), *reprinted in* CITY CHARTER OF THE CITY OF OAKLAND 332–33 (1898); *Ordinance No. 55: Prohibiting the Carrying of Concealed Weapons* (Nov. 6, 1878), *reprinted in* CHARTER AND REVISED ORDINANCES OF THE CITY OF EUREKA 251 (1905); *Prohibiting the Carrying of Concealed Deadly Weapons* (Sept. 17, 1880), *reprinted in* GENERAL ORDERS OF THE BOARD OF SUPERVISORS PROVIDING REGULATIONS FOR THE GOVERNMENT OF THE CITY AND COUNTY OF SAN FRANCISCO 8 (1884); *Ordinance No. 85: To Prevent the Carrying of Concealed Deadly Weapons* (Jan. 6, 1881), *reprinted in* DAILY INDEPENDENT (Santa Barbara, Cal.), Mar. 10, 1888, at 3.

[210] For some examples, *see Town of Montclair: An Ordinance to Regulate the Carrying of Concealed Weapons and to Prohibit the Carrying of the Same Except as Herein Provided* (May 3, 1897), *reprinted in* MONTCLAIR TIMES (N.J.), May 15, 1897, at 8; *Ordinance No. 79: An Ordinance Relating to Crimes and Punishments* (Dec. 27, 1893), *reprinted in* SCANDIA JOURNAL (Kan.), Jan. 5, 1894, at 8; *Article XXVII: Carrying of Pistols*, *reprinted in* ORDINANCES OF THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, IN FORCE, Jan. 1, 1881, at 214–16 (1881); *Pistols—Carrying Of: Ordinance to Regulate the Carrying of Pistols* (Oct. 25, 1880), *reprinted in* BROOKLYN DAILY EAGLE (N.Y.), Oct. 26, 1880, at 1; *City of Elmira—Official Notice* (July 22, 1892), *reprinted in* ELMIRA GAZETTE (N.Y.), July 28, 1892, at 7.

[211] *See, e.g.*, W. VA. CODE § 7 (1887) ("If a person carry about his person any revolver or other pistol, dirk, bowie knife, razor, slung shot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than two hundred dollars, and may, at the discretion of the court, be confined in jail not less than one nor more than twelve months; and if any person shall sell or furnish any such weapon as is hereinbefore 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 hereinbefore 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

The *Bruen* majority did not even attempt to wade through this history of the Massachusetts Model and the reasons for its subsequent legal decline. Instead, they principally relied on the 2017 District of Columbia Circuit Court of Appeals decision *Wrenn v. District of Columbia*,[212] wherein it was determined that Massachusetts Model type laws did nothing to "deny a responsible person carrying rights" unless the person posed a public threat.[213] And even in instances where the person posed a public threat, at least according to *Wrenn* court, the person "could go on carrying without criminal penalty" so long as they posted a monetary bond.[214] In other words, the *Wrenn* court interpreted Massachusetts Model type laws as only shrinking the carrying rights of the "(allegedly) reckless."[215]

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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 Relating to the Promotion of the Public Peace* (Feb. 7, 1888), *reprinted in* THE CHARTER AND ORDINANCES OF THE CITY OF NEW ULM, MINNESOTA 110–11 (1888) ("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, sling-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, may 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."); *An Ordinance Relating to Breaches of the Peace, Disorderly Conduct and the Carrying of Concealed Weapons* (May 24, 1870), *reprinted in* CITY CHARTER OF THE CITY OF HASTINGS: TOGETHER WITH ORDINANCES OF SAID CITY 75 (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: Chapter I: Of the Preservation of Good Order and Suppression of Vice* (Dec. 7, 1888), *reprinted in* BOTTINEAU PIONEER (N.D.), Dec. 13, 1888, at 4 ("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, 14 S.E. 9 (W. Va. 1891).

212 N.Y. State Rifle & Pistol Ass'n., Inc. v. Bruen, 142 S. Ct. 2111, 2149 (2022).

213 Wrenn v. District of Columbia, 864 F.3d 650, 661 (D.C. Cir. 2017).

214 *Id.*

215 *Id.*

What substantiated evidence or highly influential historical authority did the *Wrenn* court provide in support to its interpretation? Nothing.[216] Yes, the answer is nothing, not one source or authority.[217] It is fugazi, yet *Bruen* cites it as somehow historically authoritative.[218] It is one thing for a court to choose one competing or conflicting historical narrative over another. It is quite another to make up a history altogether. This is essentially what the *Bruen* majority did.[219]

Where the *Bruen* majority is indeed correct is in its historical analysis of Massachusetts Model type laws is noting that only a few examples of enforcement have survived for posterity.[220] And this is not only a United States history problem. It is also a Canadian history problem given that the Model was widely adopted there as well, yet no one (to include this author) has been able to locate any Canadian enforcement records.[221] However, the historical fact that Massachusetts Model type law enforcement records are few and far between is not in itself a justification for making up history, nor does it justify the majority's picking and choosing historical evidence of enforcement. Yet this is exactly what *Bruen* did when it claimed that the only evidence of Massachusetts Model type laws being enforced was against "black defendants who *may have* been targeted for selective or pretextual enforcement."[222] This claim is patently false. For if the *Bruen* majority would have judiciously canvassed the historical record, they would have learned that there are just as many examples of Massachusetts Model type laws being enforced against white defendants as against black defendants.[223] Granted, given that only few historical examples of the

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216 *Id.*

217 *Id.*

218 N.Y. State Rifle & Pistol Ass'n., Inc. v. Bruen, 142 S. Ct. 2111, 2124, 2126, 2148 (2022).

219 *Id.*

220 *See* CHARLES, ARMED IN AMERICA, *supra* note 3, at 143; *see also* Saul Cornell, *The Myth of Non-Enforcement of Gun Laws in Nineteenth Century America: Evidence vs Ideology in Second Amendment Scholarship*, DUKE SECOND THOUGHTS BLOG (June 1, 2022), https://firearmslaw.duke.edu/2022/06/the-myth-of-non-enforcement-of-gun-laws-in-nineteenth-century-america-evidence-vs-ideology-in-second-amendment-scholarship/.

221 *See, e.g.*, GEORGE WHEELOCK BURBIDGE, A DIGEST OF THE CRIMINAL LAW OF CANADA 77 (1890) ("Every one who has upon his person a pistol or air gun without reasonable cause to fear an assault or other injury to her person or his family or property, may, upon complaint made before any justice of the peace, be required to find sureties for keeping the peace for a term not exceeding six months; and in default finding such sureties, may be imprisoned for any term not exceeding thirty days."); ACTS OF THE PARLIAMENT OF THE DOMINION OF CANADA RELATING TO CRIMINAL LAW, TO PROCEDURE IN CRIMINAL CASES AND TO EVIDENCE 20 (1891).

222 *Bruen*, 142 S. Ct. at 2149 (emphasis added); *see also* Brief for Robert Leider et al. as Amici Curiae Supporting Petitioners, N.Y. State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (No. 18-280), at 31–32; Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, NEW HISTORIES OF GUN RIGHTS AND REGULATION (Joseph Blocher & Darrell A.H. Miller eds., forthcoming 2023) (manuscript at 15–17).

223 *Dear Pistol Practice*, MILWAUKEE DAILY SENTINEL (WIS.), Oct. 23, 1878, at 8; *The Wagoning System*, NASHVILLE UNION AND AMERICA (WI), Mar. 3, 1872, at 1.

Massachusetts Model being enforced have survived the test of time, the tally is a miniscule two cases against white defendants[224] and two against black defendants.[225] Nevertheless, simple math shows that the *Bruen*'s racial pronouncement is wrong, and at best premature.

Once more, it is important to pause and consider what the *Bruen* majority just did. With but two historical examples, the majority concluded that Massachusetts Model type laws maintain a racist past.[226] Yet, throughout the same opinion, the majority dismissed several examples of restrictive armed carriage laws—particularly territorial armed carriage restrictions—as historical outliers that in no way should inform the scope of the Second Amendment outside the home.[227] Methodologically speaking, how can two historical examples inform so much, yet many more historical examples inform so little? This is not an objective or holistic approach to history-in-law. It is hokey pokey history and is another prime example of how a court's reliance on text, history, and tradition can ultimately lead to subjective outcomes. All that is required is that the respective court jurisprudentially wills it into historical being.

What is equally flabbergasting is that much like in the earlier example of *Rex v. Knight*, the *Bruen* majority could have simply sidestepped the subject by stating something to the effect: "A plain reading of Massachusetts Model type laws show that they are not analogous to modern 'may issue' armed carriage licensing laws like New York's. The former makes no mention of a physical discretionary license, while the latter does."[228] Alternatively, the *Bruen* majority could have stated something to the effect: "Even if we take New York's historical analysis of Massachusetts Model type laws at face value, the fact remains that these laws did not outright prohibit the carrying of dangerous weapons for self-defense in all cases. Unlike New York's law, Massachusetts Model type laws provided a statutory outlet for justifiable self-defense."[229] But the *Bruen* majority, for whatever reason, felt compelled to pick and choose historical winners and losers, based on nothing more than minuscule evidence and the lawyering of history. Ultimately, the *Bruen* majority's practice of history-in-law highlights just how poor members of the bench and bar can be at researching, digesting, and analyzing basic historical evidence. It also highlights just how uninformed many within the legal academy are about the preservation and existence of historical records.

As someone that heads a research division and team of archivists at a government archive, it cannot be overstated that whatever historical records are contained within a respective archive—no matter the archive's focus or specialty—are only a small

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224 MILWAUKEE DAILY SENTINEL, *supra* note 223; NASHVILLE UNION AND AMERICA, *supra* note 223.

225 *Bruen*, 142 S. Ct. at 2149; *see also* Brief of Robert Leider et al. as Amici Curiae Supporting Petitioners, *supra* note 222, at 31–32; Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, *supra* note 222.

226 *Bruen*, 142 S. Ct. at 2149.

227 *Id.* at 2153–56.

228 *See Bruen*, 142 S. Ct. at 2159; *see also* sources cited *supra* note 211.

229 *See id.*

fragment of our collective past.[230] Every professional archivist knows this, yet *Bruen* reads as if everything that happened in the past has been recorded or annotated somewhere for historical posterity.[231] Therefore, according to *Bruen*'s line of thinking, if Massachusetts Model type laws or any other historical armed carriage laws were indeed enforced, we would have a solid, concrete record of that enforcement.[232] But this line of thinking is built on an ignorance of historical record keeping. The reality is that most instances of legal enforcement, from the establishment of the American Colonies in the mid-to-late seventeenth century through the early twentieth century United States, were done at the local level, and, as a result, the records of enforcement have either been lost to time or are woefully incomplete.[233] Moreover, those records of enforcement that have miraculously survived often require no-kidding actual, time consuming, in-person archival research, [234] not ad hoc, keyword digital searches. In other words, what professional historians and archivists know—and apparently many within the legal academy do not—is one simply cannot type words or phrases into online search engines and expect to learn everything about the history of X or Y, and certainly not about the enforcement of laws. It is complete and utter historical ignorance to believe otherwise.

Just consider that both the federal and state case reports from the late eighteenth century through the late nineteenth century are only a small fraction of all judicial opinions within the United States, particularly when one takes in account the voluminous opinions that have taken place in small, local court rooms. And sometimes, even the opinions of some of our highest courts require a professional historian to locate and resurrect them. A great example of this is the 1878 Missouri Supreme Court Case *State v. Reando*, which was cited or summarized in select case

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230 As it pertains to the archive at the Air Force Historical Research Agency ("AFHRA"), the research division receives upwards of thirty historical research requests a day. Based on this author's year of experience heading said division, only one-third of all research requests can be answered in full. Another one-third can only be provided with half or incomplete answers. And the last one-third cannot be answered at all—except with an educated explanation as to why no such answer exists.

231 *Bruen*, 142 S. Ct. at 2177.

232 *See id.* at 2149.

233 *See* Patrick J. Charles, *A Historian's Assessment of the Anti-Immigrant Narrative in* NYSPRA v. Bruen, DUKE SECOND THOUGHTS BLOG (Aug. 4, 2021), https://firearmslaw.duke.edu/2021/08/a-historians-assessment-of-the-anti-immigrant-narrative-in-nysrpa-v-bruen/ (showing the historical fallacy of gun rights scholars' claims of early Sullivan Law enforcement via the *New York Times*).

234 *See, e.g.*, Brennan Gardner Rivas, *Enforcement of Public Carry Restrictions: Texas as a Case Study*, 55 U.C. DAVIS L. REV. 2603, 2603, 2617 (2022).

reports, yet the actual opinion appeared lost to time[235]—that is until this author located what appears to be the only surviving copy.[236]

What makes *Reando* relevant for *Bruen* is it accurately reflects how most mid-to-late nineteenth century state courts viewed the police power to operate in conjunction with the right to arms—a subject that the *Bruen* majority historically sidestepped.[237] *Reando* involved the constitutionality of Missouri state law prohibiting the concealed carrying of dangerous weapons into several "sensitive places, to include "any church or place where people have assembled for religious worship, or into any schoolroom or into any place where people may be assembled for educational, literary or social purposes, or to any election precinct, on any election day, or into any court room, during the sitting of court, or into any other public assemblage of persons met for other than militia drill . . . ."[238] The law was subsequently challenged on the grounds it violated Article I, Section 8 of the Missouri Constitution of 1865, which provided the "right of the citizens to bear arms in defence of themselves and the lawful authority of the State."[239]

Judge Elijah H. Norton, who had been a delegate to the Missouri Constitutional Convention of 1861 and was considered the father of the Missouri Constitution of 1875, upheld the law as a constitutional exercise of government police power.[240] While Norton recognized the court was merely presented with a constitutional challenge to a concealed carry law, he noted that the practice of carrying dangerous weapons habitually, whether open or concealed, was so repugnant to the "moral sense of every well-regulated community" that society would be "shocked by any one who would so far disregard it, as to invade such places with fire arms and deadly weapons . . . ."[241] Norton then concluded his opinion by noting that all rights, including the right to arms, are subject to some form of reasonable regulation in the interest of the public good.[242]

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235 The case cannot be found in the Missouri Supreme Court Historical Database but was briefly reported in a contemporaneous issue of *The Central Law Journal*. *See Abstract of Decisions of the Supreme Court of Missouri: October Term, 1877*, 6 CENTRAL L. J. 16, 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*.").

236 *The Supreme Court: On Carrying Concealed Weapons*, STATE JOURNAL (Jefferson City, MO), Apr. 12, 1878, at 2.

237 *See* CHARLES, ARMED IN AMERICA, *supra* note 3, at 151–56.

238 The law was originally enacted in 1874. ACTS OF THE . . . GENERAL ASSEMBLY OF THE STATE OF MISSOURI 43 (1874). It was amended in 1875, LAWS OF MISSOURI: GENERAL AND LOCAL LAWS PASSED AT THE REGULAR SESSION OF THE TWENTY-EIGHTH GENERAL ASSEMBLY 50–51 (1875), and again in 1883, LAWS OF MISSOURI PASSED AT THE SESSION OF THE THIRTY-SECOND GENERAL ASSEMBLY 76 (1883).

239 MO. CONST. OF 1865 art. I, § 8.

240 STATE JOURNAL, *supra* note 236, at 2; *Judge Elijah Hise Norton*, MISSOURI COURTS, https://www.courts.mo.gov/page.jsp?id=180039 (last visited Jan. 21, 2023).

241 STATE JOURNAL, *supra* note 236, at 2.

242 *Id.*

This was particularly the case whenever freedom of action could negatively impact the community at large:

> The statute in question is nothing more than a police regulation, made in the interest of peace and good order, perfectly within the power of the legislature to make. Such, or similar statutes, have been upheld in all the States, so far as we have been able to ascertain . . . .
>
> The right to keep and bear arms necessarily implies the right to use them, and yet acts passed by the legislature regulating their use, or rather making it an offense to use them in certain ways and places, have never been questioned . . . .
>
> The constitution protects a person in his right of property, and instances are numerous where the legislature has assumed to regulate and control it. A person has a right to own a mischievous or dangerous animal; yet under our statute, if the owner thereof, knowing its propensities, unlawfully suffer it to go at large or shall keep it without ordinary care, and such animal while so at large and not confined, kill any human being, such owner is liable to be punished as for manslaughter in the third degree. It is provid[ed] in the constitution of the United States that the freedom of speech and of the press shall not be abridged by any law of Congress, and yet this provision has never been so construed as to deny to Congress the power to make it offence for libelous matter to be published, rendering the offender liable to prosecution and punishment for the libel so published . . . .[243]

C. Armed Carriage Licensing Laws Fugazi

Thus far, through a historical examination of the Statute of Northampton and Massachusetts Model type armed carriage laws, this Article has expounded on how the *Bruen* majority cherry-picked, explained away, and even fabricated historical evidence.[244] Although, at least in this author's humble opinion, these examples are appalling from both an accuracy and objectivity standpoint, they are arguably not the greatest history-in-law sin committed in *Bruen*. That distinction goes to the assertion that armed carriage licensing laws *never existed* until the early twentieth century.[245] According to *Bruen*, from the Reconstruction Era to the close of the nineteenth century, there is no historical record of "American governments" requiring "responsible citizens to 'demonstrate a special need for self-protection distinguishable from that of the general community' in order to carry arms in public."[246] This is one of the greatest historical fibs that the Supreme Court has ever told.

The historical reality is that beginning in the mid-to-late nineteenth century, cities and localities across the country started enacting what are commonly known today as

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243 *Id.*

244 *See infra* Part III.B.

245 *See* N.Y. State Rifle & Pistol Ass'n., Inc. v. Bruen, 142 S. Ct. 2111, 2121 (2022) (quoting Klenosky v. New York City Police Dept., 75 App. Div.2d 793, 793 (1980)).

246 *Id.*

"may issue" concealed carry licensing laws.[247] Although it is impossible to state with historical precision when and where the first armed carriage licensing law was enacted, based on the historical evidence available, it appears that California was at the forefront.[248] It began in 1870, after the California Assembly repealed its concealed weapons armed carriage law.[249] To fill the legal void created by this repeal, California's most populous cities and localities started enacting similarly worded concealed carry ordinances with one notable difference—the ordinances granted local government officials' the discretion to issue and revoke armed carriage licenses given "to any peaceable person, whose profession may require him to be out at late hours of the night . . . ."[250] The cities of San Francisco, Santa Barbara, and Fresno are just a few examples in this regard.[251] There are indeed others,[252] such as Oakland wherein "to ensure safety" the mayor required license applicants to receive the "indorsement . . . [of] two or more police officers," as well as undergo "an exhaustive investigation as to the reasons" the applicant "wish[ed] to go about the city armed."[253] And in 1891,

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247 *See* Brief of Patrick J. Charles as Amicus Curiae in Support of Neither Party, *supra* note 112 at 8–13, appendix 2–45.

248 *Id.* at appendix 2–12.

249 1863 Cal. Stat. 748; 1869–70 Cal. Stat. 67.

250 *Ordinance No. 84: Prohibiting the Carrying of Concealed Deadly Weapons*, *supra* note 209.

251 *Ordinance No. 85: To Prevent the Carrying of Concealed Deadly Weapons*, *supra* note 209, at 3; *see also Prohibiting the Carrying of Concealed Deadly Weapons*, *supra* note 209; *Ordinance No. 6* (Nov. 5, 1885), *reprinted in* FRESNO WEEKLY REPUBLICAN (Cal.), Nov. 7, 1885, at 3.

252 *See, e.g.*, *Ordinance No. 57: Defining Certain Misdemeanors and Providing Penalties for Violation* (July 2, 1897), *reprinted in* ORDINANCES OF THE TOWN OF FERNDALE 27–28 (1905) ("It shall be unlawful for any person, not being a public officer, or not having received a permit from the Town Marshal, approved by the President of the Board of Trustees to wear or carry, concealed, any pistol, dirk, brass or iron knuckles, slungshot, or other deadly or dangerous weapon."); *Ordinance No. 34: An Ordinance to Prohibit the Carrying of Concealed Weapons* (Aug. 7, 1893), *reprinted in* FOLSOM TELEGRAPH (Cal.), Sept. 9, 1893, at 2 ("It shall be unlawful for any person not being a peace officer within the limits of Sacramento county, to wear or carry, any dirk, dirk knife, Bowie knife, sword, sword-cane, pistol, slung-shot, metallic knuckles, gun or any other deadly or dangerous weapon concealed, unless such person who shall carry any such weapon, shall first have made an application in writing upon oath, to any Justice of the Peace in this county, stating the reasons why he or she desires to carry such weapon, (naming it) and if upon such statement the said Justice deems advisable, he may grant any such person a permit to carry any deadly weapon, naming the same, concealed; and such Justice granting such permit, shall keep a record of the same in his office, which record shall be open to inspection at all times."). These laws continued to spread across California in the early twentieth century. *See* LAWS OF CALIFORNIA AND ORDINANCES OF THE COUNTY AND CITIES OF LOS ANGELES COUNTY RELATING TO MINORS 45, 121–22, 129–31, 197, 213–14, 238–39, 267 (1914); CHARTER AND ORDINANCES OF THE CITY OF PASADENA, CALIFORNIA 159 (1905).

253 *Carry Arms: Those Who Have Permits to Carry Concealed Weapons*, OAKLAND TRIBUNE (Cal.), July 20, 1889, at 1. According to this same newspaper article, sixty-nine Oakland residents maintained such licenses. *Id.* At that time, the population of Oakland was somewhere

the California Supreme Court upheld one such local armed carriage licensing law against a state constitutional challenge, albeit not on Second Amendment grounds.[254]

In addition to California, the state of Kansas served as another proving ground for armed carriage licensing laws. In 1862, the state's most populous city of Leavenworth appears to have enacted the first such law, which declared that "[a]ll persons . . . excepting officers and soldiers on duty, are forbidden to carry any weapon without the consent in writing of the Provost Marshall."[255] In the decade that followed, in accordance with a state law that afforded Kansas cities and localities wide latitude to "prohibit and punish the carrying of firearms or other deadly weapons, concealed or

between 34,555 and 48,682 inhabitants. *See Oakland Census Data for 1860–1940*, BAY AREA CENSUS, http://www.bayareacensus.ca.gov/cities/Oakland40.htm (last visited Jan. 21, 2023).

254 *In re* Cheney, 90 Cal. 617 (1891).

255 *Provost Order—No. 1* (Mar. 19, 1862), *reprinted in* LEAVENWORTH TIMES (Kan.), Apr. 20, 1862, at 1. The same order also made it unlawful "for any person or persons . . . to either buy or sell any arms of any kind or description, or ammunition, except from the U.S. Arsenal at Fort Leavenworth, without first obtaining the written consent of the Provost Marshal." *Id*. By 1865, the law was amended to only prohibit the concealed carrying of dangerous weapons. *See Council Proceedings*, LEAVENWORTH TIMES (Kan.), Nov. 24, 1865, at 4 (noting that the "ordinance prohibiting the carrying of pistols, revolvers, bowie knives, dirk knives, or slung shots" would take "effect from and after the 25th of November"). In 1877, there was an attempt to amend the law so that the "Police Judge and City Marshal" would be empowered to "grant a license, at a small price, to such citizens as they may deem proper, for a permission to carry weapons." *Council Proceedings*, LEAVENWORTH TIMES (Kan.), May 4, 1877, at 3, 4. The amendment failed by a city council vote of 3 to 4. *Id*. It was not until 1881 that a new law was passed prohibiting the concealed carrying of weapons by any person, as well as the open carriage of "any pistol, revolver, dirk, bowie knife, or slung shut" except for "police officers and soldiers whyile one duty[.]" *No. 1020: An Ordinance Relating to Misdemeanors* (July 20, 1881), *reprinted in* LEAVENWORTH PRESS (KAN.), July 25, 1881, at 3.

otherwise,"[256] many cities and localities followed suit.[257] Indeed, cities and localities such as Wichita, Burlington, Abilene, and many others, enacted broad prohibitions on

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256 THE LAWS OF THE STATE OF KANSAS 134 (1871). Kansas was not the only state to expressly provide designated localities the authority to regulate armed carriage. For some other examples, *see* CHARTER AND REVISED ORDINANCES OF FORT WORTH, TEXAS 84 (1900) (recognizing the city council's authority "to prohibit or regulate the carrying of fire arms and deadly weapons upon or about the person within the said city"); CHARTER OF THE CITY OF DALLAS 42 (1899) (recognizing the city council's authority to "regulate, control, and prohibit the carrying of firearms and other weapons within the city limits"); REVISED STATUTES OF THE STATE OF UTAH IN FORCE (Jan. 1, 1898), at 120, 130, ch. 4, § 51 (1898) (authorizing designated city councils the power to "regulate and prohibit the carrying of concealed weapons"); CHARTER FOR THE CITY AND COUNTY OF SAN FRANCISCO 14 (1895) (recognizing the city's authority to pass ordinances "in relation to carrying concealed weapons"); CHARTER FOR METROPOLITAN CITIES 13 (1893) (affording all Nebraska city councils the power to "punish and prevent the carrying of concealed weapons"); MINNEAPOLIS CITY CHARTER AND ORDINANCES 58 (1892) (recognizing the city council's authority to "license, prohibit, regulate and control the carrying of concealed weapons and provide for confiscation of the same"); STATUTES OF OKLAHOMA (1890), at 161, ch. 15, art. 2, § 34 (1891) (authorizing designated city councils the power to "prohibit and punish the carrying of firearms, or other deadly weapons, concealed or otherwise"); CHARTER AND GENERAL ORDINANCES OF THE CITY OF ALBANY 58 (1887) (Oregon recognizing the Albany city council's authority to "regulate and prohibit the carrying of deadly or dangerous weapons in a concealed manner, and to provide for the punishment by fine or imprisonment, or both, of any person carrying any deadly or dangerous weapon in a concealed manner, and to define what shall be deemed a deadly or dangerous weapon and what shall constitute a carrying of such weapon in a concealed manner" and to "regulate and prohibit the use of guns, pistols, and firearms, fire-crackers, bombs and detonating works of all descriptions"); *An Act to Incorporate the City of Tacoma and Define the Powers Thereof* (Feb. 4, 1886), *in* LAWS OF THE WASHINGTON TERRITORY ENACTED BY THE LEGISLATIVE ASSEMBLY 182, 200 (1886) (recognizing the city council's authority to "regulate and prohibit the carrying of deadly weapons in a concealed manner" and "to regulate and prohibit the use of guns, pistols and firearms, fire-crackers, bombs and detonating works of all descriptions"); *An Act to Amend an Act Entitled "An Act to Amend an Act to Incorporate the City of Spokane Falls"* (Jan. 29, 1886), *in* LAWS OF THE WASHINGTON TERRITORY 300, 305 (1877) (recognizing the city council's authority to "regulate and prohibit the carrying of deadly weapons in a concealed manner" and "to regulate and prohibit the use of guns, pistols and firearms, fire-crackers, toy-pistols, bombs and detonating works of all descriptions"); *An Act Providing a Charter for the City of Norfolk and Repealing the Existing Charter, Approved April 21, 1882* (Jan. 21, 1884), *in* THE ORDINANCES OF THE CITY OF NORFOLK AND ACTS OF ASSEMBLY RELATING TO THE CITY GOVERNMENT 3, 10 (1885) (recognizing the city council's authority to enact ordinances to "prohibit the carrying of concealed weapons"); *An Act to Incorporate the City of Ashland in the County of Jackson, State of Oregon* (Oct. 9, 1882), *in* THE LAWS OF OREGON 324, 333 (1885) (recognizing the city council's authority to "prohibit and punish the carrying of dangerous weapons in a concealed manner" and to "regulate and prohibit the use of guns, pistols, and firearms, fire crackers, bombs, and detonating works of all descriptions"); *An Act to Incorporate the City of Buffalo* (Mar. 3, 1884), *in* SESSION LAWS OF THE WYOMING TERRITORY PASSED BY THE EIGHTH LEGISLATIVE ASSEMBLY 16, 22 (1884) (recognizing the city council's authority to "punish and prevent the discharge of firearms . . . in the streets, lots, grounds, alleys, or about or in the vicinity of any building, and to regulate, prevent and punish the carrying of concealed weapons"); CHARTER OF THE CITY OF PORTLAND, AS AMENDED, TOGETHER WITH THE GENERAL ORDINANCES 14 (1881) (recognizing the city council's authority to "regulate and prohibit the carrying of deadly weapons in a concealed manner" and to "regulate and prohibit the use of guns, pistols, and firearms, fire-crackers, bombs and detonating works of all descriptions"); *An Act to Amend, Revise and Consolidate the Charter of the City of Lancaster* (Mar. 17, 1882), *in*

the public carrying of concealed and dangerous weapons.[258] However, many other cities and localities enacted some form of licensing or permitting ordinance.[259] And much like in California, these laws gave local government officials wide discretion in deciding who could be licensed to carry concealed and dangerous weapons in public, as well as plenary power to revoke said licenses.[260]

Across the country, there are plenty of other examples where cities and localities enacted armed carriage licensing laws. In Chicago, Illinois for instance, if the applicant could provide the mayor or chief of police with evidence that their "business or occupation" required "the carrying of weapons for their protection," they could be granted an armed carriage license for "a term [no] longer than one year . . . ."[261] Similarly in Astoria, Oregon, an applicant first needed to receive a "recommendation, in writing, [from] the chief of police" to carry a concealed weapon before paying a five dollar fee for an annual license or a one dollar fee for a monthly license.[262] In Nashville, Illinois, it was not only at the sole discretion of the mayor to "issue written permits to such persons as in his judgment he may think necessary for the safety and protection to carry such arms," but also at the mayor's sole discretion that said permits could be revoked.[263] The annual fee for a Nashville, Illinois concealed carry permit

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THE LAWS OF WISCONSIN PASSED AT THE ANNUAL SESSION OF THE LEGISLATURE OF 1882, at 292, 309 (1882) (recognizing the city council's authority to "regulate or prohibit the carrying or wearing by any person under his clothing or concealed on his person, of any pistol, sling-shot or knuckles, bowie knife, dirk knife, or dirk or dagger or any other dangerous or deadly weapon, and to provide for the confiscation and sale of any such weapons"); *An Act to Amend an Act Entitled "An Act to Incorporate the City of Wall, Walla Approved November 13th 1873"* (Nov. 6, 1877), *in* LAWS OF THE WASHINGTON TERRITORY ENACTED BY THE LEGISLATIVE ASSEMBLY 357, 359 (1877) (recognizing the city council's authority to prevent "affrays and carrying concealed weapons"); *An Act for the Government of Cities of the Third Class* (May 19, 1877), *in* LAWS OF MISSOURI, PASSED AT THE REGULAR SESSION OF THE TWENTY-NINTH GENERAL ASSEMBLY 156, 166, § 23 (1877) (authorizing designated city councils the power to "prohibit and punish the carrying of firearms and other deadly weapons, concealed or otherwise").

257 Brief of Patrick J. Charles as Amicus Curiae in Support of Neither Party, *supra* note 112, at appendix 12–18.

258 *Id*. at appendix 68–69, 76–77, 80, 82–85.

259 *Id*. at appendix 12-18.

260 *Id.*

261 *Official Publication: Ordinance [Revising 1873 Concealed Carry Law]* (Jan. 19, 1880), *reprinted in* CHICAGO DAILY TELEGRAPH (Ill.), Jan. 28, 1880, at 4.

262 *Ordinance No. 317: Concerning Offenses and Disorderly Conduct* (Feb. 18, 1879), *reprinted in* DAILY ASTORIAN (Astoria, Or.), Feb. 22, 1879, at 3; *see also Ordinance No. 79* (June 14, 1899), *reprinted in* ADAMS COUNTY NEWS (Ritzville, Wash.), June 14, 1899, at 2 (prohibiting the carry of concealed weapons except for law enforcement and those who have a "written permit from the Town Marshal").

263 *Ordinance No. 29: Concerning the Carrying of Concealed Weapons* (Mar. 24, 1880), *reprinted in* NASHVILLE JOURNAL (Ill.), Mar. 26, 1880, at 4.

was fifty cents.[264] Meanwhile, in St. Paul, Minnesota, it appears that only those persons "whose business or occupation may seem to require the carrying of weapons for protection" could apply for a license, which was at the sole discretion of the mayor.[265] The license was required to maintain the "name, age, occupation and residence of the person to whom it [was] granted . . . ."[266]

Historically speaking, it is impossible to determine just how many cities and localities maintained armed carriage licensing laws by the close of the nineteenth century. Much like most local government records, many city and local ordinances have been lost to time.[267] Indeed, often cities and localities published their ordinances in local newspapers, and, in fact, it is from local newspapers that this author was able to locate many licensing laws.[268] Again, however, as any professional historian or archivist will attest, the records of local ordinances that have survived—as is true of most local government records—are only a tiny fragment of the whole.

Despite historians being unable to fully reconstruct the exact number armed carriage licensing laws circa the mid-to-late nineteenth century, what is known is that the New York law at issue in *Bruen* was a direct antecedent of these laws. Historians know this because prior to the state of New York enacting the Sullivan Law in 1911, at least 8 major New York cities and localities had already adopted discretionary armed carriage licensing laws.[269] These cities and localities included the capital city of Albany,[270] Buffalo,[271] Brooklyn (passed standalone law in but incorporated by

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264 *Id.*

265 *Ordinance No. 265: An Ordinance to Suppress the Carrying of Concealed Weapons Within the Limits of the City of St. Paul, and to Punish the Offenders for the Violation of the Ordinance* (Jan. 12, 1882), *reprinted in* DAILY GLOBE (St. Paul, Minn.), Jan. 20, 1882, at 3.

266 *Id.* The town of Lake and city of Evanston, Illinois maintained a similar licensing requirement. *See* THE REVISED ORDINANCES OF THE CITY OF EVANSTON 131–32 (1893); THE REVISED ORDINANCES OF THE TOWN OF LAKE 165–66 (Frank D. Thomas ed., 1887).

267 *See generally* Library of Congress, *Municipal Codes: A Beginner's Guide*, https://guides.loc.gov/municipal-codes/older-municipal-codes (last visited Jan. 21, 2023).

268 *See, e.g.*, *Ordinance No. 79*, *supra* note 262, at 2 (prohibiting the carry of concealed weapons except for law enforcement and those who have a "written permit from the Town Marshal"); *Official Publication: Ordinance [Revising 1873 Concealed Carry Law]*, *supra* note 261, at 4; *Carry Arms: Those Who Have Permits to Carry Concealed Weapons*, *supra* note 253, at 1.

269 *See* Charles, *A Historian's Assessment of the Anti-Immigrant Narrative in* NYSPRA v. Bruen, *supra* note 233.

270 *Chapter 72: An Ordinance Regulating the Carrying of Loaded Firearms in the City of Albany* (Mar. 6, 1905), *reprinted in* MUNICIPAL CODE OF THE CITY OF ALBANY, N.Y. 849–50 (1910).

271 *Title VII, Chap. II. Of the Department of Police, An Act to Revise the Charter of the City of Buffalo* (Mar. 27, 1891), *reprinted in* LAWS OF THE STATE OF NEW YORK PASSED AT THE ONE HUNDRED AND FOURTEENTH SESSION OF THE LEGISLATURE 127, 176–77 (1891).

New York City in 1898),[272] Elmira,[273] Lockport,[274] New York City,[275] Syracuse,[276] and Troy.[277] Not to mention, in 1892, New York's neighbor New Jersey enacted a law expressly recognizing the armed carriage licenses of its cities, towns, and localities as an lawful exception to its statewide concealed carry prohibition.[278]

Clearly, discretionary armed carriage licensing laws were prevalent throughout the mid-to-late nineteenth century. Considering this fact, one would presume that the Supreme Court would acknowledge their existence and subsequently weigh their significance to New York's "may issue" concealed carry regime. Yet the exact opposite happened in *Bruen*.[279] Therein, the majority proclaimed that armed carriage

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[272] *Pistols—Carrying Of: Ordinance to Regulate the Carrying of Pistols*, Oct. 25, 1880, *reprinted in* BROOKLYN DAILY EAGLE (N.Y.), Oct. 26, 1880, at 1.

[273] *City of Elmira—Official Notice* (July 22, 1892), *reprinted in* STAR-GAZETTE (Elmira, N.Y.), July 28, 1892, at 7.

[274] *Penal Ordinance No. 35: Concealed Weapon* (Dec. 7, 1909), *reprinted in* REVISED CHARTER AND ORDINANCES OF THE CITY OF LOCKPORT 336–37 (1913).

[275] *Article XXVII: Carrying of Pistols* (undated), *reprinted in* ORDINANCES OF THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, *in* FORCE (Jan. 1, 1881), 214–16 (Elliott F. Shepard & Ebenezer B. Shafer eds., 1881).

[276] CHARTER AND ORDINANCES OF THE CITY OF SYRACUSE, NEW YORK 242–43 (1894).

[277] *An Ordinance Regulating the Carrying of Loaded Firearms and Other Dangerous Weapons in the City of Troy* (May 4, 1905), *reprinted in* MUNICIPAL ORDINANCES OF THE CITY OF TROY 425–26 (1905).

[278] *Chapter CCXVII* (Mar. 29, 1892), *reprinted in* ACTS OF THE ONE HUNDRED AND SIXTEENTH LEGISLATURE OF THE STATE OF NEW JERSEY AND FORTY-EIGHTH UNDER THE NEW CONSTITUTION 353 (1892) ("That if any person shall be apprehended in any city of this state, having concealed upon his or her person any offensive weapon, then he or she shall be deemed and adjudged to be a disorderly person; provided, that this act shall not apply to sheriffs, under sheriffs, deputy sheriffs, constables, policemen or other peace officers, nor to any person having a written permit from the police authorities of such city to carry such weapon."). For once such New Jersey law, *see An Ordinance to Regulate the Carrying of Concealed or Other Weapons and to Prohibit the Carrying or Use of the Same Except Herein Provided* (Apr. 22, 1901), *reprinted in* MONTCLAIR TIMES (N.J.), May 4, 1901, at 4 (requiring concealed carry license applicants to "apply to the Chief of Police" to determine if the "applicant is a law-abiding citizen and resident of the Town and that there is good reason why such applicant should be allowed to carry such weapon . . . "). Again, it is worth noting that circa the mid-to-late nineteenth century many states recognized or authorized their respective localities to regulate armed carriage. *See Ordinance No. 84: Prohibiting the Carrying of Concealed Deadly Weapons*, *supra* note 209; Brief of Patrick J. Charles as Amicus Curiae in Support of Neither Party, *supra* note 112, at appendix 68–69, 76–77, 80, 82–85; *Ordinance No. 79*, *supra* note 262 at 2 (prohibiting the carry of concealed weapons except for law enforcement and those who have a "written permit from the Town Marshal"); *Official Publication: Ordinance [Revising 1873 Concealed Carry Law]*, *supra* note 261, at 4; *Carry Arms: Those Who Have Permits to Carry Concealed Weapons*, *supra* note 253, at 1; Charles, *A Historian's Assessment of the Anti-Immigrant Narrative in* NYSPRA v. Bruen, *supra* note 233.

[279] N.Y. State Rifle & Pistol Ass'n., Inc. v. Bruen, 142 S. Ct. 2111, 2121 (2022).

licensing laws never existed by the close of the nineteenth century.[280] And what is most remarkable about the Court's historical denial is that all the evidence was laid bare before them, including digital scans of the original laws.[281] The point to be made is that the *Bruen* majority did not have to dedicate even a minute of historical research time to locating these laws. So, why did the *Bruen* majority exclude them from their history-in-law analysis? Was it done intentionally or by error? The simple answer is we do not know—that is until someone in the *Bruen* majority is asked and answers the question.

Bruen's dismissal of a past that indeed existed begets the following questions: "If the Supreme Court declares that a historical event, law, or tradition never existed, when in fact it did, what does that mean for said historical event, law, or tradition jurisprudentially moving forward? Do all future courts and jurists need to embrace the Court's historical pronouncement, even though it is blatantly false and litigants in future cases and controversies insist otherwise?"[282] These are questions that run parallel to the old philosophical question: "If a tree falls in the forest and no one is around to hear it, does it make a sound?"

What is certain is that the Supreme Court could always reverse its historical pronouncement on the non-existence of armed carriage licensing laws, as well as any other fugazi Second Amendment history, in a future case or controversy.[283] What is also certain is that *Bruen*'s ill-conceived history of armed carriage licensing laws creates quite a conundrum for lower courts adjudicating Second Amendment cases and controversies moving forward. On the one hand, there is an argument to be made that lower courts can still utilize the history of mid-to-late nineteenth armed carriage licensing laws to weigh future challenges to "shall issue" concealed carry regimes, as well as determine the extent in which the historical police power should play in defining the scope of the Second Amendment. On the other hand, there is an argument to be made that whatever the Supreme Court declares to be history severely binds the lower courts to accept it as true. There is no unequivocal right answer here. Both avenues of approach have been utilized by the courts in the past, and as will be outlined

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280 *Id.* at 2121 (quoting Klenosky v. New York City Police Dept., 75 App. Div.2d 793, 793 (1980)).

281 Brief of Patrick J. Charles as Amicus Curiae in Support of Neither Party, *supra* note 112, at appendix 1–104.

282 *See, e.g.*, Young v. Hawaii, 896 F.3d 1044 (9th Cir. 2018), *vacated for rehearing en banc*, 915 F.3d 681 (9th Cir. 2019) (adopting a pick and choose approach to history based on a selective reading of *Heller*); Peruta v. County of San Diego, 742 F.3d 1144 (9th Cir. 2014) (same).

283 The Supreme Court is not bound to follow past precedent if the historical record proves otherwise. *See* U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779, 788 (1995); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 575 (1993); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458–59 (1983); Smith v. Allwright, 321 U.S. 649, 665–66 (1944); *see also* Cohens v. Virginia, 19 U.S. 264, 399–400 (1821) (discussing the importance of weighing each constitutional question before the Court with care).

in the next Part, this is just one of several history-in-law conundrums created by the *Bruen* decision.[284]

III. *BRUEN*'S TEXT, HISTORY, AND TRADITION PROBLEM

As outlined in Part II, *Bruen*'s approach to history-in-law is built upon complete and utter fugazi. This is not to say, however, that as a matter of constitutional law the Court's decision to strike down New York's "may issue" concealed carry regime was jurisprudentially wrong per se.[285] Rather, the point is that *Bruen*'s cherry-picking, explaining away, and fabricating of historical evidence to achieve this result is deeply troubling. Indeed, as this author has noted before, "despite the best efforts of . . . the most experienced jurists, when it comes to dabbling in history-in-law, more often than not, the courts will commit any number of historical errors and missteps."[286] This is to be expected. But it is also why it behooves the courts to "do their utmost to get historical facts right, or, at the very least, work to minimize the number of historical errors and missteps."[287] Doing so, "not only ensures that the courts are fashioning opinions with as many verifiable historical facts as possible, but in doing so makes it far less likely that the legitimacy of the opinion will come into question."[288]

The overarching problem with the Supreme Court's approach to text, history, and tradition in *Bruen* is it appears that little to no effort was made to minimize the historical errors and missteps. In fact, it is fair to argue that *Bruen* embraces its errors and missteps under the guise of historical plausibility. But this is rather a poor construct from which to jurisprudentially reason. Even worse is the fact that *Bruen* applies this poor construct to all three levels of its text, history, and tradition analysis. And by doing this, there is a precedential argument to be made that the lowers courts will have to follow *Bruen*'s lead, which will only end up making the already fugazi Second Amendment even more fugazi.

A. Bruen*'s Text Problem*

The Second Amendment reads: "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."[289] In *District of Columba v. Heller*, the Supreme Court deciphered the Second Amendment's "original" meaning by starting with the operative language—that is the "right of the people to keep and bear arms"—parsing and interpreting each word, reassembling the whole, and then hypothesizing its historical relationship to the

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284 For a broader discussion on how historical pronouncements by the Supreme Court may affect future cases and controversies, *see* Charles, *The Second Amendment in Historiographical Crisis*, *supra* note 22, at 1846–64.

285 N.Y. State Rifle & Pistol Ass'n., Inc. v. Bruen, 142 S. Ct. 2111, 2125–26 (2022).

286 Charles, *The Second Amendment and the Basic Right to Transport Firearms for Lawful Purposes*, *supra* note 43, at 135.

287 *Id.* at 136.

288 *Id.*

289 U.S. CONST. amend. II.

amendment's "well regulated Militia" prefatory language.[290] Although some in the legal academy cheered *Heller*'s textualist approach as a high point for originalism,[291] the historical reality was that the interpretive outcome was very far removed from that of the founding generation, particularly when analyzed in the context of eighteenth-century constitutionalism.[292]

As most Supreme Court watchers expected, *Bruen* continued down *Heller*'s textualist path.[293] At issue in the case was the meaning of the phrase "bear arms" in the context of carrying "arms" beyond one's doorstep.[294] Did the founding generation, as well as subsequent generations of Americans, interpret the phrase broadly as the petitioners argued, or was the phrase interpreted a bit more narrowly as the respondents argued? Ultimately, the *Bruen* majority sided with the petitioners under the rationale that when the "Second Amendment's plain text covers an individual's conduct"—which in this case was the "bearing" or carrying of "arms"—the "Constitution presumptively protects that conduct."[295] And in such cases, according to the majority, the burden rests on the government to "justify" any restrictions on the right by showing that they are "consistent with this Nation's historical tradition of firearm regulation."[296]

Yet oddly, despite *Bruen* declaring that a presumption of liberty applies to the carrying of a handgun outside the home, the actual holding appears to run counter to said presumption. Recall how the majority dismissed the historical existence of armed carriage licensing laws circa the mid-to-late nineteenth century.[297] Still, somehow, even with a presumption of liberty blowing favorably behind the petitioners' back, the

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290 District of Columbia v. Heller, 554 U.S. 570, 576–92 (2008).

291 *See, e.g.*, Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WSJ (June 27, 2008), https://www.wsj.com/articles/SB121452412614009067.

292 *See, e.g.*, Kari Sullivan, *The 'Strange' Syntax of the Second Amendment*, DUKE SECOND THOUGHTS BLOG (June 28, 2022), https://firearmslaw.duke.edu/2021/07/the-strange-syntax-of-the-second-amendment/; CHARLES, ARMED IN AMERICA, *supra* note 3, at 70–121; Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, THE PANORAMA (Aug. 3, 2018), http://thepanorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment/; Patrick J. Charles, *The Constitutional Significance of a "Well-Regulated Militia" Asserted and Proven With Commentary on the Future of Second Amendment Jurisprudence*, 3 NE. L. J. 1, 4–9 (2011); David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1296–98 (2009); Saul Cornell, Heller*, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1096–98 (2009); Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267, 267–82 (2008).

293 N.Y. State Rifle & Pistol Ass'n., Inc. v. Bruen, 142 S. Ct. 2111, 2161–62, 2134–35, 2157–58.

294 *Id.* at 2134–35.

295 *Id.* at 2126.

296 *Id.*

297 *Id.* at 2153–54.

Bruen majority concluded that modern, "shall issue" concealed carry licensing regimes are presumed constitutional.[298] It is difficult to square the two without veering into the realm of living constitutionalism or traditional tiers of scrutiny, the latter of which *Bruen* cast off as being inconsistent with *Heller*.[299] It effectively highlights how *Bruen*'s professed adherence to the "normal and ordinary" meaning of the Second Amendment is more nominal than real.[300] It is jurisprudential fugazi at its core, and it will be interesting to see what other "plain text" Second Amendment rights the courts will come to recognize in the future.

What is for certain is that much like after *Heller* and *McDonald*, there will be an avalanche of law review articles by gun rights advocates[301] arguing for a loose interpretation of the "plain text."[302] For instance, the phrase "bear arms" will be fashioned to imply a bundle of ancillary Second Amendment rights, such as "bear arms" implies the right to use said arms, and therefore all traditional uses of arms—to include the sporting, hunting, and shooting— therefore must be placed under the same presumption of liberty umbrella. And building off that implication, gun rights advocates will assuredly argue that the sporting, hunting, and shooting with arms is often communal, and therefore any large assembling of people with arms must be afforded the same presumption of liberty. Similarly, as it pertains the "keeping" of arms, gun rights advocates will advance a different bundle of ancillary Second Amendment rights, such as to "keep" arms implies a right to acquire said arms, and

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298 *Id.* at 2123–24; *id.* at 2157–58 n.1 (Alito, J., concurring); *id.* at 2161–62 (Kavanaugh, J., concurring).

299 *Id.* at 2128–30.

300 Similar criticisms were levied against *Heller*. *See* Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1344–45 (2009).

301 *See, e.g.*, David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 HARV. L. REV. F. 230, 233–37 (2014); Glenn Harlan Reynolds, *Second Amendment Penumbras: Some Preliminary Observations*, 127 S. CAL. L. REV. 247, 248–50 (2012); *see* David T. Hardy, *Ducking the Bullet:* District of Columbia v. Heller *and the Stevens Dissent*, 2010 CARDOZO L. REV. DE NOVO. 61, 61–62 (2010); STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 1–6 (2008). Loosely interpreting the Second Amendment's text has long been a strategy of gun rights advocates. *See, e.g.*, Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 801–12 (1998) (defining the Second Amendment's operative clause with hypothetical wordplay and parsing text); *see* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 474 (1995) ("A well regulated militia was thus one that was well-trained and equipped; not one that was 'well-regulated' in the modern sense of being subjected to numerous government prohibitions and restrictions."); Merritt A. Edson, *The Right to Bear Arms*, AM. RIFLEMAN, July 1955, at 14 ("There has been so much conflicting 'expert' opinion, so many interpretations of constitutional law, that it is hardly surprising that widespread confusion exists in the minds of sincerely interested persons . . . . Many have attempted varied interpretations of [the Second Amendment's language]. We prefer to believe that the simple, straightforward language means exactly what it says.").

302 *Bruen*, 142 S. Ct. at 2126.

therefore all laws pertaining to the sale, purchase, and commerce of arms and ammunition must therefore be afforded a presumption of liberty.[303]

Simply put, the loose interpretational possibilities of the Second Amendment's "plain text" are potentially endless and gun rights advocates will assuredly do everything possible to ensure these loose interpretations become a jurisprudential reality. And it is not just the Second Amendment's text that gun rights advocates will interpret loosely. If past is prologue, textual looseness will be applied to all historical texts to either expand gun rights or constrict federal, state, and local governments' ability to enact gun control. A great example of this leading up to *Bruen* is the "terror of the people" language that appeared regularly within legal commentary on the Statute of Northampton from the early eighteenth century through the early nineteenth century.[304] Starting in the mid-to-late 1970s, as part of a larger organized effort to historically remake the Second Amendment,[305] several gun rights writers, seized on this language to argue that a prosecution under the Statute of Northampton required an individual to publicly carry the arms with "evil-intent."[306] National Rifle Association ("NRA") lawyer David I. Caplan was notably the first to make the historical claim.[307] It was then repeated by several other gun rights writers,[308] and the circular citation gymnastics that is currently the bedrock of so many Second Amendment myths and falsehoods quickly took hold.[309] What substantiated historical evidence did these gun rights writers provide in the way of proving this "evil-intent"

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303 This line of argument is totally consistent with the 1871 Tennessee Supreme Court opinion Andrews v. State, 50 Tenn. 165, 178 (1871) ("The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it . . . .").

304 *See, e.g.*, HENING, *supra* note 181, at 49; GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 92 (1736).

305 CHARLES, ARMED IN AMERICA, *supra* note 3, at 279–95; *see also* L. Craig Wilson, *Guns and Today's Students: The Education of Today's Students is of Prime Importance if We Really Want to Keep Our "Right to Bear Arms"*, GUNS MAGAZINE, Dec. 1970, at 26–27, 58 (article sounding the gun rights alarm on educating young people on the importance of the Second Amendment and opposing gun control).

306 *See, e.g.*, Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, *supra* note 94, at 565; Halbrook, *The Right to Bear Arms in the First State Bills of Rights*, *supra* note 94, at 311; Gardiner, *supra* note 94, at 71–72; Dowlut & Knoop, *supra* note 94, at 202.

307 Caplan, *Restoring the Balance*, *supra* note 94, at 31–34.

308 *See, e.g.*, Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, *supra* note 94, at 565; Halbrook, *The Right to Bear Arms in the First State Bills of Rights*, *supra* note 94, at 311; Gardiner, *supra* note 94, at 71–72; Dowlut & Knoop, *supra* note 94, at 202.

309 The alleged anti-immigrant origins of the 1911 Sullivan Law long advanced by gun rights advocates is just one example. *See* Charles, *A Historian's Assessment of the Anti-Immigrant Narrative in* NYSPRA v. Bruen, *supra* note 233.

interpretation? Nothing really—just the phrase "terror of the people" as it appeared in legal commentaries[310] and colonial statutes.[311] There was no affirmative case law that gun rights writers could point to showing that "evil-intent" was indeed a prosecutorial requirement under the Statute of Northampton.[312] Moreover, gun rights writers could not provide even one historical example of this "evil-intent" requirement appearing in newspapers, journals, periodicals, books, or correspondence.

The absence of any case law or other historically on-point evidence is not all that surprising. As outlined in Part II.B on the lack of Massachusetts Model type armed carriage law enforcement records, up through the turn of the twentieth century, most law enforcement records, to include judicial decisions and Justice of the Peace, sheriff, and constable records, have been lost to time. And those law enforcement records that have miraculously survived are merely a tiny fraction of the whole. What this ultimately leaves historians with is an abundance of legal commentaries to examine and weigh the "evil-intent" requirement thesis. And it is here that the thesis quickly falls apart at the historical seams. The reason is essentially three-fold. First, if one examines the historical use of the language "terror of the people," "fear of the people," or something similar in either legal commentaries or Justice of the Peace manuals, it is clear that all are boilerplate legal 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.[313] And often an affray took place "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 . . . ."[314]

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310 *See* Mark Anthony Frassetto, *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, 69, 71–72 (2018).

311 *See, e.g.*, Act of Jan. 29, 1795, ch. 25, 1795 Mass. Laws, *reprinted in* 2 THE PERPETUAL LAWS, OF THE COMMONWEALTH OF MASSACHUSETTS, FROM THE ESTABLISHMENT OF ITS CONSTITUTION TO THE SECOND SESSION OF THE GENERAL COURT, IN 1798, at 259 (1799); Act of Nov. 27, 1786, ch. 21, 1786 Va. Laws, *in* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 33 (1794).

312 *Rex v. Knight* is the only case that gun rights advocates have pointed to. However, as outlined in Part II.A., a full historical examination of the case rebuts the evil-intent interpretation. Moreover, there is not one instance to be found—not one case, legal summary, legal commentary, newspaper, or journal article, nor correspondence—where the case was discussed or cited as implementing an evil-intent requirement. *See, e.g.*, Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting*, 55 U.C. DAVIS 2545, 2555 (2022).

313 *See, e.g.*, BLACKSTONE, *supra* note 71, at 145; HAWKINS, *supra* note 93, at 134. *See also* Frassetto, *supra* note 310, at 69, 71–72.

314 HENING, *supra* note 181, at 17 (emphasis added). *See also* A NEW CONDUCTOR GENERALIS 27 (1803) ("But although no bare words, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain, that 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 matter as will naturally cause a terror to the people."); 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 79 (Bird Wilson ed., 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 terrour among the people.").

The second reason the "evil-intent" requirement thesis falls apart is it is often packaged and sold by gun rights advocates as an assault with a deadly weapon requirement.[315] Yet such an interpretation is clearly at odds with how legal commentators, to include William Lambarde, William Hawkins, Michael Dalton, and William Blackstone, described the prosecutorial scope of the Statute of Northampton.[316] Each made a clear legal distinction between the crime of assault with a deadly weapon and the armed carriage provisions contained within the Statute of Northampton.[317]

This brings us to the third and last reason the "evil-intent" requirement thesis falls apart. When read in conjunction with the Statute of Northampton's entire legal commentary, the "evil-intent" requirement is legal nonsense. William Hawkins' 1716 treatise *Pleas of the Crown* is a great example of this.[318] For instance, Hawkins wrote that under the Statute of Northampton a person "cannot excuse the wearing such

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315 *See, e.g.*, David T. Hardy, District of Columbia v. Heller *and* McDonald v. City of Chicago: *The Present as Interface of the Past and Future*, 3 NE. L. J. 199, 205 (2011); Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101–02 (2009).

316 *Compare* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 120 (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* BLACKSTONE, *supra* note 71, at 148–49 ("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, *supra* note 70, at 141 (sureties for the peace may be enforced "[i]f any Constable shall perceive any other persons (in his presence) to be about to breake the peace, either by drawing weapons, or by striking, or assaulting one another . . . hee may take assistance, and carrie them all before the Justice to finde sureties for the peace"), *with* DALTON, *supra* note 70, at 141 (sureties of the peace may be enforced by a constable "of such as in his presence shall goe or ride Armed offensively, . . . for these are accompted to be in affray and feare of the people, and a meanes of the breach of the peace"); *compare* HAWKINS, *supra* note 93, at 133–34, ch. 63, § 1 (including in the definition of assault "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* HAWKINS, *supra* note 93, at 135, ch. 63, § 4 (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"); 1 WILLIAM LAMBARDE, EIRENARCHA: OR THE OFFICE OF THE JUSTICES OF THE PEACE, IN TWO BOOKES 134–35 (1581) ("Yet it may be done, without word, or blow given: as if a man shall shew himself furnished with armor or weapon, which is not usually worne and borne, it will strike a feare onto others that be not armed as he[] is: and therefore both the Statute of Northampton . . . & the writ therupon grounded, do speake of it by the words, *effray del pais*, and *in terrorem populi*. But an Assault, as it is fetched from another fountain . . . so can it not be performed, without the offer of some hurtfull blow" and "Assault doth not alwa[ys] necessarily imply a hitting.") (emphasis added); *see also* J. W. Cecil Turner, *Assault at Common Law*, 7 CAMBRIDGE L. J. 56–57, 67 (1939).

317 *See* sources cited *supra* note 313.

318 HAWKINS, *supra* note 93, at 136, ch. 63, § 8.

Armour in Publick, by alledging that such a one threatened [them], and that [they] wear[] it for the Safety of [their] Person from . . . Assault . . . ."[319] If one inserts an "evil-intent" requirement into this sentence, it reads as utter gibberish. Why and in what circumstances would someone wear arms or armor for self-defense with "evil-intent," and exactly how would one go about proving it? The same headscratcher presents itself for Hawkins' follow-on statement that a person shall not be inviolate of the Statute of Northampton if they assemble their "Neighbours and Friends in [their] own House, against those who threaten to do [them] any Violence . . . ."[320] How and in what circumstances would the "evil-intent" requirement fit here? The answer is it does not. Lastly, consider Hawkins' exception for persons called upon through the hue and cry to assist with suppressing rioters and disturbers of the peace.[321] Are we to believe that Hawkins was describing a legal exception for anyone caught carrying with "evil-intent" while they were called upon to preserve the peace? The answer is no. Such an interpretation is preposterous. But if one goes back and reads Hawkins' legal commentary with the understanding that the Statute of Northampton generally prohibited armed carriage in public places, all three exceptions make perfect sense.

The point to be made is that by accepting the "evil-intent" requirement interpretation of the Statute of Northampton at face value, virtually all the listed exceptions to the Statute become legally superfluous.[322] And it is highly doubtful that Hawkins and other legal commentators would have taken the time to list so many exceptions to the rule with no actionable purpose at all. Essentially, what the gun rights writers responsible for pushing the "evil-intent" requirement failed to historically grasp is that the Statute of Northampton's restriction on going armed in the public concourse was highly adaptable, discretionary, and subject to local interpretation.[323] This was true of most crimes and misdemeanors in the Anglo-American common law system.[324] But in the case of the Statute of Northampton, as several seventeenth and eighteenth century legal commentaries attest, the prohibition on going armed in the public concourse was meant to be general with exceptions.[325]

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319 *Id.*

320 *Id.*

321 *Id*. at 136, ch. 63, § 10.

322 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2183–84 (2022) (Breyer, J., dissenting) (discussing the historical problems with the evil intent interpretation of the Statute of Northampton).

323 Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence*, *supra* note 46, at 82–83; *see also* BISHOP, *supra* note 85, at § 784 ("But the statute [of Northampton] bears date long anterior to the settlement of this country, it is of a *sort adapted to the wants of every civilized community* . . . .") (emphasis added).

324 For some useful discussions, *see* Stone, *supra* note 203, at 4–5; Lewis, *supra* note 203, at 465–66, 472, 482–83.

325 *See generally* Charles, *The Statute of Northampton by the Late Eighteenth Century*, *supra* note 68.

But despite the "evil-intent" requirement thesis's lack of historical viability, or even legal sensibility for that matter, *Bruen* accepted it as true.[326] Granted, the existence of "terror of the people" language in Statute of Northampton restatements raises serious historical questions as to the overall prosecutorial scope of the Statute, as well as how, if at all, the Statute was enforced within the American Colonies up through the early nineteenth century.[327] However, the *Bruen* majority interpreted this language in a way that cannot withstand even basic historical scrutiny.[328] Exactly how and why the *Bruen* majority came to accept the unsubstantiated "evil-intent" requirement as true is unclear. If footnote eleven is any indication, it appears the answer is that the "evil-intent" interpretation was seen as historically "plausible."[329] And, according to *Bruen*, whenever the Court is presented with "multiple plausible interpretations" of historical text, the winning interpretation is not the one that can be factually verified or logically deduced based on the totality of the evidence.[330] No, the winning interpretation is whichever the Court deems "more consistent" with the constitutional text's "command."[331]

The central problem with this approach to interpreting text is it contradicts the reasons why history is ever relied upon in constitutional law—these reasons being judicial objectivity, accuracy, restraint, and predictability.[332] To be clear, history is principally relied upon in constitutional law because it provides guardrails that help cabin judicial activism.[333] Yet, if one follows *Bruen*'s line of historical thinking, these guardrails, at least in the Second Amendment context, are illusory. It has long been said that "history is in the eye of the beholder," which means that different people can perceive the same historical event differently depending upon multiple factors. Clearly, as *Bruen* shows, the same can be said of historical texts. The original or popular understanding of any historical text can be fashioned or flexed to mean whatever the respective modern interpreter wants it to.[334] It is what English historian

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326 *Bruen*, 142 S. Ct. at 2141.

327 *See* Frassetto, *supra* note 310, at 69, 71–72.

328 *Bruen*, 142 S. Ct. at 2141.

329 *Id.* at 2141 n.11.

330 *Id.*

331 *Id.*

332 CHARLES, HISTORICISM, ORIGINALISM, AND THE CONSTITUTION, *supra* note 35, at 5–28, 87–98.

333 *See, e.g.*, David F. Forte, *A Note on the Originalist Perspective*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 21–26 (2d ed. 2014); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 375–77 (2013); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 1–3 (2013); ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 399–402 (2012). *But see* David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J. L. & PUB. POL'Y 137, 137–42 (2011) (arguing that originalism does not really advance the cause of judicial restraint).

334 BUTTERFIELD, *supra* note 90, at 30.

Herbert Butterfield aptly referred to as a "pathetic fallacy" because the modern interpreter is at leisure to form historical conclusions apart from the original writer's intended or actual purpose.[335]

B. Bruen*'s History and Tradition Problem*

In Part III.A the accuracy and objectivity problems surrounding the *Bruen* majority's approach to historical text were laid out to bare.[336] As will be outlined below, the majority's approach to history and tradition are equally problematic. At first glance, *Bruen*'s stipulation that the government must "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation" appears rather straightforward and even keeled.[337] In fact, writing more than a decade ago, this author proffered the same baseline test for Second Amendment cases and controversies.[338] Moreover, as the *Bruen* majority correctly notes, history and tradition have informed how the courts should "protect other constitutional rights."[339] So, why not rely upon the history and tradition in defining the scope of the Second Amendment as well? Few historians, legal scholars, and jurists, if any, will answer a hard "no" to this question. History is the law, and the law is history.[340] The two disciplines are inseparable.

However, the problem is not with *Bruen*'s resort to history. Rather, it is how it is employed. There are plenty of examples within *Bruen* to point to. Consider the presumption of liberty given to which "arms" are constitutionally protected under the Second Amendment. According to the *Bruen* majority, the term "arms" must be read

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335 *Id.*

336 *See infra* Part III.A.

337 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

338 Charles, *The Second Amendment in Historiographical Crisis*, *supra* note 22, at 1859–60 (noting that post-*McDonald* the Second Amendment history and tradition test should be that "federal and state legislatures retain the authority to regulate arms, in both public and private, if there is evidence that there has been a 'long tradition' of regulation in the prospective area . . . On the one hand, the Court could place the burden on the challenging party to provide historical evidence that the above mentioned areas of regulation were perceived as violating the right to keep and bear arms. On the other hand, the Court could place the burden on the government to show a 'long tradition' of regulation. Wherever the burden is placed, the Court's test should be flexible enough as to allow legislatures to update or tailor the 'long tradition' of regulation by taking into account the capabilities of modern weapons and firearms.").

339 *Bruen*, 142 S. Ct. at 2130. *See also* Brown v. Ent. Merch. Ass'n, 131 S. Ct. 2729, 2734 (2011) (noting that in the First Amendment arena legislatures cannot regulate "new categories of unprotected speech" without "persuasive [historical] evidence" that the "content is part of a long . . . tradition of proscription"); United States v. Stevens, 559 U.S. 460, 472 (2010) ("Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.").

340 Matthew J. Festa, *Applying a Usable Past: The Uses of History in Law*, 38 SETON HALL L. REV. 479, 483–85 (2008); MILLER, THE SUPREME COURT AND THE USES OF HISTORY, *supra* note 36, at 20–21.

to extend "to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[341] In other words, what the majority is stating is that all modern firearms that "*facilitate* armed self-defense" are presumed to be constitutionally protected.[342] Conversely, when it comes to regulating these same "arms," the burden rests squarely on the government to prove that their respective regulation is not only consistent with history and tradition, but also "analogous" to a particular type of historical regulation.[343] This creates quite the analytical double standard given that what "arms" are protected under the Second Amendment is guided by living constitutionalism, yet the manner in which governments may regulate those same "arms" is restrained by history and tradition. And if one takes *Bruen* at its word, there does not appear to be much historical leeway for governments when it comes to regulation. Indeed, at one point in the *Bruen* opinion it states that "analogical reasoning under the Second Amendment is neither a regulating straightjacket nor a regulatory blank check," and that in practice the government need only "identify a well-established and representative *analogue*, not a historical twin."[344] At the same, time, however, *Bruen* stipulates that should the government attempt to adopt a new regulatory means of addressing the age-old problem of firearms-related violence, it could very well serve as "evidence" that the new regulatory means is "unconstitutional."[345]

Another analytical double standard presents itself in *Bruen*'s discussion on the "sensitive places" doctrine—a doctrine that makes it constitutionally permissible for governments to outright prohibit the carrying, transport, or use of "arms" at specific, sensitive locations.[346] "Although the historical record yields relatively few [examples] where weapons were altogether prohibited—*e.g.*, legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions," notes *Bruen* majority, adding, "[w]e therefore can assume it settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment."[347] Here, the *Bruen* majority notes that a *lack* of historical evidence is sufficient for presuming the constitutionality of laws prohibiting dangerous weapons at specific, sensitive locations.[348] Yet later in the opinion, the majority notes that the *lack* of Massachusetts Model or "surety law" enforcement records justifies the Court in dismissing it as "too slender a read on which to hang a historical tradition of restricting the right to public carry."[349] It is difficult

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341 *Bruen*, 142 S. Ct. at 2132.

342 *Id.* (emphasis added).

343 *Id.* at 2130–31.

344 *Id.* at 2133.

345 *Id.* at 2131.

346 *Id.* at 2133.

347 *Id.*

348 *Id.*

349 *Id.* at 2149.

to see how the *Bruen* majority can justify relying on a *lack* of evidence to support one conclusion, and then make the very same observation to support the opposite conclusion.[350] This is neither a holistic nor honest approach to history-in-law. It is fugazi "law office history." And it is not the only place in the *Bruen* opinion which it applies.

Bruen's embrace of the common law prohibition on carrying dangerous and unusual weapons is another case in point.[351] Recall the majority's rationale for rejecting Massachusetts Model type armed carriage laws as evidence of a historical tradition restricting the carrying of firearms in public places—*i.e*., a lack of court and enforcement records.[352] Yet if one applies the same 'lack of historical evidence' rationale to the common law prohibition on carrying of dangerous and unusual weapons in public, this historical tradition too must be cast aside as evidence deficient. The reason being there is no substantive case law or illustrative examples that historically inform what constituted a weapon being too "dangerous" or "unusual" to carry.[353] Indeed, from the mid-seventeenth century through the early nineteenth century, the common law prohibition on carrying dangerous and unusual weapons is frequently restated in legal commentaries.[354] However, in contrast to Massachusetts Model type armed carriage laws, which at least provides historians with a handful of enforcement examples,[355] as well as a historically informative body of law on when a threat was indeed imminent to justify going publicly armed,[356] the common law

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350 *Id.* at 2133, 2149.

351 *Id.* at 2143; *id.* at 2162 (Kavanaugh, J., concurring).

352 *Id.* at 2149.

353 As best as this author can tell, the term "unusual weapons" first appears in Matthew Hale's *Pleas of the Crown*, but not in the context of armed carriage in the public concourse. Rather, it appears in the context of "forcible entry." *See* MATTHEW HALE, PLEAS OF THE CROWN 138 (1678).

354 *See, e.g.*, BLACKSTONE, *supra* note 71, at 148–49; WILSON, COLLECTED WORKS OF JAMES WILSON, *supra* note 190, at 1138, 1170–71.

355 Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, *supra* note 222, at 15–17. *See Concealed Weapons*, THE CRIM. L. MAG. & REP., Oct. 1886, at 413–14.

356 *See Concealed Weapons*, *supra* note 355, at 413–14. This body of law was not limited to Massachusetts Model type armed carriage laws. *See* Tipler v. State, 57 M. 365 (1880), *reprinted in* 57 REPORTS OF CASES IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI 685–87 (1880). During the mid-to-late nineteenth century, several localities enacted concealed carry prohibitions with 'reasonableness' exceptions. For some examples, *see McCracken, Kan., Ordinance* 8 (Aug. 27, 1898), *reprinted in* MCCRACKEN ENTERPRISE (Kan.), Sept. 9, 1898, at 4 (excepting from the town's concealable weapon prohibition, regardless of whether the carriage was concealed or open, those "engaged in any legitimate business"); *Beatrice, Neb., An Ordinance, Making it Unlawful to Carry Any Concealed Weapons . . . in the City of Beatrice, and Providing Penalties for its Violation* (Mar. 23, 1897), *reprinted in* BEATRICE DAILY TIMES (Neb.), Apr. 7, 1897, at 2 (excepting from the town's concealed carry prohibition those that carried "in the pursuit of any lawful business, calling or employment, and the circumstances in which he was placed at the time aforesaid were such as to justify a prudent man in carrying the weapon or weapons aforesaid for the defense of his person, property or family"); *Wallace, Kan., Ordinance* 5 (Nov. 26, 1887), *reprinted in* WALLACE COUNTY REGISTER (Kan.), Dec. 3, 1887,

prohibition on carrying dangerous and unusual weapons produces none. Not one. Therefore, if one faithfully applies *Bruen*'s reasoning on the Massachusetts Model's *lack* of enforcement evidence, it is difficult to see how the common law prohibition on carrying dangerous and unusual weapons can survive future court scrutiny. For, without any history informing us how to adjudicate a weapon's dangerousness or unusualness, the courts will ultimately have to make up a legal standard based on some form of interest balancing. Yet this is something that *Bruen* outright rejects.

Conversely, if we take a step backwards and faithfully apply *Bruen*'s own reasoning on the *lack* of historical evidence challenging the constitutionality of mid-to-late nineteenth century "sensitive places" laws—*i.e.*, that the lack of historical evidence constitutionally challenging "sensitive places" laws presumes their constitutionality—it is fair to argue that the entire holding in *Bruen* is wrong given the contemporaneous existence of discretionary armed carriage licensing laws.[357] For not only were discretionary armed carriage licensing laws widespread during the mid-to-late nineteenth century, but these laws were also never sufficiently challenged on constitutional grounds.[358] And, analytically speaking, the fact that the public understanding of these discretionary armed carriage licensing laws was that they respected and preserved the Second Amendment (not violated it) would appear to only bolster this conclusion.[359]

The simple point is that *Bruen*'s approach to history-in-law is downright hypocritical. While it is easy for the *Bruen* majority, or anyone for that matter, to proclaim that jurists and legal scholars are well-suited to conduct historical inquiries

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at 3 (excepting from the town's armed carriage prohibition, both concealed and open carriage, those "engaged in the pursuit of any lawful business calling or employment and the circumstances in which such person is placed at the time aforesaid are such as to justify a prudent man in carrying such weapon for the defense of his person, property or family nor cases where any person shall carry such weapons openly in his hands for the purpose of sale, barter or of repairing the same or for use in any lawful occupation requiring use of the same."); *Grand Island, Neb., Ordinance 88* (Dec. 22, 1885), *reprinted in* GRAND ISLAND DAILY INDEPENDENT (Neb.), Dec. 28, 1885, at 2 (excepting from the town's concealed carry prohibition those that carried "in the pursuit of any lawful business, calling or employment that necessitated carrying the weapons aforesaid for the defense of his or her person, family, or property"); NASHVILLE, TENN., ORDINANCES ch. 108 (1873), *reprinted in* ORDINANCES OF THE CITY OF NASHVILLE 340–41 (1881) (excepting from the city's concealable weapon prohibition, regardless of whether the carriage was concealed or open, those "entitled by law to carry such weapons" and when the "act of handling or moving such deadly weapons in any ordinary business way."); OMAHA, NEB., REV. ORDINANCES ch. 28, *reprinted in* REVISED ORDINANCES OF THE CITY OF OMAHA 85, 86–87 (1872) (excepting from the city's concealed carry prohibition "well known and worthy citizens or persons of good repute who may carry arms for their own protection in going to or from their place or places of business, if such business be lawful.").

357 *See infra* pp. 659–65 and accompanying notes.

358 *See Ex parte Cheney*, 90 Cal. 617, 618–22 (1891) (upholding a constitutional challenge to an armed carriage licensing law, albeit it none on Second Amendment grounds); *Concealed Weapons: Judge Brannon's Decision on This Subject*, WHEELING REGISTER (W. Va.), Oct. 15, 1883, at 1 (upholding a constitutional challenge to Wheeling, West Virginia's armed carriage licensing law).

359 *See infra* note 3; *see also* Charles, *The Invention of the Right to 'Peaceable Carry' in Modern Second Amendment Scholarship*, *supra* note 46, at 196–98.

by relying on "'evidentiary principles and default rules' to resolve uncertainties,"[360] it is quite another thing to apply said principles and rules faithfully, transparently, and holistically. If *Bruen* has taught the legal and historical communities anything, it is that the honest and objective practice of history-in-law is difficult for even our most learned jurists and legal scholars.[361] It is hubris to believe—as the *Bruen* majority apparently does—that the courts are better off picking and choosing from a "historical record compiled by the parties"[362] than relying on actual, no-kidding, historically and factually conscious research and analysis.[363] The former generally facilitates mythmaking, the latter much less so. This is especially true in the Second Amendment context given how, for decades, gun rights advocates have proactively hyperbolized and fabricated history in law review articles through their tried and true practice of circular citation gymnastics.[364] Additionally, to draw the courts' attention to this hyperbolized and fabricated history, gun rights advocates regularly stack case legal dockets in their favor through the submission of ideologically slanted amicus briefs—many of which are paid from the very same coffers as the party or parties challenging the law.[365]

Simply put, our adversarial legal system, at least as currently constituted, is not all that conducive to providing the courts with honest and objective history from which to jurisprudentially reason. This is largely because the courts are receiving their history *not* from experienced historians or respected historical works, but from lawyers and "motivated groups that are pressing for a particular outcome."[366] As Allison Orr Larsen aptly notes, "the history [these lawyers and motivated groups] present . . . is

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360 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 n.6 (2022).

361 To borrow from Oliver Wendell Holmes: "In order to know what [the law] is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. *But the most difficult labor will be to understand the combination of the two into new products at every stage*." OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881) (emphasis added).

362 *Bruen*, 142 S. Ct. at 2130 n.6 (quoting William Baude and Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 810–11 (2019)).

363 *Id.* at 2177–78 (Breyer, J., dissenting); *see also* Kelly, *supra* note 34, at 155–56 ("Counsel preparing briefs do not attempt to present a court with balanced and impartial statements of truth. On the contrary, counsel are expected to put the best face possible on all relevant matters . . . The object of this process is not objective truth, historical or otherwise, but advocacy—*i.e.*, the assertion of a client's interests.").

364 *See* CHARLES, ARMED IN AMERICA, *supra* note 3, at 279–95; Charles, *The Second Amendment in Historiographical Crisis*, *supra* note 22, at 1735–827.

365 Will Van Sant, *The NRA's Shadowy Supreme Court Lobbying Campaign*, POLITICO (Aug. 5, 2022), https://www.politico.com/interactives/2022/nra-supreme-court-gun-lobbying/.

366 Allison Orr Larsen, Opinion: *The Supreme Court Decisions on Guns and Abortion Relied Heavily on History. But Whose History?*, POLITICO (July 26, 2022), https://www.politico.com/news/magazine/2022/07/26/scotus-history-is-from-motivated-advocacy-groups-00047249.

mounted to make a point and served through an advocacy sieve."[367] And today, considering *Bruen*'s constitutional endorsement of "plausible" history,[368] the Second Amendment arena is more primed than ever for gun rights litigants to advance outlandish, hyperbolic, and unsubstantiated historical claims. The American Revolution was started due to British attempts at gun control,[369] one of the grievances in the Declaration of Independence was written with gun control in mind,[370] the founders believed in the formation and sustainment of militias independent from government,[371] and there were no gun controls laws on the books in the American Colonies and later United States until the turn of the nineteenth century[372] are just some of the outlandish, unsubstantiated historical claims advanced in gun rights circles over the past thirty years. But perhaps the worst, most egregious example[373] of them all is the 'all gun control is racist' claim.[374] For more than three decades this

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367 *Id.*

368 *Bruen*, 142 S. Ct. at 2141 n.11.

369 *See, e.g.*, HALBROOK, THE FOUNDERS' SECOND AMENDMENT, *supra* note 301, at 75–108, 328–30; *Guns and Independence*, AM. RIFLEMAN, July 1976, at 20. For a rebuttal, *see* Charles, *The Second Amendment in Historiographical Crisis*, *supra* note 22, at 1777–80.

370 *See, e.g.*, David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283, 284–86 (2012). For a rebuttal, *see* Charles, *The Second Amendment in Historiographical Crisis*, *supra* note 22, at 1784–91.

371 *See, e.g.*, STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILL OF RIGHTS AND CONSTITUTIONAL GUARANTEES 51–52, 61–62 (1989). For a rebuttal, *see* Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J. L. & PUB. POL'Y 323, 374–79 (2011).

372 *See, e.g.*, Nelson Lund, *Second Amendment Standards of Review in a* Heller *World*, 39 FORDHAM L. J. 1617, 1619–21 (2012); Nelson Lund, *No Conservative Consensus Yet: Douglas Ginsburg, Brett Kavanaugh, and Diane Sykes on the Second Amendment*, 13 ENGAGE 30, 30 (2012); Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, *supra* note 300, at 1368. *See also* Brief for Historians, Legal Scholars, and CRPA Foundation as Amici Curiae Supporting Appellees and in Support of Affirmance, Wrenn v. District of Columbia, 808 F.3d 81 (D.C. Cir. 2015) (No. 15-7057), at 15–33; Brief for Academics for the Second Amendment as Amicus Curiae Supporting Petitioners, Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012) (No. 12-845), at 16–18. For a rebuttal, *see* Charles, *The Second Amendment in Historiographical Crisis*, *supra* note 22, at 1830–31.

373 *See, e.g.*, Darrell A.H. Miller, *Conservatives Sound Like Anti-Racists—When the Cause is Gun Rights*, WASH. POST (Oct. 27, 2021), https://www.washingtonpost.com/outlook/2021/10/27/gun-rights-anti-racism-bruen-conservative-hypocrisy/.

374 *See generally* Patrick J. Charles, *Racist History and the Second Amendment: A Critical Commentary*, 43 CARDOZO L. REV. 1343, 1344–45, 1359–61 (2022); Patrick J. Charles, *Some Thoughts on Addressing Racist History in the Second Amendment Context*, DUKE SECOND THOUGHTS BLOG (Jan. 14, 2022), https://firearmslaw.duke.edu/2022/01/some-thoughts-on-addressing-racist-history-in-the-second-amendment-context/.

historical claim has permeated gun rights literature[375] and was front and center in *Bruen* amicus briefs supporting petitioners.[376] And although *Bruen* did not outright endorse the 'all gun control is racist' historical claim, it did invoke at least one aspect of the narrative—an invocation based on the most circumstantial of historical evidence no less[377]—in its analysis of Massachusetts Model type armed carriage laws.[378] This invocation will only further embolden gun rights writers and litigants to present even more circumstantial, *i.e.*, "plausible" evidence of racism or racist effects to show that any respective firearms regulation is unconstitutional.

And while the *Bruen* opinion, through its analytical double-standards and hypocritical approach to history-in-law, appears to stack the constitutional deck in favor of gun rights and against gun control, there is a jurisprudential and history-in-law argument to be made that government defendants will also be able to play loose with history.[379] This argument can be found in Associate Justice Brett Kavanaugh's concurring opinion, joined by Chief Justice John Roberts[380] Therein, Justice Kavanaugh writes that if *Bruen*'s approach to text, history, and tradition is applied properly by the lower courts, a "variety" of firearms regulations will ultimately

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375 *See* STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS: A CONSTITUTIONAL RIGHT OF THE PEOPLE OR A PRIVILEGE OF THE RULING CLASS? 264–75 (2021); Brief for National African American Gun Association, Inc. as Amicus Curiae Supporting Petitioners, N.Y. State Rifle & Pistol Association, N.Y. State Rifle & Pistol Ass'n v. City of New York, 139 S. Ct. 939 (2019) (No. 18-280), at 22–30 (authored by Stephen P. Halbrook); David B. Kopel, *The Racist Roots of Gun Control*, ENCOUNTER BOOKS (Feb. 23, 2018), https://www.encounterbooks.com/features/racist-roots-gun-control/; David B. Kopel & Joseph Greenlee, *The Racist Origin of Gun Control Laws*, THE HILL (Aug. 22, 2017), https://thehill.com/blogs/pundits-blog/civil-rights/347324-the-racist-origin-of-gun-control-laws; DAVID B. KOPEL, THE TRUTH ABOUT GUN CONTROL 11–15 (2013); Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHICAGO-KENT L. REV. 1307, 1307–11 (1995); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J. L. & PUB. POL'Y 17, 17 (1994); *see also* Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 242–45 (2020).

376 *See, e.g.*, Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449, 451, 452, 455 (2022).

377 *See* Brief for Robert Leider et al. as Amici Curiae Supporting Petitioners, N.Y. State Rifle & Pistol Ass'n v. City of New York, 139 S. Ct. 939 (2019) (No. 18-280), at 31–32; Leider, *Constitutional Liquidation*, *supra* note 222, at 15–17.

378 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2149 (2022).

379 *See, e.g.*, United States v. Charles, 2022 U.S. Dist. LEXIS 180375, at *17–*18, *23 (W. D. Tex. 2022) (noting that *Bruen* does not create an "inflexible" test for the courts in analogizing history and tradition); *see also* United States v. Seiwart, 2022 U.S. Dist. LEXIS 175417, at *4–*5 (N. D. Ill. 2022); United States v. Coombes, 2022 U.S. Dist. LEXIS 170323, at *12–*26 (N. D. Okla. 2022); United States v. Kays, 2022 U.S. Dist. LEXIS 154929, at *5–*11 (W.D. Okla. 2022).

380 *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring).

withstand constitutional scrutiny.[381] And in offering this assurance, Justice Kavanaugh reaffirmed *Heller*'s and *McDonald*'s list of longstanding, presumptively constitutional firearms regulations.[382] Interestingly among this list are three categories of firearms regulations—"prohibitions on the possession of firearms by felons and the mentally ill . . . [and] laws imposing conditions and qualifications on the commercial sale of arms"[383]—that did not begin to take hold in the United States until the early-to-mid twentieth century.[384]

This embrace of early-to-mid twentieth century regulations as presumptively lawful by Justice Kavanaugh is noteworthy because the *Bruen* majority opinion was forthright in dismissing all twentieth century history as unpersuasive in determining the meaning of the Second Amendment.[385] This history-in-law choice contained within the majority opinion could—if isolated from *Bruen* concurring opinions—constitutionally upend all firearm regulatory categories post-1900.[386] Take for example any firearms regulations based on alienage.[387] Firearms regulations based on alienage did not become prevalent (and certainly were not widespread) in the statute and ordinance books until the early to mid-twentieth century.[388] Considering this fact alongside the fact that the Second Amendment's text plainly states that the right to "keep and bear arms" belongs to "the people,"[389] not just citizens, unless government defendants are allowed to play loose with history—that is rely on the history of federal, state, and local immigration and alienage powers[390]—then all firearms regulations based on alienage must be nullified and ruled unconstitutional.

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381 *Id.* at 2162.

382 *Id.*

383 *Id.*

384 Indeed, the legislative genesis for these categories of firearms laws began in the late nineteenth century. CHARLES, ARMED IN AMERICA, *supra* note 3, at 156–57. However, it would not be until the early twentieth century, with the political backing of gun rights supporters, that the categories became widespread. *Id.* at 194–230.

385 *Bruen*, 142 S. Ct. at 2154 n.28.

386 *See, e.g.*, United States v. Price, 2:22-cr-00097, 2022 U.S. Dist. LEXIS 186571 (S.D. W. Va. 2022) (striking down 18 U.S.C. § 922(k), which prohibits the transport of any firearm with the "serial number removed, obliterated, or altered," as unconstitutional because serial numbers were not required on firearms until the twentieth century).

387 *See, e.g.*, 18 U.S.C. § 922(g)(5) (West 2022).

388 The first prevalent firearms restrictions based on alienage were part of the Capper Bill and later the Uniform Firearms Act. For a history, *see* CHARLES, ARMED IN AMERICA, *supra* note 3, at 194–204.

389 *See* Pratheepan Gulasekaram, *"The People," Citizenship, and Firearms*, DUKE SECOND THOUGHTS BLOG (Jan. 13, 2022), https://firearmslaw.duke.edu/2022/01/the-people-citizenship-and-firearms/; Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1522–23 (2010).

390 *See* United States v. Jimenez-Shilon, 34 F.4th 1042, 1049 (11th Cir. 2022).

The same can be said of the regulatory category of "imposing conditions and qualifications on the commercial sale of arms."[391] Unless the courts allow government defendants to pursue one of two approaches to analyzing history and tradition, then all firearms regulations pertaining to commercial sales of arms must be nullified and ruled unconstitutional. The first approach involves historically relying on founding era laws that prohibited the sale of arms to indigenous tribes and people of color.[392] But given moral and racist optics of invoking these founding era laws; the historical analogy is a poor vehicle for setting constitutional precedent.[393]

This only leaves us with the second approach of allowing governments and gun control proponents leeway in making highly flexible historical analogies between the firearms regulations of our past and present—firearms regulations no less that were not yet uniform or widespread. Uniformity in firearms regulation did not take hold as a legal concept in the United States until the early to mid-twentieth century with the advent of model state firearms legislation.[394] Until that point in time, firearms regulations varied widely from state to state, and sometimes even from locality to locality.[395] Local variation in the law was not solely a firearms or weapons regulatory concern.[396] It applied to many regulatory areas[397] and is one of the principal reasons why the American Bar Association ("ABA") was formed in 1878.[398] For many years,

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391 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (2022) (Kavanaugh, J., concurring).

392 *See, e.g.*, *Chap. XXIV: An Act, Concerning Slaves and Servants*, *reprinted in* A COLLECTION OF ALL THE PUBLIC ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH CAROLINA 161, 170 (1751) ("That no Slave shall go armed with Gun, Sword, Club, or other Weapon, or shall keep any such Weapon, or shall hunt or range with a Gun in the Woods, upon any Pretence whatsoever, (except such Slave or Slaves who shall have a Certificate, as is herein after provided) . . . ."); *Act of Dec. 1, 1642*, *reprinted in* PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 79 (1850) (forbidding the sale or giving of guns, gunpowder, shot, lead and military weapons to Indians, and requiring that persons "inhabiting out of this jurisdiction" have a license for such sale).

393 *But see* Kanter v. Barr, 919 F. 3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting) (citing laws prohibiting the sale of arms to slaves and indigenous tribes as historical support for modern laws disarming dangerous persons).

394 CHARLES, ARMED IN AMERICA, *supra* note 3, at 194–204.

395 *Id.* at 158.

396 The political rise of Jeffersonian Republicans in the early nineteenth century led to a shift away from a national, Anglo-American common law and towards individual state legal systems. This in turn led to a wide variance of laws on many legal subjects for much of the nineteenth century. For a helpful history, *see* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT, A STUDY IN ANTEBELLUM LEGAL REFORM (1981).

397 *Id.*

398 AMERICAN BAR ASSOCIATION, ANNUAL REPORT, INCLUDING PROCEEDINGS OF THE ANNUAL MEETING 30 (1878) ("[The ABA's] object shall be to advance the science of jurisprudence, promote the administration of justice and *uniformity of legislation throughout*

the ABA led the movement for the adoption of uniform state laws.[399] Initially, the movement was focused on what one legal commentor referred to as "conservative uniformity"[400]—that is uniform state laws aimed at issues such as divorce, marriage, estates, and commerce.[401] Over time, however, the movement set its sight on pressing national issues.[402] And given the precipitous rise of firearms related crime, assaults, injuries, and deaths in the early twentieth century, the uniformity of firearms law was eventually brought front and center.[403]

Understanding the history of the late nineteenth and early twentieth century movement for legal uniformity is rather important. It highlights just how preposterous it is for gun rights litigants in the wake of *Bruen* to argue that any historical firearms regulation must be widespread, uniform, or meet some ad hoc census population test to pass constitutional muster.[404] The historical reality is that but for a handful of

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the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar.") (emphasis added).

399 For some helpful backgrounders, *see* NATHAN WILLIAM MACCHESNEY, UNIFORM STATE LAWS, A MEANS TO EFFICIENCY CONSISTENT WITH DEMOCRACY (1916); James F. Colby, *Necessity for Uniform State Laws*, 13 FORUM 541 (1892).

400 Alton B. Parker, *Uniform State Laws*, 19 YALE L.J. 401, 407 (1910).

401 *See, e.g.*, Lewis N. Dembitz, *Uniformity of State Laws*, 106 N. AM. REV. 84, 88–89 (1899); F.J. Stimson, *National Unification of Law*, 7 HARV. L. REV. 92, 93 (1893); Lyman D. Brewster, *The Promotion of Uniform Legislation*, 6 YALE L.J. 132, 133 (1887).

402 For some helpful background, *see* Nathan William MacChesney, *Progress on Uniform State Laws*, 11 AM. BAR ASSOC. J. 807 (1925); *see generally* Nathan William MacChesney, *Progress in Passage and Formulation of Uniform State Laws*, 9 VA. L. REG. 579 (1923).

403 *See, e.g.*, Edward Marshall, *Guarding New York Against Death by Violence*, N.Y. TIMES, Mar. 1, 1914, at 10 (urging for the enactment of uniform state firearms laws in line with New York's Sullivan Law).

404 *See, e.g.*, Frey v. Nigrelli, 2023 U.S. Dist. LEXIS 42067 (S.D. NY 2023); Antonyuk v. Hochul, 2022 U.S. Dist. LEXIS 201944 (N.D. NY 2022); *see also* Andrew Willinger, *SCOTUS Gun Watch—Week of 1/9/23*, DUKE SECOND THOUGHTS BLOG (Jan. 9, 2023), https://firearmslaw.duke.edu/2023/01/scotus-gun-watch-week-of-1-9-23/. The census population test being proposed by several gun rights litigants is particularly specious, historically speaking, given that weapons restrictions up through the close of the nineteenth century were generally inapplicable outside of city and town centers. *See* Joseph Blocher, *Firearms Localism*, 123 YALE L.J. 82, 112–16 (2013) (discussing the historical urban-rural divide as it pertains to weapons regulations). In 1790 for instance, roughly ninety-five percent of the U.S. population lived outside of city and town centers, meaning that only five percent of the population would have been subject to weapons restrictions. *See* Leon E. Truesdell, *The Development of the Urban-Rural Classification in the United States: 1874 to 1949*, CURRENT POPULATION REPORTS 14 (Bureau of the Census, 1949). And by 1880, despite the precipitous rise of city and town centers, as well as the U.S. population growing more than twelve-fold, roughly seventy-two percent of the population continued to live outside of city and town centers, and therefore would not have been subject to most weapons restrictions. *Id*. It would not be until 1920 that the urban-rural U.S. population divide was equal. *See History: Urban and Rural Areas*, UNITED STATES CENSUS BUREAU, https://www.census.gov/history/www/programs/geography/urban_and_rural_areas.html.

firearms and weapons regulations, such as unlawful discharge and concealed carry laws, meeting this constitutional threshold will be almost impossible for government defendants. This includes the aforementioned regulatory category of "imposing conditions and qualifications on the commercial sale of arms . . . ."[405] Indeed, several mid-to-late nineteenth century charters provided local governments wide discretion in regulating and controlling the sale or use of firearms within their respective jurisdictions.[406] Moreover, it is important to note that by the close of the nineteenth century, there is no substantive evidence that historically suggests governmental police power to regulate the commercial sale of firearms and other deadly weapons

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405 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (2022).

406 *See, e.g.*, 7 THE LAWS OF TEXAS 1822-1897, at 233 (1898) (providing Bryan, Texas the authority to regulate in "relation to the use of guns, pistols, fire arms, [and] fire crackers of all kinds, within the city"); CHARTER OF THE CITY OF PATTERSON 59 (1894) (providing Patterson, New Jersey the authority to "regulate and prohibit the use of guns, pistols, firearms and fireworks of all descriptions within the city"); CHARTER AND ORDINANCES OF THE CITY OF SYRACUSE, NEW YORK 54 (1894) (providing Syracuse, New York the authority to regulate in "relation to the use of guns, pistols, fire-arms, fire-crackers, fire-works and detonating works of all descriptions within the city"); THE LAWS OF OREGON AND THE RESOLUTIONS AND MEMORIALS OF THE FIFTEENTH REGULAR SESSION OF THE LEGISLATIVE ASSEMBLY THEREOF 207, 246 (1889) (providing the Oregon cities of Albina and Albany the authority to "regulate and prohibit the use of guns, pistols and firearms, fire-crackers, bombs and detonating works of all descriptions"); THE DONGAN CHARTER, PRESENT CHARTER, CITY LAWS AND ORDINANCES AND LAWS OF THE STATE OF NEW YORK APPLICABLE TO THE CITY OF ALBANY 41 (1885) (providing Albany, New York the authority to regulate in "relation to the use of guns, pistols, fire-arms, fire-crackers, fire-works and detonating works of all descriptions within the city"); A REVISED CODE OF ORDINANCES OF THE CITY OF TUSCALOOSA 28 (1885) (1873 amendment granting Tuscaloosa, Alabama the authority to "license and regulate . . . dealers in pistols, bowie-knives and shotguns or fire arms, and knives of like kind or description . . . "); CHARTER AND CODE LAWS FOR THE CITY OF UNIONTOWN, ALABAMA 12–13 (1885) (charter granting Uniontown, Alabama the authority to "pass laws . . . [t]o establish, regulate and control . . . dealers in pistols, bowie knives, dirk Knives or brass knuckles"); CHARTER OF THE CITY OF PORTLAND 17 (1885) (providing Portland, Oregon the authority to "regulate and prohibit the use of guns, pistols and firearms, fire-crackers, bombs and detonating works of all descriptions"); LAWS OF THE TERRITORY OF WASHINGTON 112, 140, 302, 342 (1883) (providing the Washington cities of Olympia, Whatcom, Snohomish, and Cheney the authority to "regulate and prohibit the use of guns, pistols and fire-arms, fire-crackers, bombs and detonating works of all descriptions"); THE CHARTER, GENERAL ORDINANCES, BY-LAWS OF THE CITY OF TERRE HAUTE 51 (1882) (providing Terre Haute, Indiana the authority to "prevent or regulate the use of fire arms, fire works, or other things or practice tending to endanger persons or property"); *Charter for the City and County of San Francisco*, SAN FRANCISCO EXAMINER (CA), July 3, 1880, at 5 (providing San Franciso, California with the authority to regulate in "relation to the use of guns, pistols, firearms, firecrackers, fireworks and detonating works of all descriptions"); SPECIAL LAWS OF THE STATE OF TEXAS 194 (1873) (providing Sherman, Texas the authority to regulate in "relation to the use of guns, pistols, [and] firearms of all kinds within the city"); AN ACT TO REORGANIZE THE LOCAL GOVERNMENT OF NEW YORK, PASSED APRIL 5, 1870, at 16 (1871) (providing New York City the authority to regulate in "relation to the use of guns, pistols, firearms, firecrackers, and detonating works of all descriptions within the city"). *See also supra* note 256 (providing other examples of firearms localism in the armed carriage context).

was inviolate of the right to arms.[407] However, the historical fact remains that imposing conditions and qualification on the commercial sale of arms did not become widespread or uniform until the early-to-mid twentieth century.[408]

The point to be made is that the only way this regulatory category will pass constitutional muster post-*Bruen* is if government defendants are afforded historical leeway in articulating the public understanding of firearms regulations circa the mid-to-late nineteenth century. For it was during this period that one will find the first ordinances and laws regulating the commercial purchase and sale of firearms.[409] And it is important to note that given advances in firearms technology, to include notable advances in firearms lethality, firing rate, and firing range, it was during this period that one will find average Americans from across the country seriously debating and discussing the growing problem of firearms related violence.[410] And what most Americans at that time agreed upon was that more guns in the public sphere often led to more needless death.[411] This was in large part why discretionary armed carriage licensing laws proliferated as much as they did by the close of the nineteenth century.[412] Such laws ensured that only those that had a definite need to carry dangerous weapons in public could do so.[413] As a result, the habitual and unnecessary carrying of arms—which was seen as the cause of many firearms related deaths and injuries—would be effectively curtailed.[414]

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[407] If anything, the historical evidence available suggests the opposite—that is state and local governments could impose restrictions on the commercial sale of firearms and other deadly weapons. *See, e.g.*, *The Handy Pistol*, SAN FRANCISCO CHRONICLE (CAL.), Oct. 3, 1893, at 6 ("There is but one way to stop the indiscriminate carrying and use of pistols, and that is to go further back and impose rigid regulations on those who can sell them. If the cities of California would pass and enforce ordinances prohibiting dealers in firearms from selling pistols to anybody without a permit from the municipal authorities, and compelling them to mark every weapon with an indelible serial number, and to keep and accurate record of sale of such weapons, then it might be possible to enforce the ordinances [regulating armed carriage] . . . . It is not only the right, but the duty of cities to adopt such a plan. If we could be sure that the 'gun-fighters' would shoot only each other, there would be no need of restricting the sale of firearms, but, as in the Oakland case, it is often the innocent bystander who is made to suffer. The Constitution of the United States confers upon the people the right to bear arms, but it does not say that a city shall not inhibit their sale to every irresponsible or vicious hoodlum who has aspirations to become a 'bad man'.").

[408] CHARLES, ARMED IN AMERICA, *supra* note 3, at 194–98 (discussing the spread of mode state firearms bills).

[409] *Id.* at 156–57.

[410] *Id.* at 150–56.

[411] *Id.* at 151.

[412] *Id.* at 157–61.

[413] Brief of Amicus Curiae Patrick J. Charles in Support of Neither Party, *supra* note 112, at 8–13, appendix 2–45.

[414] *Id.* at 11.

In addition to believing that more guns in the public sphere generally led to more death, most Americans living at that time—to include legal commentators and jurists—believed that state and local governments maintained broad authority to enact firearms regulations in the interest of the health, safety, and welfare of its citizens.[415] This is not to say, of course, that every American living in the mid-to-late nineteenth century endorsed this view.[416] A small insular minority of Americans believed in the concept of Second Amendment absolutism—that is the right to "keep and bear arms" was absolute, and therefore any infringement on the right was unconstitutional.[417] But again, this was the view of an insular minority—a view that would not gain sufficient traction in the public discourse until the rise of the "no compromise" gun rights movement in the early 1970s.[418]

Herein lies the central problem for the courts in applying any 'history and tradition' analysis. How are jurists to know which historical viewpoints fall under the majority or minority headings without relying on verifiable history? As any experienced historian knows, if a dedicated researcher looks hard enough, they will find examples of individuals, institutions, or government bodies espousing whatever viewpoint or ideological predilection they hold dear. Thus, as Second Amendment cases and controversies move forward, jurists will assuredly have to sift through handpicked historical quotes by lawyers and motivated groups advancing selectively framed viewpoints and then decide which the majority and minority view is. And given *Bruen*'s endorsement of "plausible" history, are jurists forced to choose the respective viewpoint that is consistent with the Second Amendment's plain text, or can jurists require that it be verifiably proven as a majority viewpoint?

Personally, this Article would hope it is the latter given that the principal reason jurists rely on history is to ensure an accurate and objective outcome. However, considering *Bruen*'s pick and choose approach to history-in-law, one cannot be too sure. Consider *Bruen*'s historical treatment of the open carry-concealed carry distinction. According to the *Bruen* majority, by the mid-nineteenth century the national "consensus" view was that if a state or local government categorically banned

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415 CHARLES, ARMED IN AMERICA, *supra* note 3, at 156–57; *see also* Charles, *Scribble Scrabble*, *supra* note 152, at 1822–29 (providing founding era support for firearms regulations that served the interest of the public good).

416 CHARLES, ARMED IN AMERICA, *supra* note 3, at 167–72.

417 *Id.*; *see also* W.C. Webb, *The Right to Carry Arms: Judge Webb, of Topeka, Gives and Opinion*, LEAVENWORTH TIMES (KAN.), Nov. 27, 1896, at 5 (calling into question the regulatory authority of Kansas municipalities to pass armed carriage restrictions on the grounds such laws are (a) inviolate of the Kansas Constitution's right to arms and (b) inconsistent with a 1868 Kansas statute, yet conveniently omitting a 1871 Kansas statute that expressly provides Kanas municipalities to pass such restrictions); *Carrying Concealed Weapons*, 4 COLO. L. REP. 277, 281 (1883) ("[I] do [not] defend the practice of promiscuously carrying any sort of weapon; but the right to carry [weapons] is absolute and entirely independent of the question as to when it should be carried."); *Why a Veteran Georgian Believes in Carrying Concealed Weapons*, LEAVENWORTH WEEKLY PRESS (Kan.), May 15, 1879, at 4 (military veteran asserting that the "right of self-defense" affords persons the right "use anything" to facilitate it, including a "right to carry a pistol" any way he wants).

418 *See generally* PATRICK J. CHARLES, VOTE GUN: HOW GUN RIGHTS BECAME POLITICIZED IN THE UNITED STATES (2023).

the concealed carriage of dangerous weapons in public, it could not simultaneously ban their open carriage, or vice-versa.[419] This historical conclusion is utterly false. Indeed, the *Bruen* majority is correct in noting that a handful of Southern Antebellum state courts held that their respective legislatures could not ban both the open and concealed carrying of dangerous weapons.[420] This is without question. However, the *Bruen* majority is wrong in presuming that this was the national "consensus" view.[421] Far from it. The historical reality is that early to mid-nineteenth century Americans held a wide variety of views on going armed in public.[422] But what is most concerning about *Bruen*'s choice of historical viewpoint in this instance is that the majority never wrestles with the reasons why the open carry-concealed carry distinction was so prevalent in the South to begin with—these reasons being Southern notions of vengeance and honor through dueling, as well as subjugating people of color and maintaining the institution of slavery.[423]

It was the subjugating of people of color and maintaining the institution of slavery that would go on to influence John Brown in drafting the weapons articles within his 1859 Provisional Constitution and Ordinances for the People of the United States.[424] Brown had drafted his constitution in 1858 while staying at Frederick Douglass's home.[425] Therein, Brown defended his violent beliefs and actions on two grounds.[426] The first was that the institution of slavery was the "most barbarous, unprovoked, and unjustifiable War of one portion of its citizens against another portion."[427] The second was that America's sustainment of the institution was "in utter disregard and violation of those eternal and self-evident truths set forth" in the Declaration of Independence.[428] As it pertained to carrying weapons, Brown's constitution contained three articles—each of which was meant to protect "[a]ll persons of mature age, whether Prescribed, oppressed or enslaved Citizens, or of the Proscribed and

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419 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2146–47, 2150 (2022).

420 *Id.*

421 *Id.* at 2146–47.

422 *See* CHARLES, ARMED IN AMERICA, *supra* note 3, at 141–73, *accord* Charles, *The Second Amendment and the Basic Right to Transport Firearms for Lawful Purposes*, *supra* note 43, at 148–55.

423 *See* Ruben & Cornell, *supra* note 132, at 124–28.

424 JOHN BROWN, PROVISIONAL CONST. AND ORDINANCES FOR THE PEOPLE OF THE U.S. 1, 14, https://catalog.archives.gov/id/3819337.

425 ROBERT E. MCGLONE, JOHN BROWN'S WAR AGAINST SLAVERY 213–16 (2009); DAVID S. REYNOLDS, JOHN BROWN ABOLITIONIST: THE MAN WHO KILLED SLAVERY, SPARKED THE CIVIL WAR, AND SEEDED CIVIL RIGHTS 249–56 (2005).

426 BROWN, *supra* note 424, at 1.

427 *Id.*

428 *Id.*

oppressed races of the United States" from harm.[429] Article 44 prohibited the carrying of concealed weapons except for specified government officers and officials.[430] Article 45 sought to compliment Article 44 wherein a person "not connected" with Brown's movement was found carrying arms, "concealed or otherwise."[431] No matter whether the person was unlawfully carrying weapons in violation of Article 44 or Article 45, anyone, not just specified government officers and officials, could seize, arrest, and carry the person to be "investigated" by "some vigilant officer . . . ."[432] And what allowed anyone associated with Brown's movement to disarm an armed outsider was the third and last carrying weapons article within Brown's proposed constitution, Article 43.[433] That article "encouraged" "all persons . . . whether male of female" "connected" with Brown's movement and "known to be of good character, and of sound mind and suitable age" to "carry arms openly . . . ."[434]

Why would Brown encourage his followers to open carry, yet at the same time prohibit the concealed carry of weapons, as well as both the open and concealed carrying of weapons by outsiders? The answer lies with understanding Brown's views on justifiable violence, which were extremist to say the least.[435] According to Brown, when it came to eradicating slavery and guaranteeing racial equality, violence was not

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429 *Id.* at art. I ("All persons of mature age, whether Proscribed, oppressed and enslaved Citizens, or of the Proscribed and oppressed races of the United States, who shall agree to sustain and enforce the Provisional Constitution and Ordinances of this organization, together with all minor children of such persons, shall be held to be fully entitled to protection under the same.").

430 *Id.* at art. XLIV ("No person within the limits of the conquered territory, except regularly appointed policemen, express officers of the army, mail carriers, or other fully accredited messengers of the Congress, President, Vice President, members of the supreme court, or commissioned officer of the army—and those only under peculiar circumstances—shall be allowed, at any time, to carry concealed weapons; and any person not specially authorized so to do, who shall be found so doing, shall be deemed a suspicious person, and may at once be arrested by any officer, soldier, or citizen, without the formality of a Complaint or Warrant, and may, at once be subjected to thorough search, and shall have his or her case throughout investigated; and be dealt with as circumstances, on proof, shall require.").

431 *Id.* at art. XLV ("Persons within the limits of the territory holden by this organization, not connected with this organization, having arms at all, concealed or otherwise, shall be seized at once; or be taken in charge of some vigilant officer; and their case thoroughly investigated: and it shall be the duty of all citizens and soldiers, as well as officers, to arrest such parties as are named in this and the preceding Section or Article, without the formality of Complaint or Warrant; and they shall be placed in charge of some proper officer for examination, or for safe keeping.").

432 *Id.*

433 *Id.* at art. XLIII.

434 *Id.* ("All persons known to be of good character, and of sound mind, and suitable age, who are connected with this organization, whether male or female, shall be encouraged to carry arms openly.").

435 *See, e.g.*, R. BLAKESLEE GILPIN, JOHN BROWN STILL LIVES!: AMERICA'S LONG RECKONING WITH VIOLENCE, EQUALITY, AND CHANGE 18, 26–27 (2014).

only justified but actively encouraged.[436] Simply put, to Brown, the ends justified the means, no matter how violent and no matter who was caught in the bloody crossfire. And Brown, a student of slavery, understood that slaveholders and slave patrols regularly utilized the open carriage of arms to strike fear into slaves and deter potential revolts.[437] Article 43 countered this.[438] For by encouraging his followers to open carry, Brown was letting slave holders and slave patrols know that they too should be fearful.

Here, history informs how the open carriage of weapons in the early to mid-nineteenth century was largely synonymous with subjugation, fear, oppression, and violence. Certainly, there is a historical argument to be made that the open-concealed carry distinction in Southern Antebellum law was developed in part to distinguish between the lawful and unlawful use of arms.[439] Lawful people, it was reasoned, carried arms openly.[440] Unlawful, dastardly people did not.[441] But to be historically honest, it cannot be denied that the open-concealed carry distinction was also about suppressing people of color through threats of violence.

And given this fact, one would think the Supreme Court in *Bruen* would give considerable pause before endorsing it as the "consensus" view.[442] This, of course, did not happen and it underscores two interrelated points about invoking, utilizing, and applying history-in-law in the real world. The first point is that the idea or concept of a text, history, and tradition approach to constitutional interpretation may sound good in principle.[443] It is another thing, however, to implement it in a way that is transparent, objective, and doctrinally holistic. As is often said, "the devil is in the details," which brings us to the second important point about invoking, utilizing, and applying history-in-law in the real world.[444] Accurate, objective, and transparent historical analysis is not as easy as it seems or is often made out to be by members of

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436 *Id.*; REYNOLDS, JOHN BROWN ABOLITIONIST, *supra* note 425, at 122–23, 151–52, 164–66.

437 For an informative history of slave patrols, *see* SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 168–72 (2001).

438 BROWN, *supra* note 424, at art. XLIII.

439 GILPIN, *supra* note 435, at 4.

440 *See, e.g.*, *An Ordinance Concerning Offenses Affecting Public Peace and Quiet*, Dec. 21, 1874, *reprinted in* HISTORY OF RAY COUNTY, MO. 427, 428 (1881) ("No person shall wear or carry about his or her person, any pistol, dirk, bowie knife, revolver, slingshot, brass, lead or iron knuckles, or any other deadly weapon *except in such a manner that such weapon can plainly and distinctly be seen by any person*; any violation of the provisions of this section, shall be punished by a fine of not less than one, nor more than ninety dollars and costs.") (emphasis added).

441 *Id.*

442 *Id.*; N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

443 *Bruen*, 142 S. Ct. at 2127–28.

444 *See, e.g.*, SCALIA & GARNER, READING LAW, *supra* note 333, at 399–402.

the bench and bar.[445] As *Bruen* shows us, jurists, including our most learned jurists, can be easily led astray through the "law office history" pleadings of lawyers and motivated groups.[446]

Much of the problem stems from an unfamiliarity with historiography across the legal profession. Historiography is essential for historians in delineating between verifiable academic history and amateur junk history. It informs where respective historical theories, theses, and claims come from, how and why they were formulated, and if they are still viable or if they have been rebutted. It is like shepardizing case law, but for the study of history there is no research database or tool that anyone can refer to. Rather, when it comes to historiography, one must conduct the old-fashioned practice of reading copious amounts of literature, understanding the historical methodology behind each writing, and subsequently checking, comparing, and contrasting the historical sources within them. This academic exercise is not for the fly-by-night historian. The process is long and time consuming. Grappling with the historiography of a particular subject or event can take an experienced historian years or even a decade to sort through. Historiography involves much more than picking and choosing historical winners under some ad hoc, "plain text" plausibility standard. Rather, understanding the reefs and shoals of historiography is hard work, but necessary if one wants to be serious about getting history right, or at the very least minimizing historical mistakes and errors.[447]

IV. RESOLVING *BRUEN*'S TEXT, HISTORY, AND TRADITION PROBLEM

Much like after *District of Columbia v. Heller* and *McDonald v. City of Chicago*, the Supreme Court's opinion in *Bruen* has left lower courts with far more questions than answers.[448] While *Bruen* is clear in pronouncing that text, history, and tradition is the foundation from which lower courts are to gauge the constitutionality of firearms and weapons regulations moving forward, what is less clear is how it is supposed to be implemented.[449] If one focuses squarely on the majority opinion, there is an

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[445] *Id.*

[446] *Bruen*, 142 S. Ct. at 2177 (Breyer, J., dissenting).

[447] For more on historiography and the discipline of history, *see* JEREMY BLACK, CLIO'S BATTLES: HISTORIOGRAPHY IN PRACTICE (Indiana University Press, 2015); GORDON S. WOOD, THE PURPOSE OF THE PAST: REFLECTIONS ON THE USES OF HISTORY (The Penguin Press, 2008); PHILLIPP SCHOFIELD & PETER LAMBERT, MAKING HISTORY: AN INTRODUCTION TO THE HISTORY AND PRACTICES OF A DISCIPLINE (2004); PETER NOVICK, THAT NOBLE DREAM: THE 'OBJECTIVITY QUESTION' AND THE AMERICAN HISTORICAL PROFESSION (Cambridge University Press, 1988); BARBARA W. TUCHMAN, PRACTICING HISTORY: SELECTED ESSAYS (Alfred A. Knopf, Inc., 1981); HERBERT BUTTERFIELD, MAN ON HIS PAST (The Syndics of the Cambridge University Press, 1955).

[448] *Compare Bruen*, 142 S. Ct. at 2135 (noting that the majority opinion favors gun rights over regulations due to historical implications) *with id.* at 2133, 2150 (highlighting how regulation is also rooted in historical tradition).

[449] *See* Brannon P. Denning & Glenn H. Reynolds, *Retconning* Heller*: Five Takes on* New York Rifle & Pistol Association, Inc. v. Bruen, 65 WM. & MARY L. REV. at manuscript 16–19 (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4372216 (likening

argument to be made that the rules laid down in *Bruen* presume liberty, and therefore favor gun rights over firearms regulation absent a definitive showing by the government that the regulation at issue is shown to be "consistent with this Nation's historical tradition of firearm regulation."[450] Yet at the same time *Bruen* stipulates that the "reasonable regulation" of firearms is also part of our historical tradition and that the Second Amendment is not a regulatory "straightjacket."[451] How are the lower courts supposed to reconcile these two competing statements? In trying to find an answer to this question, it does not help that at several times the majority opinion analytically contradicts itself. Therefore, how are the lower courts to make sense of *Bruen* and faithfully apply it?

The way this Article sees it, there are basically two avenues for the lower courts to approach text, history, and tradition. The first is to follow the *Bruen* majority's lead in practicing hokey pokey, pick and choose, fugazi history through ad hoc, non-holistic, historical methodologies and practices advanced by non-history experts. The second is to resort to a more principled, structured, and historically objective approach as advanced by history experts.[452] As it pertains to the first avenue of practicing hokey pokey, pick and choose, fugazi history, so long as the lower courts provide a sufficient rationale as to why one litigant's presentation of the historical record is more convincing than the other, it will technically be in line with *Bruen*.[453] In employing this approach, the lower courts do not need to be methodologically consistent with their analysis of historical texts and evidence, nor holistic with their historical analogies. Rather, so long as the respective lower court's choice of history is indeed plausible, the history chosen is arguably sufficient to pass constitutional muster.

This first avenue of approach has already been adopted and applied by some lower courts.[454] This is not surprising. It also happened in the wake of *Heller* and *McDonald*.[455] However, this Article hopes that most lower courts will take a different, second avenue of approach—that is adopt and employ a more objective, historically

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Bruen's text, history, and tradition methodology to *South Park*'s Season 2, Episode 17 "underpants gnomes" television episode).

450 *Bruen*, 142 S. Ct. at 2135.

451 *Id.* at 2133, 2150.

452 *See, e.g.*, Charles, *The Second Amendment in Historiographical Crisis*, *supra* note 22, at 1854–64 (proffering a holistic and objective historical standard to analyzing Second Amendment claims).

453 *See, e.g.*, Randy E. Barnett & Nelson Lund, *Implementing* Bruen, L. & LIBERTY BLOG (Feb. 6, 2023), https://lawliberty.org/implementing-bruen/ (asserting that the lower courts will manipulate history to uphold modern gun control laws, and that Heller's list of presumptive gun controls contradicts any text, history, and tradition analysis).

454 *See, e.g.*, United States v. Jackson, 2022 WL 3582504, at *2–3 (W.D. Okla. Aug. 19, 2022); Firearms Pol'y Coal., Inc. v. McCraw, 2022 WL 3656996, at *3, 9 (N.D. Tex. Aug. 25, 2022).

455 *See generally* Charles, *The Faces of the Second Amendment Outside the Home, Take Three*, *supra* note 9 (examining the different circuit courts history-in-law approaches to the Second Amendment outside the home).

accurate, and holistic approach to text, history, and tradition. An approach that aids in facilitating predictability and reliability in the law, or what is otherwise known as stare decisis;[456] an approach that seeks to mesh the *Bruen* majority opinion[457] with that of Associate Justice Brett Kavanaugh's concurring opinion[458] and ensures that a "variety" of firearms regulations,[459] including those that were not widespread until the twentieth century,[460] survive constitutional scrutiny.

What does a principled approach to text, history, and tradition look like? While there are indeed several ways of formulating such an approach, in this author's humble opinion it requires adhering to four basic history-in-law rules: (1) historical context over historical inference (always); (2) the past and present are not the same, nor can they ever be, and it is utter hubris to suggest otherwise; (3) history serves the law and jurists better as a flexible guidepost than an firm outcome determinative tool; and (4) history, to include the history of the development of particular bodies of law, is largely premised on common sense, and it is that common sense that should principally guide the courts.[461]

As it pertains to the first rule on historical context over historical inference, the rule simply dictates that historical context indeed matters, and matters definitively more than any history-based legal claims built upon conjecture or inference. In other words, history-based legal claims that are principally derived from the lawyering or select parsing of historical sources rather than substantive no-kidding, historical evidence are not the type of history-based legal claims that jurists should be building their evidentiary base from which they legally reason, nor from which they historically analogize from. For jurists, or anyone for that matter, to build an analogy on nothing more than the lawyering of history or a historical inference is essentially the same thing as fabricating history. To borrow once more from English historian Herbert Butterfield, the greatest "sin" in historical composition is not "bias" but when an individual seeks "to abstract events from their context and set them up in implied comparison with the present day, and then pretend that by this 'the facts' are being allowed to 'speak for themselves.'"[462]

The second rule that should be followed by jurists to ensure that any approach text, history, and tradition is even keeled and principled is that the past and the present are

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456 For some discussions, *see* Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533 (2008); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281 (1990); Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A. J. 501 (1945).

457 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2139–54 (2022).

458 *Id.* at 2161–62 (Kavanaugh, J. concurring).

459 *Id.* at 2162.

460 *Id.* at 2189 (Breyer, J. dissenting).

461 *See generally* Charles, *The Faces of the Second Amendment Outside the Home, Take Three*, *supra* note 9 (discussing broadly history-in-law and its implications).

462 BUTTERFIELD, *supra* note 90, at 57.

not the same, nor will they ever be. This rule is important because often when members of the bench and bar look to history for interpretative guidance it is forgotten that what may have worked in the past may no longer work today. The demise of Massachusetts Model type armed carriage laws is one case on point. By the late nineteenth century, due to demographic changes and advances in firearms technology, this highly flexible method of preventing the habitual carriage of dangerous weapons in public places was no longer working as intended.[463] As a result, state and local governments began enacting more tangible modes of armed carriage enforcement, such as replacing the Model's surety of the peace process with concrete fines and sentences or enacting discretionary armed carriage licensing laws.[464] The gradual demise of the Southern open-concealed carry distinction in armed carriage law is another case in point.[465] The Thirteenth Amendment's abolishment of slavery which nullified the need for publicly armed slave patrols, coupled with a precipitous rise in firearms related crimes, injuries, and deaths, steered several mid-to-late nineteenth century Southern courts to embrace northern attitudes on the needs to preventing all types of armed carriage in public spaces, whether such carriage was open or concealed.[466] In other words, as firearms technology advanced and society changed so did the law. The law had to. It is the law's natural path.

The point to be made is that when members of the bench and bar advocate for a so-called originalist return to a past legal rule or system it is important to first consider how and why our society moved away from that rule or system, and then ask themselves the following questions: How will returning to that past legal rule or system work today? What, if anything, will it legally upend? What are the benefits and burdens of making this originalist return? Is there a way to embrace or implement this rule in a way that minimally impacts the legal status quo?

Asking and answering these questions are important for they tie into the third rule on implementing a principled approach to text, history, and tradition—this rule being history best serves as a jurisprudential guide rather than as an outcome determinative tool. The fact of the matter is that we can only ask so much of the past in answering the questions of the present. To state this differently, our understanding of the past is forever incomplete. As noted earlier in Part II.B and Part III.A, in all but a few cases, the historical records that have survived posterity are only a small fraction of the whole.[467] The simple point to be made is this; there is only so much that we, living in the present can discern from the past, and therefore it is prudent that one exercises intellectual humility when importing the past for the legal present.

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463 *See infra* pp. 652–53 and accompanying notes.

464 *See, e.g.*, THE REVISED ORDINANCES OF PROVO CITY, UTAH 96 (1893) ("Every person who shall wear, or carry upon his person any pistol, or other fire arm, slungshot, false-knuckles, bowieknife, dagger or any other dangerous or deadly weapon within the city limits of this city is guilty of an offence, and upon conviction thereof shall be liable to a fine in any sum not exceeding twenty-five dollars, or to be imprisoned in the city jail not exceeding twenty-five days, or to both fine and imprisonment.").

465 CHARLES, ARMED IN AMERICA, *supra* note 3, at 154–55.

466 *Id.* at 161–62.

467 *See supra* Part II.B and Part III.A.

A critical examination of virtually any historical writing or document weighs this out. Consider the early 1789 correspondence between Massachusetts Chief Justice William Cushing and John Adams on the "liberty of the press."[468] Cushing penned several questions to Adams regarding Article XVI of the Massachusetts Declaration of Rights, which reads, "the liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth."[469] In particular, Chief Justice Cushing wondered whether a libel directed against officeholders could be punishable under the clause if "such charges are supportable by the truth of fact."[470] He further elaborated, writing:

> But the words of our article understood according to plain English, make no such distinction, and must exclude *subsequent* restraints, as much as *previous restraints* . . . .
>
> The question upon the article is this—What is the liberty of the press, which is essential to the security of freedom? The propagating literature and knowledge by printing or otherwise tends to illuminate men's minds and to establish them in principles of freedom. But it cannot be denied also, that a free scanning of the conduct of the administration and shewing the tendency of it, and where truth will warrant, making it manifest that it is subversive of all law, liberty, and the Constitution; it can't be denied. I think that the liberty tends to the *security of freedom in a State*; even more directly and essentially than the liberty of printing upon literary and speculative subjects in general. Without this liberty of the press could we have supported our liberties against British administration? or could our revolution have taken place? Pretty certainly it could not, at the time it did. Under a sense of impression of this sort, I conceive, this article was adopted. This liberty of publishing truth can never effectually injure a good government, or honest administrators; but it may save a state from the necessity of a revolution, as well as bring one about, when it is necessary . . . .
>
> But this liberty of the press having truth for its basis who can stand before it? Besides it may facilitate a legal prosecution, which might not, otherwise, have been dared to be attempted. When the press is made the vehicle of falsehood and scandal, let the authors be punished with becoming rigour.
>
> But why need any honest man be afraid of truth? The guilty only fear it; and I am inclined to think with Gordon (Vol. 3 No. 20 of Cato's Letters) that truth scarcely adhered to, can never upon the whole prejudice, right religion, equal government or a government founded upon proper balances and checks, or the happiness of society in any respect, but must be favorable to them all.

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468 Original Draft of Letter from William Cushing, Chief Justice, to John Adams (Feb. 18, 1789), *in* MASS. L.Q., Oct. 1942, at 12, 12 [hereinafter Letter from Chief Justice Cushing].

469 MASS. CONST. art XVI (annulled 1948).

470 Original Draft of Letter from William Cushing, *supra* note 468, at 12.

> Suppressing this liberty by penal laws will it not more endanger freedom than do good to government? The weight of government is sufficient to prevent any very dangerous consequences occasioned by *provocations* resulting from charges founded in truth; whether such charges are made in *a legal course or otherwise*. In either case, the *provocation* (which Judge Blackstone says is the sole foundation of the law against libels) being much the same.
>
> But not to trouble you with a multiplying of words; If I am wrong I should be glad to be set right, &c., &c.[471]

Chief Justice Cushing's letter highlights three important aspects on the liberty of the press in the late eighteenth-century. First, Cushing's analysis incorporates treatises such as William Blackstone's *Commentaries*, and *Cato's Letters*.[472] Certainly, the practice of incorporating available legal treatises into constitutional analysis was quite common among the founding generation.[473] A close reading of Cushing's letter, however, reveals other intellectual influences that coincidently matriculated through a free press.[474] Second, Cushing's remembrance of the American Revolution highlights the significant event that shaped the liberty of the press.[475] Just as actual events would affect the adoption, text, and structure of the Declaration of Independence,[476] so too did they affect the founding generation's view on constitutional doctrine.[477] Third, and perhaps most importantly, Cushing embraced the liberty of the press as an entity that facilitates the voice of the people, which "directly and essentially" contributes to the "*security of freedom in a State*."[478] Cushing made sure to distinguish between reporting on the "conduct of the administration and shewing the tendency of it" and the "liberty of printing upon literary and speculative subjects in general."[479] Even John Adams's reply to Cushing conveys a larger constitutional purpose for the press:

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471 *Id.* at 14–15 (emphasis added).

472 *Id.*

473 *See generally* Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984) (discussing how European writers had an influence on American political thought between 1760 and 1805).

474 *See generally* Original Draft of Letter from William Cushing, *supra* note 468.

475 Interpreting the Constitution through the events of the American Revolution is rare among legal scholars but is crucial to understanding the evolution of eighteenth-century political and constitutional thought. *See generally* JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION (2011).

476 *See generally* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 105–23 (Alfred A. Knopf, Inc., 1997).

477 *See* Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence*, *supra* note 151, at 477–512.

478 Original Draft of Letter from William Cushing, *supra* note 468, at 14 (emphasis added).

479 *Id.*

> Our Chief Magistrates and senators &c are annually eligible by the People.[480] How are their Characters and Conduct to be known to their Constituents but by the Press? If the Press is Stopped and the People kept in Ignorance, We had much better have the first Magistrates and senators hereditary.[481]

Ultimately, what this historical exchange informs is that Cushing and Adams saw the liberty of the press as crucial to the success of the American Republic. Both men viewed it not merely as an extension of free speech or a right to publish through the invention of printing.[482] A free press meant much more.[483] What this historical exchange *does not* inform is whether other persons living at that time shared Cushing's and Adam's views. It also *does not* inform the full parameters of the "liberty of the press," particularly how it would apply in certain examples or cases. Answering these questions requires a further historical deep dive, and upon doing so it is clear that the founders viewed the liberty of the press as much more than an extension of free speech through print mediums.[484] The founders did not refer to the "liberty of the press" as a palladium or bulwark of liberty[485] and frequently toast to said liberty at constitutional celebrations without reason.[486] It was intentional.[487] A free press as an institution was deemed crucial for the future success of the American Republic.[488] But noting this historical fact does very little to educate us on how the "liberty of the press" was meant to constitutionally operate—that is a free press's right and left constitutional parameters.[489] The available historical evidence cannot answer this question, and it is just one of many examples as to why history should mainly serve as a jurisprudential guide rather than an outcome determinative tool.

This brings us to the fourth and last rule that jurists should follow to ensure that any approach to text, history, and tradition is even keeled and principled; history, to include the history of the development of particular bodies of law, is largely premised

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480 Original Draft of Letter from John Adams, to William Cushing, Chief Justice (March 7, 1789).

481 *Id.* at 16.

482 *See* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 511 (2011) (making this line of historical argument based on nothing more than a handful of legal commentaries).

483 *See generally* Patrick J. Charles & Kevin F. O'Neill, *Saving the Press Clause from Ruin: The Customary Origins of a "Free Press" as Interface to the Present and Future*, 2012 UTAH L. REV. 1691 (2012); *see also* Sonja R. West, *The "Press," Then & Now*, 77 OHIO ST. L.J. 49, 70 (2016).

484 Charles & O'Neill, *supra* note 483, at 1717–19.

485 *Id.*

486 *Id.* at 1726.

487 *Id.*

488 *Id.*

489 *See id.* at 1723.

on common sense, and it is common sense that should principally guide us in formulating legal analysis.[490] This Article is not alone in articulating this history-in-law rule. For instance, in *Kanter v. Barr*, then Seventh Circuit Court of Appeals Judge Amy Coney Barrett noted that "[h]istory is consistent with common sense," and therefore in the Second Amendment context demonstrates that "legislatures have the power to prohibit *dangerous* people from possessing guns."[491] Similarly, in another Seventh Circuit Court of Appeals opinion, *Friedman v. City of Highland Park*, Judge Frank Easterbrook applied historical common sense in determining that lawmakers inherently have the power to prohibit the ownership and purchase of certain modern military grade rifles.[492] As Judge Easterbrook noted, modern military grade rifles are historically far removed from their 1791 muzzle loading counterparts, and sufficiently more deadly than any nineteenth-century era firearm.[493] For these reasons, Judge Easterbrook found it a historical bridge too far to grant modern military grade rifles a constitutionally protected status simply because they are being mass manufactured, and said rifles *could* be used in a self-defense capacity.[494] The way Judge Easterbrook saw it, to rule the other way—that is accept the premise that any firearm, no matter how deadly and dangerous, is constitutionally protected simply because of its present commercial manufacturing and potential to *facilitate* self-defense—would mean that every firearm is constitutionally protected.[495] And such a legal conclusion would effectively gut lawmakers' ability to commercially restrict the production, sale, and transfer of any dangerous weapons in the present and future.[496] Simply put, common sense dictates that there must be a no-kidding, legal line somewhere that allows lawmakers to restrict or even ban certain dangerous weapons.[497]

And what makes Judge Easterbrook's legal analysis even more common sense is the fact that it is consistent with the most basic and sweeping historical tradition pertaining to the regulation of arms. This historical tradition being that since the Norman Conquest,[498] lawmakers and government bodies have regulated the access, ownership, and use of arms in a variety of settings through what is commonly known

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490 *See, e.g.*, Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

491 *Id.* (emphasis added).

492 *See* Friedman v. City of Highland Park, 784 F.3d 406, 412 (7th Cir. 2015).

493 *See id.* at 410.

494 *Id.* at 411.

495 *Id.*

496 *See id.* at 412.

497 As one anonymous writer put it in 1789, although the 1780 Massachusetts Constitution enshrined the "freedom of the press" and the "right to keep and bear arms," there must be laws that restrict both rights to "prevent the wonton injury and destruction of individuals" and ensure there is a legal "line some where, or the peace of society would be destroyed by the very instrument designed to promote it." *Liberty*, INDEP. CHRON. & UNIVERSAL ADVERTISER (Bos., Mass.), Aug. 20, 1789, at 1.

498 Charles, *Scribble Scrabble*, *supra* note 152, at 1822.

as the police power, whether it be in the individual or communal militia capacity.[499] This police power to regulate arms in the interest of society's health, safety, and welfare (what the founders often referred to as the common or public good) has coexisted with the right to arms from the beginning,[500] was repeated by members of the bench and bar up through the turn of the twentieth century,[501] and was even acknowledged by gun rights advocates for more than half a century.[502] To be clear,

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499 *See id.* at 1822–35; Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights*, *supra* note 371, at 331–33; *see also* Presser v. Illinois, 116 U.S. 252, 580–81 (1886).

500 *See* Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 L. & HIST. REV. 197, 197–204 (2007); Robert Churchill, *Gun Regulation, the Police Power, and the Right to Keep and Bear Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & HIST. REV. 139, 161–65 (2007); Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence*, *supra* note 151, at 497–507, 517–22.

501 *See* CHARLES, ARMED IN AMERICA, *supra* note 3, at 143–53 and accompanying notes.

502 *See, e.g.*, Harold W. Glassen, *Right to Bear Arms Is Older than the Second Amendment*, AM. RIFLEMAN, Apr. 1973, at 23 ("It is necessary . . . [that] the millions [of gun owners] who think as we do to recognize at once that 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."); Raymond F. Hamel, *Con-Con Protects Gun Owners*, CHI. TRIB., Dec. 8, 1970, at 20 (statement of Illinois Rifle Association president Raymond F. Hamel: "The [police] power has existed without regard to any constitutional provision from the earliest days of our republic and its inclusion here serves only to assure concerned voters that present [firearms control] statutes will not be invalidated."); Harold W. Glassen, Remarks Before the Duke Law Forum, Duke University, February 18, 1969, Harold W. Glassen Papers, box 1 (Ann Arbor, Mich.: University of Michigan Bentley Historical Library), at 8 ("Under the police power states have a right to control firearms."); PROPOSED AMENDMENTS TO FIREARMS ACTS 171 (1965) ("The general police power resides in the individual states. In the exercise of this power and in the due administration of criminal justice, the states have adopted various controls over the possession, purchase, sale, carrying, and use of firearms . . . . A virtually infinite variety of regulation, not repugnant to the state constitution, is possible and is adopted under the police power. Limitations on the exercise of this power are not easily definable. Of all the powers of state government, the police power is the least limitable."); FEDERAL FIREARMS LEGISLATION 415 (1968) ("The Second Amendment . . . guarantees against infringement the right of the people to keep and bear arms. However, there can be no doubt that the states, under their broad 'police power', can enact legislation controlling the possession and use of firearms by private citizens. Such controls are not necessarily unconstitutional, and many existing firearms laws have been repeatedly upheld by the courts."); Judge Bartlett Rummel, *To Have and Bear Arms*, AM. RIFLEMAN, June 1964, at 41 ("Despite all constitutional provisions, under the police power of the States the courts generally have upheld what they have considered the reasonable regulation of concealed weapons, the possession of weapons not ordinarily used for defense or warfare, the firing of guns in populous areas, and many other like regulations. Although the Federal government has no police power and can impose controls over firearms only through its right to tax, and its jurisdiction over the mails, all the States do have what is known as police power. Police power is the right to regulate the conduct of persons in furtherance of the health, the safety, and the general welfare of the citizens."); *Basic Facts of Firearms Control*, AM. RIFLEMAN, Feb. 1964, at 14 ("Thirty-five states have constitutional provisions guaranteeing the

the police power is *the* historical tradition and legal doctrine that binds all weapons regulations from thirteenth century England to the present. For whatever reason, *Bruen* does not mention it, not even in passing, but it is indeed a part of our collective past and something that the courts will assuredly have to wrestle with. It is a legal doctrine that runs directly counter to the argument that all arms, no matter how deadly and no matter their intended purpose, are protected under the umbrella of the Second Amendment—an argument that did not enter the public discourse until the rise of the 'no compromise' gun rights movement in the early 1970s.[503] Up to that point in time, gun rights advocates only claimed that common use, sporting and target shooting type firearms were constitutionally protected by the Second Amendment.[504] Military grade firearms were not.[505] Moreover, in line with contemporary proponents of military grade firearms restrictions, gun rights advocates of years' past openly admitted that military grade firearms, such as the AR-15, were not about stopping would be

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right 'to keep and bear arms.' The courts have held that the states under there general and broad police powers may regulate, within the limits of their constitutions, the possession and use of firearms in furtherance of the health, safety, and general welfare of their citizens. In the exercise of this power and in the due administration of criminal justice, the states have adopted various controls over the possession, purchase, sale, carrying, or use of firearms."); NATIONAL RIFLE ASSOCIATION, THE PRO AND CON OF FIREARMS LEGISLATION 3 (1940) (noting that state governments through the "judicious use" of "the police power . . . may properly regulate the use of firearms as a means of preventing crime but legislatures cannot exercise [it] in an arbitrary manner . . ."); Karl T. Frederick, *Pistol Regulation: Its Principles and History*, 23 AM. INST. CRIM. L. & CRIMINOLOGY 531, 540 (1932) ("The decisions of courts have generally been to the effect that the particular laws under consideration regulating the possession or use of pistols were not unconstitutional by reason of [state constitutional right to arms provisions], but that in the particular cases presented they constituted an exercise of what is known as the 'police power' of the State and were valid.").

503 *See generally* CHARLES, VOTE GUN, *supra* note 418, at 199–247.

504 *See, e.g.*, Woodson D. Scott, *A Statement By the President of the National Rifle Association*, AM. RIFLEMAN, Mar. 1970, at 16 ("[T]he NRA pledges its continued efforts to keep the American public alerted to the dangers of firearms confiscation and of governmental interference in the private ownership of guns in ways not contemplated by the Constitution of the United States . . . . We perceived no need at this time for any registration, licensing, I.D. card, data retrieval or certification law, or for any law prohibiting the sale of acquisition of *target and sporting firearms* in the interstate of foreign commerce.") (emphasis added); *Handguns Are Sporting Arms*, AM. RIFLEMAN, Jan. 1970, at 45 (noting that eighty percent of all handguns are for "hunting, target shooting, or other outdoor use").

505 *See, e.g.*, L.R. Kershner, *Sabotage from Within Precedes Loss of Right to Possess Guns*, GUN WK., May 29, 1970, at 14. The idea that military-style weapons, such as the AR-15, are necessary for individual self-defense and therefore protected by the Second Amendment does not really begin to take hold in gun rights discourse until the early 1990s. *See, e.g.*, Michael Rezendes, *Reading Their 'Rights': Gun Lobby Challenging 2d Amendment's Interpretation*, BOS. GLOBE, Sept. 10, 1995; Katharine Q. Seelye, *GOP Aims to Repeal Assault Weapons Ban*, TIMES-TRIB. (Scranton, Pa.), Apr. 6, 1995, at 8; Susan Baer, *Citing Crime, NRA Woos Women*, BALT. SUN (MD), Oct. 17, 1993; Robert J. Cottrol & Don B. Kates, *Assault Weapon Ban is Suspect: Founders Backed Gun Ownership*, DEMOCRAT & CHRON. (Rochester, N.Y.), Mar. 3, 1993; *see also* Stephen P. Halbrook, *Reality Check: The 'Assault Weapon' Fantasy and Second Amendment Jurisprudence*, 14 GEO. J. L. & PUB. POL'Y 47, 48–49 (2016).

assailants, but 'killing' and 'liquidating' them.[506] As William B. Edwards, a mid-to-late twentieth century gun rights advocate and frequent *Guns Magazine* contributor[507] wrote in 1961 promoting the police use of the AR-15:

> The avowed job of the law enforcement officer is to *apprehend, not liquidate, the malefactor. But AR-15, which will put a dozen bullets into the desperado before the smile fades from his face, will raise the morality rate amongst baddies something considerable*. And maybe this is in a way serving the ends of justice. At least, the families of murdered children, of outraged night nurses, of harmless store keepers slain by thugs in pursuit of small change, may be excused the feeling that if more crimes of violence were dealt with swiftly and violently by police, it would be a good example of other would-be criminals.[508]

So, how would this four-rule, principled approach to text, history, and tradition apply to say the "sensitive places" doctrine? Recall that the "sensitive places" doctrine affords governments the authority to outright prohibit the carrying, transport, or use of "arms" at specific, sensitive locations.[509] What is unclear, especially in the wake of *Bruen*, is the exacting criteria for lawmakers and the courts to designate an area "sensitive."[510] Historically speaking, for nearly five centuries in England, from the late thirteenth century through the late eighteenth century, what constituted a so-called "sensitive place" in which arms bearing could be prohibited was rather broad. It encompassed densely populated areas, as well as areas where people regularly congregated or conducted commerce. The text "fairs" and "markets" language contained within the 1328 Statute of Northampton makes this abundantly clear.[511] So too do several other English legal sources. For instance, in 1351, Edward III issued a proclamation declaring it was unlawful to "go armed" with dangerous weapons "within the City of London, or within the Suburbs, or any other places between the said city and the Palace of Westminster . . . except the officers of the King . . . ."[512] Similarly, in John Carpenter's 1419 treatise *Liber Albus*, it stipulates that

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506 *See, e.g.*, William B. Edwards, *New Gun Against Crime*, GUNS MAG., Apr. 1961, at 49.

507 *See, e.g.*, William B. Edwards, *How You Can Get Good Gun Publicity*, GUNS MAG., Mar. 1961, at 22–24, 58–59; William B. Edwards, *Why Not Have a Pro Gun Law?*, GUNS MAG., Sept. 1957, at 22–25, 52–58, 62.

508 Edwards, *New Gun Against Crime*, *supra* note 506, at 49 (emphasis added).

509 *See supra* Part III.B.

510 N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 U.S. 2111, 2133–34 (2022); United States v. Class, 930 F.3d 460, 463–64 (D.C. Cir. 2019); *see, e.g.*, GeorgiaCarry.Org, Inc. v. Georgia, 687 F. 3d 1244, 1260–61 (11th Cir. 2012).

511 Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.).

512 *Royal Proclamation as to the Wearing of Arms in the City, and at Westminster; and as to Playing at Games in the Palace at Westminster*, *in* MEMORIALS OF LONDON AND LIFE 268, 268–69 (H.T. Riley ed., 1868).

> no one, of whatever condition he be, go armed in the said *city [of London[or in the suburbs*, or carry arms, by day or by night, except the va[]lets of the great lords of the land, carrying the swords of their masters in their presence, and the serjeants-at-arms of his lordship the King, of my lady the Queen, the Prince, and the other children of his lordship the King, and the officers of the City, and such persons as shall come in their company in aid of them, at their command, for saving and maintaining the said peace; under the penalty aforesaid, and the loss of their arms and armour.[513]

The extent in which this English understanding of what constituted a "sensitive place"—that is where arms bearing could be prohibited—traveled across the Atlantic is unknown.[514] As outlined in Part III.A, the Justice of the Peace, sheriff, and constable records up through the late nineteenth century did not survive for historical posterity, and therefore it is impossible for historians to reconstruct exactly how often, when, and where armed carriage restrictions were enforced.[515] What the historical record does unequivocally inform is that armed carriage restrictions indeed made their way into the American Colonies and subsequent United States.[516] Additionally, historians can state with certainty that governments were well within their authority to prohibit armed assemblies circa the late eighteenth century, no matter whether said assemblies were deemed the militia[517] or not.[518] This is because it had long been understood that

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513 JOHN CARPENTER, LIBER ALBUS: THE WHITE BOOK OF THE CITY OF LONDON 335 (Henry Thomas Riley ed., 1861) (emphasis added). For other affirmations in the Liber Albus that the going armed in densely populated public places was unlawful. *See id.* at 555, 556, 558, 560, 580.

514 *But see* DEL. CONST. of 1776, art. XXVIII ("To prevent any violence or force being used at the said elections, no person shall come armed to any of them, and no muster of the militia shall be made on that day . . . .").

515 *See infra* Part III.A.

516 *See* Charles, *The Faces of the Second Amendment Outside the Home, Take Two*, *supra* note 3, at 381, 391.

517 *See* Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights*, *supra* note 371, at 326–27, 374, 376–77.

518 *An Act to Prevent Routs, Riots, and Tumultuous Assemblies, and the Evil Consequences Thereof, September Session*, Chapter VIII (Mass. 1786); *An Act for the More Speedy and Effectual Suppression of Tumults and Insurrections in the Commonwealth, January Session*, Chapter LIX (Mass. 1786); *An Act to Prevent Routs, Riots, and Tumultuous Assemblies* (N.J. 1797), *reprinted in An Act to Prevent Routs, Riots, and Tumultuous Assemblies*, THE CUMBERLAND GAZETTE (Mass.), Nov. 17, 1786; *An Act to Prevent Hunting with Fire-Arms in the City of New-York, and the Liberties Thereof* (N.Y. 1763), *reprinted in* JAMES B. LYON, THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 748 (1894); *An Act Against Riots and Rioters* (Pa. 1705); *see also* RAWLE, *supra* note 174, at 126 (noting that the Second Amendment "ought not . . . in any government . . . be abused to the disturbance of the public peace," which included the assembling "of persons with arms, for an unlawful purpose . . ."); BURN'S ABRIDGEMENT, OR THE AMERICAN JUSTICE, CONTAINING THE WHOLE PRACTICE, AUTHORITY AND DUTY OF JUSTICES OF THE PEACE, WITH CORRECT FORMS OF PRECEDENTS RELATING THERETO, AND ADAPTED TO THE PRESENT SITUATION IN THE UNITED STATES 22 (2d ed., 1792) ("[I]n some cases there may be an affray, where there is no actual violence; as where a

any armed assemblage required the consent of government officials.[519] The same was true for the hue and cry as is attested by several historical sources.[520]

The historical point is simply this: the founders did not place the Second Amendment right to "bear arms" above other fundamental rights, particularly those of free speech, assembly, religion, education, political participation, and one's ability to engage in regular commerce.[521] To suggest otherwise is to misunderstand how the founders' conceptualized and understood liberty.[522] The same can be said for subsequent generations of Americans up through the early to mid-twentieth century. In fact, it is not until the late twentieth century that one will find frequent examples of persons asserting that the Second Amendment is greater than or equal to other

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man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people; which is said to have been always an offence at the common law, and strictly prohibited by statute.").

519 This understanding of the law goes all the way back to the 1328 Statute of Northampton. *See* Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.); *see also May 16, 1388*, *in* CALENDAR OF CLOSE ROLLS, RICHARD II, 1385–1389, at 399–400 (H.C. Maxwell-Lyte ed., vol. 3 1914); *December 1, 1377*, *in* CALENDAR OF CLOSE ROLLS, RICHARD II, 1377–1381, at 34 (H.C. Maxwell-Lyte ed., vol. 1 1914).

520 *See, e.g.*, BLACKSTONE, *supra* note 71, at 293–94; RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 234 (Vol. 2, 1762); JOHN BOND, A COMPLETE GUIDE FOR JUSTICES OF THE PEACE 42 (Vol. 1, 1685); WILLIAM SHEPPARD, A NEW SURVEY OF THE JUSTICE OF THE PEACE HIS OFFICE 38, 53 (1659); DALTON, THE COUNTREY JUSTICE, *supra* note 167, at 360.

521 *See, e.g.*, THOMAS DAWES, AN ORATION, DELIVERED JULY 4, 1787, AT THE REQUEST OF THE INHABITANTS OF THE TOWN OF BOSTON, IN CELEBRATION OF THE ANNIVERSARY OF AMERICAN INDEPENDENCE 11 (1787) ("Education is one of the deepest principles of Independence . . . In arbitrary governments, where the people neither make the law nor choose those who legislate, the more ignorance the more peace. But in a government where the people fill all the branches of the sovereignty, Intelligence is the life of Liberty. An American would resent his being denied the use of his mus[ket]: but he would deprive himself a stronger safeguard, if he should want that learning which is necessary to a knowledge of his constitution."). One gun rights writer asserted otherwise given the fact that St. George Tucker referred to the Second Amendment as the "palladium of liberty." *See* Stephen P. Halbrook, *St. George Tucker's Second Amendment: Deconstructing "The True Palladium of Liberty"*, 3 TENN. J. L. & POL'Y 120, 123 (2006). But Tucker's description of the Second Amendment as a "palladium of liberty" was not meant to place the rights to "keep and bear arms" above other rights. Rather, it was how the founders' described several rights that were understood to balance the constitution in favor of the people. *See* Charles & O'Neill, *Saving the Press Clause from Ruin*, *supra* note 483, at 1717–18, 1745–46. And as it pertained to the Second Amendment specifically, Tucker's "palladium of liberty" reference was specific to the importance of a constitutional well-regulated militia. *See* Charles, *The Constitutional Significance of a "Well-Regulated Militia" Asserted and Proven*, *supra* note 292, at 76–77.

522 *See, e.g.*, THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY: 1782-1793, at 395 (Henry P. Johnston ed., vol. 3 1890) ("Civil liberty consists, not in a right to every man, to do just what he pleases; but it consists in equal right, to all the citizens, to have, enjoy, and to do, in peace, security, and without molestation, whatever the equal and constitutional laws of the country admit to be consistent with the public good."); *see also* Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence*, *supra* note 151, at 524–27.

fundamental rights, and these assertions were coming from gun rights extremists no less.[523] This historiography is something that the courts will eventually have to grapple with. They will also have to grapple with several highly specious historical claims. For today, it is common for gun rights writers to whimsically state things like eighteenth century persons frequently carried their firearms loaded to and from their house to wherever with impunity, and the hue and cry was a laissez faire crime enforcement system where virtually anyone could take up personal arms to pursue an alleged criminal.[524] Such historical claims have little to no evidentiary support,[525] and, if anything, contradict the bulk of the evidentiary record.[526] Additionally, gun rights writers often claim that in the Early Republic individuals could form, associate, and train their own independent militias divorced from government service.[527] Hereto, the evidentiary record strongly rebuts the historical claim,[528] and it effectively underscores just how important it is for jurists to understand historiography, and ask questions such as: Where are these historical claims coming from? Why are the authors making them? What organizations are the authors affiliated with? What historical evidence definitively supports it? Is the historical evidence being used within its proper historical context? What historical evidence contradicts it?

The same set of questions need to be asked regarding the 'racist history' allegation recently advanced by gun rights writers in this area—the allegation being that mid-to-

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523 *See, e.g.*, Wayne LaPierre, *America's First Freedom*, AM. RIFLEMAN, Dec. 1997, at 8 ("I say that the Second Amendment is, in order of importance, the first amendment. It is America's First Freedom, the one right that protects all the others. Among freedom of speech, of the press, of religion, of assembly, of redress of grievances, it is the first among equals . . . . The right to keep and bear arms is the one right that allows 'rights' to exist at all."); Harold W. Glassen, "Vice-President's Report 1967: First Board of Directors Meeting," undated 1967, Glassen Papers, box 1 (postulating that the "Second Amendment might well have been and probably was placed immediately following the First Amendment with the idea of making enforcement of the first possible . . ."); Daniel K. Stern, *Tell the People!*, AM. RIFLEMAN, Mar. 1955, at 39, 40.

524 *See, e.g.*, Joyce L. Malcolm, *The Creation of a "True Antient and Indubitable" Right: The English Bill of Rights and the Right to Be Armed*, 32 J. BRIT. STUD. 226, 229 (1993) ("Men were expected to defend themselves and their families and, if need be, their neighbors as well. But the duty was not merely defensive. Anyone who discovered a crime was required to raise the 'hue and cry' and join, 'ready appareled,' in pursuit of the culprit if necessary . . . .").

525 Consider the historical claim that the founders carried their firearms loaded to and from their house to wherever with impunity. The claim is easily rebutted by simply presenting two historical facts. First, late eighteenth-century firearm technology made carrying a loaded firearms for sufficient periods of time impossible, assuming of course one wanted it to fire. *See* Charles, *The Faces of the Second Amendment Outside the Home, Take Three*, *supra* note 9, at 46–47 and accompanying notes. Second, as several legal treatises attest, the mere act of presenting a firearm legally constituted an assault. *See, e.g.*, HAWKINS, *supra* note 93, at 133–34, ch. 63, § 1.

526 *See* Charles, *The Faces of the Second Amendment Outside the Home, Take Three*, *supra* note 9, at 46–47.

527 *See, e.g.*, HALBROOK, A RIGHT TO BEAR ARMS, *supra* note 371, at 30, 61–62.

528 *See supra* note 147.

late nineteenth century "sensitive places" laws, particularly those enacted in the South maintain a "racial subtext."[529] This historical allegation, professionally speaking, is complete and utter garbage.[530] It is built primarily on inference, not proven historical facts.[531] Was racism rampant in the United States from the mid-to-late nineteenth century? Yes. But answering "yes" to this question does not automatically lead to the conclusion that each and every law enacted during that period is in itself racist.[532] Sexism was also rampant throughout the mid-to-late nineteenth century, yet it would be foolish to claim that all laws enacted during this period maintain a sexist subtext. Similarly, racism and sexism were rampant in the United States throughout the 1960s (and persists today), yet it would be foolish to argue that every firearms regulation adopted during that period are racist and sexist.

The simple point is that historical claims need to be proven with actual, substantiated evidence, not inferred nor created on an advocacy whim. Yet sadly this is the foundation from which gun rights advocates build their historical claims.[533] It generally starts with a kernel of truth, such as following the Civil War people of color were subjected to both institutional and overt acts of racism, as well as widespread civil rights violations, often at the hands of state and local government officials, or that in the early twentieth century Italian immigrants faced widespread discrimination.[534] But from there the history almost always goes awry.[535] Any and all

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529 David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 250 (2018). Hypocritically, while alleging that mid-to-late nineteenth "sensitive places" laws maintain a "racial subtext," Kopel and Greenlee rely on historically verifiable, racist 'bring your guns to church' laws to argue against a broad interpretation of the "sensitive places" doctrine. *Id.* at 232, 242.

530 *See* Charles, *Racist History and the Second Amendment*, *supra* note 374, at 1345–68 (outlining the development of specious racist history claims by gun rights writers).

531 *See Reddon Fined $50: For Concealed Pistol. Charge of Disturbing Public Worship Not Sustained*, BIRMINGHAM NEWS (Ala.), Sept. 29, 1899, at 5 (case where a white man, R.G. Reddon, was tried and convicted for "chasing a negro whom it was supposed was an escaped convict . . . through a colored church"); *Legal Notes—Carrying Concealed Weapons*, FULTON GAZETTE (Mo.), Aug. 9, 1878, at 3 (quoting L.W. McKinney, the prosecuting attorney in a case where two persons unlawfully carried concealed weapons to a picnic, as stating he would prosecute everyone who violated the "sensitive places' law "without regard to race, color or previous condition of servitude").

532 *See, e.g.*, Justin Aimonetti & Christian Talley, *Race,* Ramos*, and the Second Amendment Standard of Review*, 107 VA. L. REV. ONLINE 193, 194–95, 197 (2021) (making this racist history line of argument).

533 *See* Charles, *The Second Amendment in Historiographical Crisis*, *supra* note 22, at 1747–48.

534 *See, e.g.*, *Immigration and Relocation in U.S. History: Under Attack*, LIBRARY OF CONGRESS, https://www.loc.gov/classroom-materials/immigration/italian/under-attack/ (last visited Jan. 25, 2023).

535 *See* Charles, *A Historian's Assessment of the Anti-Immigrant Narrative in* NYSPRA v. Bruen, *supra* note 233 (discrediting gun rights writers' history on the 1911 Sullivan Law);

history of gun rights is cast as a positive good. Conversely, any and all history of gun control is cast as a negative evil. This is undoubtedly intentional.[536] Portraying gun rights as positive good and gun control as a negative evil has long been a political messaging tactic by gun rights advocates. In the early twentieth century, gun rights advocates audaciously claimed gun control was the tool of organized crime to disarm law-abiding citizens.[537] It was not. Come World War II, gun rights advocates began framing gun control as part of a Nazi and fascist agenda to disarm the United States from within.[538] It was not. Following the war, gun rights advocates framed gun control as a key component of a communist agenda to take over the United States from within.[539] It was not. And by the late 1960s and early 1970s, with the precipitous rise of crime, gun rights advocates took to principally framing gun control as a 'liberal' scheme to disarm law-abiding citizens.[540] It was not. Needless to say, based on this author's extensive research and experience, the history often advanced by gun rights advocates is not what it appears to be.[541] It must be read and analyzed with a grain of salt (more like a pound of salt). Therefore, it is imperative that jurists understand the reefs and shoals of historiography, and objectively weigh history based on the totality of the evidence, not selective quotations, or bombastic and unproven historical claims.

This is particularly true when it comes to "sensitive places" laws circa the mid-to-late nineteenth century. For not only do gun rights advocates baselessly claim that these laws were enacted with a "racial subtext," but they have also already begun selling the courts on a historical paradigm that would gut the "sensitive places"

Charles, *Racist History and the Second Amendment*, *supra* note 374, at 1361–62 (discrediting gun rights writers' claim that all gun control is racist).

536 *See, e.g.*, KOPEL, *supra* note 375, at 1–4.

537 *See, e.g.*, Otto R. Keiter, *Anti-Legislation Plaint*, AM. RIFLEMAN, Oct. 1939, at 36; C.B. Lister, *The Remedy*, DU PONT MAG., Mar. 1924, at 10. *See also* Elizabeth S. Hall, *A Lady Speaks*, FIELD & STREAM, Jan. 1936, at 15; Harry McGuire, *Behold, the Popgun Crusaders!*, OUTDOOR LIFE, Sept. 1932, at 17; Harry McGuire, *Farewell to the Popgun Crusaders*, OUTDOOR LIFE, Dec. 1931, at 20–21; Harry McGuire, *The Good Women of the Friday Morning Club*, OUTDOOR LIFE, Apr. 1929, at 1.

538 *See, e.g.*, C.B. Lister, *The Nazi Deadline*, AM. RIFLEMAN, Feb. 1942, at 7; *Danger Ahead!! Help!!*, AM. RIFLEMAN, Apr. 1941, insert, at 2; *Zero Hour*, AM. RIFLEMAN, Dec. 1940, at 4; *Important Decisions*, AM. RIFLEMAN, Aug. 1940, at 22; *'National Defense' Decoy*, AM. RIFLEMAN, Aug. 1940, at 4.

539 CHARLES, VOTE GUN, *supra* note 418, at 34–78, 125–49.

540 *Id*. at 150–247.

541 *See, e.g.*, MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS 129 (2007) (noting that the gun rights conception of the Second Amendment is "ill-defined, largely because its proponents have devouted most of their effort to creating [a broad, gun rights centric interpreation of the right to keep and bear arms] and not much to elaborating what that model implies about particular forms of gun control").

doctrine to only those places where security guards and magnetometers are present.[542] According to these advocates, the courts should not give mid-to-late nineteenth century "sensitive places" laws any historical credence given that said laws were "short-lived," inconsistent with what was practiced in most jurisdictions, and therefore cannot "provide any insight into the original meaning of the Second Amendment," particularly given "their temporal distance from the Founding."[543] On its face, this line of history-in-law argument may appear convincing. However, as anyone who studies Second Amendment literature knows, it is an argument that is directly at odds with what gun rights advocates have said previously.

Beginning in the 1990s, gun rights advocates repeatedly asserted that the mid-to-late nineteenth century was highly, if not more informative than the founding when it came to interpreting the scope and meaning of the Second Amendment.[544] Yet after *Bruen* oral arguments, knowing that a robust "sensitive places" doctrine may restrict the right to carry arms in public, gun rights advocates began singing a different tune.[545] And this is not the first time that gun rights advocates have suddenly changed course on the history of the Second Amendment. During and prior to litigating *Heller* and *McDonald*, gun rights advocates frequently espoused support for the English origins of the right to arms.[546] However, post-*McDonald*, when it was clear that the

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542 *See* David Kopel, *The Sensitive Places Issue in New York Rifle*, REASON: THE VOLOKH CONSPIRACY (Nov. 8, 2021, 1:04 PM), https://reason.com/volokh/2021/11/08/the-sensitive-places-issue-in-new-york-rifle/.

543 Brief of Amicus Curiae the Independent Institute in Support of Petitioners at 16, N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 883 F.3d 45 (2018) (No. 18-280). Gun rights writers David. B. Kopel and Stephen P. Halbrook respectively serve as the Independent Institute's research director and senior fellow. *See About David P. Kopel*, INDEP. INST., https://www.independent.org/aboutus/person_detail.asp?id=999 (last visited Jan. 29, 2023); *About Stephen P. Halbrook*, INDEP. INST., https://www.independent.org/aboutus/person_detail.asp?id=517 (last visited Jan. 29, 2023). For more than 15 years, the NRA has paid stipends to the Independent Institute to fund Kopel's and Halbrook's Second Amendment research. *See* Van Sant, *supra* note 365; *Civil Rights Defense Fund-Supported Research (Previous Years)*, NRA CIVIL RIGHTS DEFENSE FUND, June 20, 2012 (on file with author) (showing a $315,000 in grants to the Independent Institute to fund Kopel's and Halbrook's Second Amendment research over a 2 year span); *Civil Rights Defense Fund-Supported Research*, NRA CIVIL RIGHTS DEFENSE FUND, June 20, 2012 (on file with author) (showing a $55,000 grant to the Independent Institute to fund Kopel's "Second Amendment Project").

544 *See, e.g.*, Amicus Brief for Academics for the Second Amendment in Support of Petitioners at 11–15, McDonald v. City of Chicago, 561 U.S. 742 (2010) (No. 08-1521); STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at ix-xi (1998).

545 *See* Kopel, *The Sensitive Places Issue in New York Rifle*, *supra* note 542; David Kopel, *Bearing Arms in "Sensitive Places"*, REASON: THE VOLOKH CONSPIRACY (Nov. 2, 2021, 3:26 AM), https://reason.com/volokh/2021/11/02/bearing-arms-in-sensitive-places/.

546 *See, e.g.*, Brief of Amicus Curiae CATO Institute and History Professor Joyce Lee Malcom in Support of Respondent at 4–34, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290); David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to*

English history of arms regulation may derail a robust Second Amendment, gun rights advocates immediately abandoned it.[547] To be clear, the only history that matters to gun rights advocates at any specific time is whatever history advances the greatest abundance of Second Amendment rights. All other history is conveniently cast aside until the case and argument arises where it may prove useful again. This is not an honest or holistic approach to history-in-law. It is fugazi.

And what are gun rights advocates so afraid of when it comes to "sensitive places" laws circa the mid-to-late nineteenth century? Two historical facts come to mind, both of which severely undercut an unduly broad conception of the Second Amendment outside the home. First, the mid-to-late nineteenth century is the historical period in which the police power becomes more jurisprudentially engrained, and modern conceptions of arms regulation are developed, discussed, and gradually implemented.[548] Second and more importantly, "sensitive places" laws circa mid-to-late nineteenth century were worded quite broadly and generally upheld by the courts as a constitutional exercise of governmental police power.[549] For instance, except for travelers or sojourners, several cities and towns prohibited the concealed carrying of weapons within their respective jurisdictions.[550] Meanwhile, other cities and towns

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Arms, 93 MICH. L. REV. 1333, 1333–34 (1995); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 996 (1995).

547 *See, e.g.*, David Kopel, *Second Amendment Professors Brief in Supreme Court Right to Bear Arms Case*, REASON: THE VOLOKH CONSPIRACY (Oct. 6, 2021, 6:31 PM), https://reason.com/volokh/2021/10/06/second-amendment-professors-brief-in-supreme-court-right-to-bear-arms-case/; Brief of Amicus Curiae Professors of the Second Amendment et al. in Support of Petitioners at 4–16, N.Y. Rifle & Pistol Ass'n, Inc. v. Bruen, 142 U.S. 2111 (2022) (No. 20-843); Stephen P. Halbrook, *The Common Law and the Right of the People to Bear Arms: Carrying Firearms at the Founding and the Early Republic*, 7 LINCOLN MEM'L UNIV. L. REV. 44–45 (2020).

548 *See* CHARLES, ARMED IN AMERICA, *supra* note 3, at 146–65.

549 *See, e.g.*, State v. Shelby, 90 Mo. 302, 468–69 (Mo. 1886); State v. Wilforth, 74 Mo. 528, 530–31 (Mo. 1881); *The Supreme Court: On Carrying Concealed Weapons*, STATE J. (Jefferson City, Mo.), Apr. 12, 1878, at 2 (only reprint of 1878 Missouri Supreme Court opinion *State v. Reando*); Owens v. State, 3 Tex. App. 404 (Tex. App. 1878), *reprinted in* CASES ARGUED AND ADJUDGED IN THE COURT OF APPEALS OF THE STATE OF TEXAS 404–8 (Vol. 3, 1878); Hill v. State, 53 Ga. 472, 473–75 (Ga. 1874); English v. State, 35 Tex. 473, 473–74, 476 (Tex. 1873); Andrews v. State, 50 Tenn. 165, 168 (Tenn. 1871). *But see* Rainey v. State, 1 Tex. App. 62 (Tex. App. 1880), *reprinted in* TEXAS CRIMINAL REPORTS 62–64 (Vol. 8, 1880) (noting that a conviction requires the armed carriage to be at a time when the sensitive place has people assembled).

550 *See, e.g.*, *An Act Defining and Punishing Certain Offenses Against the Public Peace*, *reprinted in* ACTS, RESOLUTIONS AND MEMORIALS OF THE FIFTEENTH LEGISLATIVE ASSEMBLY OF THE TERRITORY OF ARIZONA 30, 30 (1889) (prohibiting "any person within any settlement, town, village or city within this Territory" from carrying "any pistol, dirk, dagger, slung shot, sword cane, spear, brass knuckles, bowie knife, or any other kind of knife manufactured or sold for the purposes of offense or defense," but "[p]ersons traveling may be permitted to carry arms within settlements or town of the Territory for one-half hour after arriving in such settlements or town, and while going out of such towns or settlements"); *An Ordinance Defining Offenses and Fixing the Punishment Thereof*, Aug. 16, 1878, *reprinted in* AMENDED CITY CHARTER AND ORDINANCES OF THE CITY OF WALLA WALLA 165, 170 (1896) (prohibiting the carrying of

prohibited armed carriage altogether within their corporate or commercial limits.[551] Such was the case for the Pennsylvania capital city of Harrisburg circa 1873, which

"concealed weapons within the corporate limits," except for law enforcement, city officials, watchmen acting in their official capacity, and "any person temporarily sojourning in the City for a period of not exceeding five days . . .").

551 *See, e.g.*, THE REVISED ORDINANCES OF PROVO CITY, UTAH, *supra* note 464, at 96 ("Every person who shall wear, or carry upon his person any pistol, or other fire arm, slungshot, false-knuckles, bowieknife, dagger or any other dangerous or deadly weapon within the city limits of this city is guilty of an offence, and upon conviction thereof shall be liable to a fine in any sum not exceeding twenty-five dollars, or to be imprisoned in the city jail not exceeding twenty-five days, or to both fine and imprisonment."); THE REVISED ORDINANCES OF PAYSON CITY, UTAH 84 (1893) ("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 upon conviction thereof shall be liable to a fine in any sum not exceeding twenty-five dollars, or to be imprisoned in the city jail not exceeding twenty-five days, or to both fine and imprisonment."); THE REVISED ORDINANCES OF TOOELE CITY, UTAH 87 (1893) ("Every person who shall wear, or carry upon his person any pistol, or other fire arm, slungshot, false-knuckles, bowieknife, dagger or any other dangerous or deadly weapon, is guilty of an offence, and upon conviction thereof shall be liable to a fine in any sum not exceeding twenty-five dollars, or to be imprisoned in the city jail not exceeding twenty-five days, or to both such fine and imprisonment."); *An Ordinance: An Ordinance to Prohibit the Carrying of Concealed Deadly Weapons* (Feb. 4, 1889), *reprinted in* MARYSVILLE DAILY DEMOCRAT (Cal.), Feb. 7, 1889, at 4 ("It shall be unlawful for any person, not being a public officer or traveler, or not having a written permit from the Marshal of the city of Marysville, to wear or carry concealed, or otherwise, within the limits of the city of Marysville, any pistol, dirk, or other dangerous or deadly weapon."); *An Ordinance to Prohibit Intoxication, Breach of Peace, Carrying Deadly Weapons, the Use of Obscene Language, the Discharge of Fire-Arms, and to Close Places of Amusement on Sunday in the City of Wallace* (Jan. 31, 1889), *reprinted in* WALLACE COUNTY. REG. (KAN.), Feb. 9, 1889, at 2 ("Any person who shall be found carrying on his person a pistol, bowie knife, dirk or other deadly weapon shall upon conviction be fined in any sum not exceeding $25 or by imprisonment in the city jail not exceeding 30 days; Provided however that this section shall not apply to any peace officer of the state, counties or cities of this state and provided further that if it shall appear to the court trying the offense that the accused was engaged in any legitimate business or calling that would necessitate the carrying of any such weapons, such persons shall be acquitted."); *Ordinance No. 97: Ordinance Related to Carrying Deadly Weapons* (May 17, 1882), *reprinted in* BURLINGTON DEMOCRAT (Kan.), May 26, 1882, at 2 ("That is shall be unlawful for any person hereafter to carry on his or her person a pistol, bowie-knife, dirk or other deadly weapon, concealed or otherwise, within the corporate limits of sad City of Burlington, *Provided*: This Section shall not apply to any person carrying a deadly weapon while in the performance of his or her legitimate business, wherein the law commands such person to carry a deadly weapon."); *An Ordinance: Concerning Carrying Fire Arms and Lethal Weapons* (Feb. 4, 1876), *reprinted in* DEMOCRATIC LEADER (Cheyenne, Wyo.), Feb. 13, 1876, at 3 (prohibiting the carrying of "any pistol, revolver, knife, slung-shot, bludegeon or other lethal weapon" within the city of Cheyenne); *Miscellaneous Ordinance* (June 24, 1871), *reprinted in* ABILENE WKLY. CHRON. (Kan.), June 29, 1871, at 3 ("That any person who shall carry within the corporate limits of the city of Abilene or commons, a pistol, revolver, gun, musket, dirk, bowie knife, or other dangerous weapon upon his person, either openly or concealed, except to bring the same and forthwith [to] deposit it or them at their house, store room, or residence, shall be fined seventy-five dollars."). For some examples of concealed carry prohibitions within corporate limits, *see Ordinance No. 25: An Ordinance Regulating Certain Misdemeanors and Punishments* (June 8, 1883), *reprinted in* WYANDOTT HERALD (Kan.), June 14, 1883, at 2 ("If any person shall carry concealed on his

prohibited both the open and concealed carrying of "any pistol, dirk-knife, slung-shot or deadly weapon, within the city limits . . . except police officers . . . ."[552] The same was true for the Washington capital of Olympia circa 1860, which prohibited any "carry[ing] . . . [of] deadly weapons within the corporate limits" during the "usual walks of life . . . ."[553] Then there was the small town of Great Bend, Kansas, which maintained a large "painted notice on the southwest corner of the public square," which read: "Desperadoes are warned not to carry firearms or deadly or dangerous weapons in the city limits. The penalty for the violation of this law is a fifty-dollar fine, or imprisonment until paid."[554]

Several local and state laws were quite specific in defining "sensitive places," such as the North Carolina religious camp grounds of Stanley Creek and Rock Spring; both of which had obtained the consent of the North Carolina Assembly to prohibit "the carrying of guns or pistols within the incorporate limits of the Camp Ground" when people were "assembled for public worship . . . ."[555] The cities of New Haven,

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person any pistol or revolver, brass or iron knucks, iron, lead, or wooden billies, or slung-shot, or other weapon liable to produce great bodily hard, within the corporate limits of [Armourdale, Kansas], shall be deemed guilty of a misdemeanor . . . ."); *An Ordinance Against Carrying Concealed Deadly Weapons, or Selling Same to Minors* (Mar. 14, 1881), *reprinted in* WEEKLY MESSENGER (Russellville, Ky.), Apr. 16, 1881, at 2 ("If any person chall carry concealed a deadly weapon upon or about his person, other than an ordinary pocket knife, within the corporate limits of said town of Russellville, he shall, upon conviction thereof, be finded not less than twenty-five nor more than one-hundred dollars and imprisoned in the County Jail for not less than ten nor more than thirty days . . . ."); *Ordinance No. 33: To Prevent Persons Carrying Fire Arms or Deadly Weapons of Any Kind, Within the Corporate Limits of the City of Lewiston* (Nov. 18, 1879), *reprinted in* LEWISTON DAILY TELLER (Idaho), Nov. 21, 1879, at 2 ("It shall be unlawful for any person to carry any firear arms or deadly weapons of any kind, in a concealed manner, within the limits of the city of Lewiston.").

552 LOUIS RICHARDS & JAMES M. LAMBERTON, A DIGEST OF THE LAWS AND ORDINANCES FOR THE GOVERNMENT OF THE CITY OF HARRISBURG, PENNSYLVANIA IN FORCE AUGUST 1, A.D. 1906 557–58 (1906).

553 *Ordinance No. 13: An Ordinance to Prohibit the Use and Carrying of Deadly Weapons and the Discharging of Fire Arms* (Mar. 3, 1860), *reprinted in* WASHINGTON STANDARD (Olympia, Wash.), Dec. 29, 1860, at 4.

554 *Letter from Great Bend*, DAILY KAN. TRIB. (Lawrence, Kan.), July 27, 1873, at 2.

555 *Stanley Creek Camp Ground, Gaston County, N.C.—Laws and Regulations*, S. HOME, Sept. 22, 1873, at 2; *Rock Spring Camp Ground, Lincoln Co., N.C.: Laws and Regulations*, CHARLOTTE DEMOCRAT, July 30, 1872, at 2.

Connecticut,[556] Buffalo, New York,[557] Chicago, Illinois,[558] Cincinnati, Ohio,[559] Saint Paul, Minnesota,[560] Spokane, Washington,[561] Philadelphia,[562] Reading,[563] and Williamsport, Pennsylvania,[564] Wilmington, Delaware,[565] and others[566] outright

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556 CHARTER AND ORDINANCES OF THE CITY OF NEW HAVEN, TOGETHER WITH LEGISLATIVE ACTS AFFECTING SAID CITY 293 (1898) ("No person shall carry or have any fire-arms on any of said parks, and no fire-arms shall be discharged from, or into any of the same.").

557 *Park Ordinances*, BUFFALO COMMERCIAL (N.Y.), May 15, 1873, at 4 ("All persons are forbidden to carry firearms, or fire at or shoot any bird or animal").

558 THE MUNICIPAL CODE OF CHICAGO 391 (1881) ("All persons are forbidden to carry firearms or to throw stongs or other missiles within any one of the public parks.").

559 ANNUAL REPORT OF THE BOARD OF PARK TRUSTEES FOR THE YEAR ENDING DECEMBER 31, 1891, at 27 (1892) (May 16, 1892 rule by the Cincinnati Board of Park Commissioners stipulating that "[n]o person shall bring into or discharge within the parks any firearms or other device by which birds or animals may be killed, injured, or frightened").

560 ANNUAL REPORTS OF THE CITY OFFICERS AND CITY BOARDS OF THE CITY OF SAINT PAUL 689 (1889) ("No person shall carry firearms or shoot birds in any Park or within fifty yards thereof, or throw stones or other missiles therein.").

561 THE MUNICIPAL CODE OF THE CITY OF SPOKANE, WASHINGTON 316 (1896) (1892 ordinance directing that "[a]ll persons are forbidden to carry firearms or to throw stone or other missiles within any one of the public parks or other public grounds of the city").

562 LAWS OF THE GENERAL ASSEMBLY OF THE STATE OF PENNSYLVANIA, PASSED AT THE SESSION OF 1868, at 1088 (1868) (1868 state law stipulating that in Fairmount Park "[n]o person shall carry fire arms or shoot birds in the park, or within fifty yards thereof, or throw stones or other missiles therein"); *see also* FAIRMOUNT PARK 124 (1871).

563 A DIGEST OF THE LAWS AND ORDINANCES FOR THE GOVERNMENT OF THE MUNICIPAL CORPORATION OF THE CITY OF READING, PENNSYLVANIA IN FORCE APRIL 1, 1897, at 240 (1897) (1887 law stipulating that in Penn's Common "[n]o person shall carry fire arms or shoot birds in the park, or within fifty yards thereof, or throw stones or other missiles therein").

564 LAWS AND ORDINANCES, FOR THE GOVERNMENT OF THE MUNICIPAL CORPORATION OF THE CITY OF WILLIAMSPORT, PENNSYLVANIA, IN FORCE APRIL 1ST, 1891, at 141 (1891) ("No person shall carry fire-arms, or shoot in the park . . . .").

565 *Park Regulations*, MORNING NEWS (Wilmington, Del.), July 13, 1888, at 4 ("No person shall carry fire-arms or shoot birds or other animals within the park, or throw stones or other missiles therein."); *see also* THE CHARTER OF THE CITY OF WILMINGTON 571 (1893) (1893 amendment to the city's charter prescribing the same rule).

566 *See, e.g.*, THE REVISED ORDINANCES OF THE CITY OF CANTON OF 1910, at 284 (1910) ("All persons are forbidden to carry firearms, or to throw stones or other missiles within any of said parks."); *Park Regulations*, EVENING STAR (Washington, D.C.), May 14, 1895, at 1 (stipulating that in Rock Creek Park, "all persons are forbidden: To carry or discharge firearms, firecrackers, rockets, torpedoes or other fireworks."); CITY OF TRENTON: CHARTERS AND ORDINANCES 390 (1903) (1890 Trenton, New Jersey ordinance stipulating that "[n]o person shall carry firearms or shoot birds in said park or squares, within fifty yards thereof, or throw stones or other missiles therein"); DIGEST OF ORDINANCES OF THE BOROUGH OF PHOENIXVILLE 135 (1906) (1878 ordinance stipulating that "[n]o person shall carry fire-arms or shoot birds or throw stones or

prohibited the carrying and discharging of firearms in urban based parks. Then there was the town of Columbia, Missouri, which in accord with Missouri state law,[567] passed an ordinance prohibiting the carrying of dangerous weapons "into any school room, or place where people are assembled for educational, literary or social purposes; or into any court room, during the sitting of court, or to any election precinct on any election day; or into any other public assemblage of persons met for any lawful purpose . . . ."[568] Similarly, the city of Stockton, Kansas passed an ordinance prohibiting the carrying of dangerous weapons "into any church or place where the people have assembled for public worship, or into any school room or place where people have assembled for educational, literary or social purposes, or to any election on any election day, or into any court room during the sitting of court, or into any other public assemblage of persons . . . or shall go upon the public streets or public places of the city . . . ."[569]

As for state "sensitive places" laws, in 1869 Tennessee prohibited the carrying of dangerous weapons into "any election . . . fair, race course, or other public assembly of the people."[570] Not long thereafter, Texas prohibited the carrying of dangerous weapons "into any church or religious assembly, any school-room or other place where persons assembled for educational, literary, or scientific purposes, or into a ball room, social party, or other social gathering, composed of ladies and gentlemen, or to any election precinct on the day or days of any election, where any portion of the

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other missiles therein."); THE CENTRALIA CITY CODE 188 (1896) ("All persons are forbidden to carry firearms, or to throw stones or other missiles in said park."); THE REVISED ORDINANCES OF THE CITY OF DANVILLE 83 (1883) ("Whoever shall carry any fire-arms into said parks, or shall fire off or discharge the same in, or into said parks . . . shall be fined not less than one dollar no more than one hundred dollars, for each offense."); DAVID H. MACADAM, TOWER GROVE PARK OF THE CITY OF ST. LOUIS 117 (1883) ("All persons are forbidden . . . [t]o carry firearms or to throw stones or missiles within it.").

567 The ordinance mirrored an 1874 Missouri state law titled "Acts of the . . . General Assembly of the State of Missouri." LAWS OF MISSOURI: GENERAL AND LOCAL LAWS PASSED AT THE ADJOURNED SESSION OF THE XXVII GENERAL ASSEMBLY 43 (1874). The law was slightly modified a year later. *See* LAWS OF MISSOURI: GENERAL AND LOCAL LAWS PASSED AT THE REGULAR SESSION OF THE TWENTY-EIGHTH GENERAL ASSEMBLY 50–51 (1875). In 1883, the state law was amended to increase the fine. *See* LAWS OF MISSOURI PASSED AT THE SESSION OF THE THIRTY-SECOND GENERAL ASSEMBLY 76 (1883). In 1890, Warrensburg, Missouri adopted a similar law. *See Concealed or Deadly Weapons*, JOHNSON COUNTY STAR (Mo.), June 7, 1890, at 4.

568 *Chapter XVII: Carrying Concealed Weapons—Firing Guns, Pistols, Fire Crackers, Etc.*, *reprinted in* GENERAL ORDINANCES OF THE TOWN OF COLUMBIA, IN BOONE COUNTY, MISSOURI 35 (Lewis M. Switzler ed., 1890). Like Columbia, Webb City, Missouri enacted a similar law. *See Ordinance No. 577: An Ordinance Defining What Shall Constitute Misdemeanors or Offenses Against the City of Webb City, and Providing Penalties Therefor*, May 15, 1905, *reprinted in* THE REVISED ORDINANCES OF THE CITY OF WEBB CITY, MISSOURI, 1905, at 100 (1905).

569 *Ordinance No. 76: An Ordinance Prohibiting Deadly Weapons*, *reprinted in* STOCKTON REV. & ROOKS CNTY. REC. (Kan.), July 1, 1887, at 1.

570 PUBLIC STATUTES OF THE STATE OF TENNESSEE SINCE THE YEAR 1858, at 108 (James H. Shankland ed., 1871).

people of this state are collected to vote at any election, or to any other place where people may be assembled to muster or to perform any other public duty, or any other public assembly . . . ."[571] That same year, Georgia provided that "no person . . . be permitted or allowed to carry about his or her person any . . . pistol or revolver, or any kind of deadly weapon, to any election ground or precinct, or any place of public worship, or any other public gathering in this state . . . ."[572] Arizona followed suit in 1889, prohibiting the carrying of dangerous weapons "into any church or religious assembly, any school room, or other place where persons are assembled for amusement or for educational or scientific purposes, or into any circus, show or public exhibition of any kind, or into a ball room, social party or social gathering, or to any election precinct on the day or days of any election, . . . or to any other place where people may be assembled to minister or to perform any other public duty, or to any other public assembly . . . ."[573] Then there was the state of Oklahoma, which by 1890 had prohibited the carrying of dangerous weapons "into any church or religious assembly, any school room or other place where persons are assembled for public worship, for amusement, or for educational or scientific purposes, or into any circus, show or public exhibition of any kind, or into any ball room, or to any social party or social gathering, or to any election, or to any place where intoxicating liquors are sold, or to any political convention, or to any other public assembly . . . ."[574]

If one examines these local and state "sensitive places" laws from a macro level, circa the mid-to-late nineteenth century, it is safe to say that state and local governments maintained the authority to prohibit the carrying of dangerous weapons in a variety of places where people were known to congregate. Such places included (1) churches and places of worship; (2) places where large public assemblies generally took place, *i.e.*, parks, town squares, and the like; (3) polling places[575] and other buildings where political activity generally took place; (4) schools and institutions of higher learning; (5) places where events of amusement took place, *i.e.*, places where people congregate for large planned events; and (6) bars, clubs, social venues, or anywhere in which alcohol or psychoactive or mood altering drugs were purchased or consumed.

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571 *An Act Regulating the Right to Keep and Bear Arms*, *reprinted in* GEORGE W. PASCHAL, A DIGEST OF THE LAWS OF TEXAS: CONTAINING THE LAWS IN FORCE, AND THE REPEALED LAWS ON WHICH RIGHTS REST FROM 1754 TO 1875, at 1322 (5th ed.1873).

572 *An Act to Preserve the Peace and Harmony of the People of This State, and for Other Purposes*, *reprinted in* ACTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, PASSED IN ATLANTA, GEORGIA, AT THE SESSION OF 1870, at 421 (1870).

573 *An Act Defining and Punishing Certain Offenses Against the Public Peace*, *supra* note 550, at 30.

574 *Article 47: Concealed Weapons*, *reprinted in* STATUTES OF OKLAHOMA 1890, at 495–96 (Will T. Little, L.G. Pitman, & R.J. Barker eds., 1891).

575 In the Reconstruction South, prohibitions on going armed to polling places were viewed as vital to holding free and fair elections from the threat of violence. *See, e.g.*, *The Carrying of Firearms Forbidden*, *supra* note 148, at 1 ("All men entitled to vote must be allowed to exercise this privilege, and will be protected in so doing . . . and therefore all concerned is hereby called to the orders heretofore issued from these headquarters, forbidding the carrying of firearms, which orders must be rigidly adhered to.").

Given how broad these "sensitive places" categories are, it is no wonder that gun rights advocates are urging the courts to adopt a limited, security guard and magnetometer standard of review. In hopes of ensuring this outcome, gun rights advocates are trying to minimize the historical record by proclaiming that these "sensitive places" laws were only adopted in a minority of jurisdictions, and therefore are an improper vehicle for crafting a "sensitive places" doctrine.[576] Yet, hypocritically (and not surprisingly), while litigating *Heller*, *McDonald*, and *Bruen*, the very same gun rights advocates advanced 'minority' history to buttress their legal arguments.[577] The courts should not permit gun rights advocates or any litigant to have it both ways. For to accept this history-in-law double standard is only going to perpetuate fugazi Second Amendment history, not resolve it.

Furthermore, if the history of mid-to-late nineteenth century "sensitive places" laws is indeed minimalized by the courts as gun rights advocates would like, then it must be conceded that under any 'widespread adoption', 'uniformity of law', or ad hoc 'census population' standard of review[578] only a handful of firearms regulations will ever survive constitutional scrutiny.[579] This is because up until the early to mid-twentieth century one will be hard pressed to find any assemblance of legal uniformity when it comes to firearms regulation.[580] Consider that up to the mid-nineteenth century, except for the categories of hunting,[581] discharging firearms in public or near

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576 *See, e.g.*, Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction at 33, Antonyuk et al. v. Bruen, 2022 WL 3999791 (N.D.N.Y. 2022) (1:22-cv000734) (arguing that the burden is on the government to show a "broad historical tradition" regarding "sensitive places," "not an outlier or two").

577 A great example of this is how gun rights advocates used the 1787 Dissent of the Minority of the Convention of Pennsylvania to advocate for a broad, individual rights interpretation of the Second Amendment. *See, e.g.*, Brief of Amicus Curiae Academics for the Second Amendment in Support of Respondent at 25, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290); Brief of Amicus Curiae of Organizations and Scholars in Support of Respondent at 13–14, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290); *see also* HALBROOK, THE FOUNDERS' SECOND AMENDMENT, *supra* note 301, at 195–96. Another great example is how gun rights advocates used eighteenth century 'bring your guns to church' laws—Southern colonial laws that maintain a racist past—to advocate for broad carry rights. *See, e.g.*, Brief of Petitioners at 8, 28, 31, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 U.S. 2111 (2022) (No. 20-843); Brief of Amici Curiae Professors of Second Amendment Law et al. in Support of Petitioners at 25, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 U.S. 2111 (2022) (No. 20-843); Brief of Amicus Curiae National African American Gun Association in Support of Petitioners at 5–8, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 U.S. 2111 (2022) (No. 20-843).

578 *See supra* note 462.

579 *See* CHARLES, ARMED IN AMERICA, *supra* note 3, at 193–203 (discussing how and why the gun rights movement of the early twentieth century was responsible for the bringing uniformity to firearms regualtion); *see supra* pp. 78–79 (discussing the history of uniform state law movement).

580 PATRICK J. CHARLES, THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT 20–21 (2009).

581 *Id.* at 18–19.

populated areas,[582] armed assemblage,[583] and the carrying of concealed weapons outside the home,[584] all other firearm regulations were far from being widespread or uniform. And if one canvases firearms regulations up through the close of the nineteenth century, except for perhaps laws prohibiting minors from purchasing firearms and laws against firearm brandishing,[585] one will be hard pressed to find any other categories of firearm regulation that were nationally widespread.

This is particularly true for "sensitive places" laws, which makes complete historical sense considering that firearms localism[586] (not firearms nationalism) prevailed in the United States from the Early Republic through the early-to-mid twentieth century. The historical reality is that different states and localities maintained different laws for restricting armed carriage and therefore limiting the potential for deadly affrays within their public spaces. Take for instance the town of Oklahoma City, Oklahoma circa 1890, wherein, except for "officers of law in discharge of their duties," the concealed carrying of dangerous weapons was outright prohibited.[587] Additionally, to prevent any firearms related injuries, it was against the law for anyone, "*at any time, under any circumstances*, within the limits of said city, excepting officers of the law" to "discharge any pistol, gun, or other firearm or arms."[588] If one puts these two laws together, it effectively nullifies the need for any "sensitive places" law. The same can be said for those jurisdictions that adopted armed carriage licensing laws, including much of California. Consider the city of Oakland, California circa 1889. Out the city's roughly 48,000 inhabitants,[589] only sixty-nine maintained armed carriage licenses.[590] In light of this fact, there was no need for Oakland to have a "sensitive places" law given that its armed carriage licensing law already restricted armed carriage within the corporate city limits to just 0.14% of the population.[591] Lastly, one must consider that several localities outright prohibited the

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582 *See infra* p. 103.

583 *See* Charles, *The Faces of the Second Amendment Outside the Home, Take Two*, *supra* note 3, at 402, 404–05.

584 CHARLES, ARMED IN AMERICA, *supra* note 3, at 156.

585 Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Under* Heller, 116 NW. U. L. REV. 139, 169–70 (2021).

586 For more on firearms localism, *see generally* Blocher, *Firearms Localism*, *supra* note 404; CHARLES, VOTE GUN, *supra* note 418, at preface. *See also infra* notes 587–88 (providing examples of firearms localism).

587 *Ordinance No. 15*, *reprinted in* EVENING GAZETTE (Oklahoma City, OK), Sept. 16, 1890, at 3.

588 *Id.* (emphasis added).

589 *See Oakland Census Data for 1860-1940*, BAY AREA CENSUS, http://www.bayareacensus.ca.gov/cities/Oakland40.htm (last visited Jan. 27, 2023).

590 *Carry Arms: Those Who Have Permits to Carry Concealed Weapons*, *supra* note 253, at 1.

591 *See id.*

carrying of dangerous weapons within their corporate limits, concealed or otherwise,[592] which effectively negated the need for any type of "sensitive places" law.

Here again, the point to be made is that throughout most of our country's history firearms regulation was far from uniform—at least not until the early to mid-twentieth century. This historical fact is something that gun rights advocates will continue to seize upon in the wake of *Bruen* with the hope of jurisprudentially negating most gun controls. But as noted earlier in this Article, Associate Justice Brett Kavanaugh's concurrence in *Bruen*, joined by Chief Justice John Roberts, weighs heavily against this.[593] Therein, Kavanaugh wrote that if *Bruen*'s approach to text, history, and tradition is properly applied by the lower courts, a "variety" of firearms regulations will ultimately withstand constitutional scrutiny, including laws that did not appear or proliferate within the statute and ordinance books until the early to mid-twentieth century.[594] And quite honestly the only way this happens is if the lower courts reject any 'history and tradition' test that requires government defendants to show a particular type of firearms regulation was widespread, uniform, or passes some ad hoc census population test by the close of the nineteenth century.

Rather, in its place, the lower courts should adopt a standard that shifts the evidentiary burden once the government provides sufficient historical evidence of an analogous regulation. The burden would then rest on the challenging party to show that the analogous regulation was publicly understood to be unconstitutional or inviolate of the right to arms through no-kidding, substantiated historical evidence. Not only is this burden shifting approach to history and tradition more historically objective and even keeled for the respective parties, but it is also in line with *Bruen*'s discussion on the constitutionality of "sensitive places" laws, where it states that "[a]lthough the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited," a *lack* of historical evidence showing any "disputes regarding the[ir] lawfulness" presumes their constitutionality.[595] In other words, what *Bruen* commands is that historical evidence proving the constitutionality or unconstitutionality of any respective "sensitive places" law is what matters most, not whether the law was widespread or uniform.

And if the lower courts indeed view uniformity of the law as relevant in deciding whether a respective "sensitive places" law (or any firearms regulation for that matter) is constitutional, this is where this Article believes early to mid-twentieth century firearms regulation history could be leveraged. Once again, it is during this period that we see many of the scattered, localized firearm regulations of the mid-to-late

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592 *See, e.g.*, *An Act to Prohibit the Unlawful Carrying and Use of Deadly Weapons*, *reprinted in* ACTS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF NEW MEXICO, TWENTY-SEVENTH SESSION 55 (1887); *Ordinance No. 12: Deadly Weapons*, *reprinted in* BURLINGTON PATRIOT (Kan.), May 18, 1883, at 4.

593 *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 U.S. 2111, 2161–62 (2022) (Kavanaugh, J., concurring).

594 *Id.*

595 *Id.* at 2133.

nineteenth century begin to become more widespread and normalized.[596] Yes, there is no disputing that the *Bruen* majority rejected twentieth century history as non-persuasive when looking for "insight into the meaning of the Second Amendment," especially when it "contradicts earlier evidence."[597] At the same time, however, it is worth noting that the *Bruen* majority was silent as to whether early to mid-twentieth century history should be jurisprudentially jettisoned altogether, particularly in cases where the history can inform whether a type of firearms regulation subsequently became accepted or widespread.[598]

V. CONCLUSION

Throughout this Article, *Bruen*'s historical contradictions, fabrications, double-standards, and non-holistic use of history-in-law were laid to bare. And assuredly, in the coming months and years there will be several legal commentators, scholars, and even jurists who will not only proclaim *Bruen* was rightly decided, but also that the *Bruen* majority 'got the history right'. While this author concedes that the holding in *Bruen*—this being that highly discretionary "may issue" armed carriage laws violate the Second Amendment—is one of a handful of legitimate outcomes that the Supreme Court could have arrived at (depending, of course, on how the history was framed), it is patently absurd to argue that *Bruen*'s historical approach and overall marshalling, selecting, analyzing of historical evidence was honest, objective, and even-keeled. It is fugazi, plain and simple.

The full jurisprudential consequences that *Bruen* will impose on the future of gun control are yet to be seen.[599] Given that Supreme Court precedent is the highest legal authority form which the lower courts must weigh future Second Amendment cases and controversies, there is an argument to be made that most forms of gun control—except those that were nationally widespread up through the late nineteenth century, which was relatively few—should be struck down as unconstitutional. But, as this Article points out, this approach does not appear to align with Associate Justice Brett Kavanaugh's concurrence.[600] The same can be said of Associate Justice Samuel Alito's, which notes that striking down discretionary "may issue" armed carriage laws like New York's is "*all*" the Court decided in *Bruen*, nothing more:

> Our holding *decides nothing* about who may lawfully possess a firearm or the requirements that must be met to buy a gun. *Nor does it decide* anything about the kinds of weapons that people may possess. *Nor have we disturbed anything* that we said in *Heller* or [*McDonald*], about restrictions that may be imposed on the possession or carrying of guns.[601]

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596 *See supra* pp. 98–100.

597 *Bruen*, 142 U.S. at 2154, n.28.

598 *Id.* at 2122–56.

599 *See supra* note 19 for the early case results.

600 *Bruen*, 142 U.S. at 2161–62 (Kavanaugh, J., concurring).

601 *Id.* at 2157 (Alito, J., concurring) (emphasis added).

Needless to say, *Bruen* has created quite the jurisprudential conundrum. Much like after *Heller* and *McDonald*, the onus is now on the lower courts to fashion a history-based jurisprudential test that is holistic, predictable, and reliable and therefore legitimate. It will not be an easy challenge. However, this author hopes the suggestions laid out in Part IV will serve as a helpful guidepost for the courts on 'what to' and 'what not to do' in the name of ensuring a more historically accurate and jurisprudentially transparent Second Amendment.