The Myth of Open Carry

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INTRODUCTION

Since the Supreme Court's 2008 decision in *District of Columbia v. Heller*, perhaps the most hotly disputed area of Second Amendment law has been the scope of the right outside of the home.[1] Federal courts across the country have heard Second Amendment challenges to state

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[1] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

public carry licensing laws.[2] Specifically, groups like the NRA have challenged "good cause" laws that require applicants for carry permits to show that they have a specific need to carry a gun for self-defense, rather than just the generalized need of a person concerned about crime.[3] The First, Second, Third, Fourth, and Ninth Circuits have upheld good cause laws,[4] but in 2017, the D.C. Circuit struck down D.C.'s law requiring applicants for public carry permits to show good cause.[5] The Supreme Court recently heard oral arguments in a challenge to New York's good cause public carry licensing law in a case called *New York State Rifle and Pistol Association v. Bruen*.[6]

Since *Heller*, federal courts have uniformly adopted a two-part framework for deciding Second Amendment cases. Under this framework, courts first look to text, history, and tradition to determine whether a challenged gun law falls within the scope of the Second Amendment.[7] That is, whether the law is consistent with the historical tradition of firearms regulation. If it is consistent, then there is not a viable challenge and the case ends. If the challenged law does fall within the scope of the Second Amendment right, the court then applies one of the tiers of constitutional scrutiny — either intermediate scrutiny or strict scrutiny depending on how significantly the law impacts the right.[8]

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[2] *See, e.g.*, Young v. Hawaii, 992 F.3d 765 (9th Cir. 2021) (en banc) (upholding Hawaii's public carry licensing law); Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018) (upholding Massachusetts's public carry licensing law as applied in the cities of Boston and Brookline); Drake v. Filko, 724 F.3d 426 (3d Cir. 2013) (upholding New Jersey's public carry licensing law); Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013) (upholding Maryland's public carry licensing law); Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012) (upholding New York's public carry licensing law).

[3] *See, e.g.*, HAW. REV. STAT. ANN. § 134-9(a) (2007) ("In an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property, the chief of police of the appropriate county may grant a license to an applicant[.]"); MD. CODE ANN., PUB. SAFETY § 5-306(a)(6)(ii) (2013) (requiring applicants for a carry license to show "good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger").

[4] *Gould*, 907 F.3d at 662; *Drake*, 724 F.3d at 428; *Woollard*, 712 F.3d at 868; *Young*, 992 F.3d at 773 (en banc); Kachalsky, 701 F.3d at 84.

[5] Wrenn v. District of Columbia, 864 F.3d 650, 667 (D.C. Cir. 2017).

[6] 142 S. Ct. 333 (2021).

[7] *E.g.*, United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

[8] Brief of Second Amendment Law Professors as Amici Curiae in Support of Neither Party at 4, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 333 (2021) (No. 20-843).

In challenges to good cause public carry licensing laws, gun lobby lawyers have constructed an ahistorical narrative in which the open carry of firearms was widely accepted throughout American history.[9] According to their narrative, Southern states typically had bans only on concealed weapons, while in the North, all carry was largely unregulated.[10] Going further, they argue that open carry was viewed as the valiant, socially acceptable, and constitutionally protected way to publicly carry firearms, as compared to concealed carry.[11] Thus, according to gun rights proponents, because a right to openly carry guns in public during a person's ordinary course of business was always recognized, good cause licensing laws violate the Second Amendment.[12]

During oral argument in *Bruen*, the NRA's lawyer, Paul Clement, drew on this invented tradition, stating:

> [D]uring time periods where open carry was allowed, [] some states did specifically restrict concealed carry on the precise theory that if we allow you to carry open, then, if you're carrying concealed, you're probably up to no good.[13]

Later, Justice Kavanaugh picked up on this theme in a question for Deputy Solicitor General Brian Fletcher:

> This might be a level of generality issue, but I think Mr. Clement responded to what -- some of what you're saying on history and tradition by saying you have to look at carry laws more generally. And there was open carry traditions in a lot of those states.[14]

This theory of Second Amendment history rests upon a very important premise — that during the Founding Era, Antebellum Period, and Reconstruction, openly carrying firearms in public was viewed as

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[9] *See, e.g.*, Brief for Petitioners at 30-40, *N.Y. State Rifle & Pistol Ass'n*, 142 S. Ct. 333 (No. 20-843) (detailing the history of the Second Amendment from its supposed origins in the 1689 English Bill of Rights).

[10] Brief of Amici Curiae Professors of Second Amendment Law Supporting Petitioners at 21-23, *N.Y. State Rifle & Pistol Ass'n*, 142 S. Ct. 333 (No. 20-843).

[11] *See* Jonathan Meltzer, Note, *Open Carry for All:* Heller *and Our Nineteenth Century Second Amendment*, 123 YALE L.J. 1486, 1516 (2014) (noting that concealed weapons were considered "a tool of the sneaky and the dishonorable."); Eugene Volokh, *The First and Second Amendment*, 109 COLUM. L. REV. SIDEBAR 97, 102 (2009).

[12] *See*, *e.g.*, Brief for Petitioners, *supra* note 9, at 9 (discussing cases upholding prohibitions on concealed weapons because of availability of open carry).

[13] Transcript of Oral Argument at 20, *N.Y. State Rifle & Pistol Ass'n*, 141 S. Ct. 333 (No. 20-843).

[14] *Id.* at 98.

an acceptable practice and was common. Under the gun rights view, open carry embodied the widely understood scope of an essential liberty. Therefore, their argument goes, good cause carry laws are inconsistent with the historical tradition of firearms regulation and thus constitutionally suspect.

The problem for gun rights advocates is that they have produced virtually no evidence that this theory is true. There is no historical record supporting the claim that individuals at the Founding or the time of the ratification of the Fourteenth Amendment openly carried guns in populated areas during their day-to-day activities.[15] Instead, the historical record shows that openly carrying firearms was not simply unusual, it was virtually unheard of in populated areas and would have been viewed as acceptable only in limited circumstances, when a person faced a particularized threat to themselves or their property.[16] The norm for carry outside of the context of hunting or militia service was concealed — a decision necessitated by the strong social stigma attached to openly carrying arms. This was true in the South, where the carrying of concealed weapons was endemic even though nearly every Southern state specifically prohibited concealed carry.[17]

In *Heller*, Justice Scalia stated that the Second Amendment codified a "venerable, widely understood libert[y]."[18] The historical record discussed in this Article shows that, rather than "venerable" and "widely understood" as acceptable, open carry was always viewed as highly unusual and anti-social conduct.[19] There is no evidence widespread open carry ever occurred. More should be required before the Supreme Court strikes down democratically enacted gun regulations under the Second Amendment.

Part II of this Article will lay out the gun rights argument for a broad right to openly carry firearms in public based on the absence of specific open carry prohibitions in some states. Part III will present evidence that open carry was rare and socially unacceptable. Part IV will discuss the implications of the historical reality of open carry — namely, the

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[15] *Contra* Brief in Support of Petitioner, *supra* note 10, at 28-30 (asserting several examples of people in the founding generation carrying); *but see* Mark Anthony Frassetto, *Meritless Historical Arguments in Second Amendment Litigation*, 46 HASTINGS CONST. L.Q. 531, 538 (2019) (discussing the flaws in several anecdotes about the founders carrying).

[16] *See infra* Parts III.C, III.D.

[17] *See infra* Part II.

[18] District of Columbia v. Heller, 554 U.S. 570, 605 (2008).

[19] *See infra* Parts III.C, III.D.

absence of a widespread tradition of such carry — for Second Amendment doctrine.

I. THE SOUTHERN MODEL OF PUBLIC CARRY REGULATION

The best historical scholarship on the American history of public carry regulation divides states into two broad traditions, a Northern tradition and a Southern tradition.[20] This dichotomy was first laid out in the seminal Yale Law Journal Forward article by Eric Ruben and Saul Cornell, *Firearms Regionalism*.[21]

In Ruben and Cornell's telling, around the Founding, Northern states adopted the preexisting English Model, which broadly prohibited carrying weapons in populated public areas.[22] This model later evolved to create statutory exceptions for people who had a specific need to carry weapons in public, while still broadly prohibiting most carry.[23] In the second half of the nineteenth century, many Western states adopted a modified version of the Northern tradition, which completely prohibited carrying weapons in populated towns and cities, but left carrying in rural and frontier areas completely unregulated.[24]

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[20] Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121 (2015) [hereinafter *Firearms Regionalism*].

[21] *Id.*

[22] *See, e.g.*, STATUTE OF NORTHAMPTON, 2 Edw. 3, 258, ch. 3 (1328) ("That no man. . . be so hardy to come before the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their bodies to Prison"); 1786 Va. Laws 33, ch. 51 ("That no man. . . be so hardy to come before the Justices of any Court, or other of their Ministers of Justice, doing their office, with force and arms, on pain, to forfeit their armour to the Commonwealth, and thir bodies to prison, at the pleasure of a Court; nor go nor ride armed by night nor by day, in fair or markets, or in other places, in terror of the Country, upon pain of being arrested and committed to prison by any Justice on his own view, or proof of others.") For a detailed analysis of the history of public carry regulation, see PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY (2018).

[23] *See, e.g.*, 1838 Wisc. Sess. Laws 381, § 16 ("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, or to his family, or property, he may, on complaint of any other person having reasonable cause to fear an injury or breach of the peace, be required to find sureties for keeping the peace for a term not exceeding six months."); *Firearms Regionalism*, *supra* note 20, at 131-32 (describing enactment of good-cause public carry laws in several states).

[24] *See, e.g.*, 1889 Ariz. Laws, no. 13, § 1 (prohibiting the carrying of a pistol "within any settlement, town, village, or city"); 1869 N.M. Laws 312, ch. 32 § 1 ("It shall be

Southern states generally adopted a different approach by broadly prohibiting concealed carry but leaving open carry unregulated.[25] As this Article will discuss, that does not mean people actually openly carried guns. The weight of the evidence discussed below strongly suggests that they did not, and therefore, Southern laws were geared specifically to address concerns about publicly carrying concealed firearms.

Like any historical analysis spanning more than a century across dozens of states, there are myriad exceptions and nuances — some Southern states adopted the Northern model and some Northern states only prohibited concealed carry — but as a broad historical narrative, the Ruben and Cornell argument is accurate.[26]

The standard gun rights narrative regarding the historical scope of public carry regulation ignores the Northern tradition and focuses exclusively on the South. Under this narrative, in the nineteenth century, many states prohibited carrying concealed weapons because concealing a weapon showed a person had a nefarious intent.[27] Openly carrying weapons, on the other hand, was viewed as the manly, socially acceptable way to go armed during a person's everyday life.[28] Under this view, because there was a tradition of open carry even when concealed

unlawful. . .to carry deadly weapons. . .within any of the settlements of this Territory"); 1876 Wyo. Laws 352, ch. 52, § 1 (prohibiting a "resident of any city, town or village" from carrying a firearm "within the limits of any city, town or village").

[25] *See, e.g.*, 1841 Ala. Laws 148-49 ch. 7, § 4 (prohibiting concealed carry of firearms and deadly weapons without "good cause to apprehend an attack"); 1838 Ark. Acts 280 (making the carrying of a concealed firearm or other weapon a misdemeanor); 1862 Colo. Sess. Laws 56 § 1 (making concealed carry of a firearm or weapon punishable by a fine); 1840 Fla. Laws 423 ch. 860 (prohibiting the carrying of "arms of any kind. . .secretly. . .or known to be secreted upon the person"); 1861 Ga. Laws 859 tit. 1, div. 9, § 4413 (making concealed carry a misdemeanor punishable by a fine or imprisonment).

[26] For example, Virginia adopted a Northern model complete prohibition while Indiana adopted a Southern style concealed carry prohibition. 1847 Va. Laws 127, ch. 14, § 16; 1819 Ind. Acts 39 ch. 23, § 1.

[27] *See generally* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1152-70 (9th Cir. 2014) (vacated, en banc) (arguing historical case law supports a broad right to carry openly); Meltzer, *supra* note 11, at 1512-16 ("Most states that heard challenges to laws regulating the carry of weapons instead distinguished between open and concealed carry. They found open carry protected by the Second Amendment or the state analogue, while determining that concealed carry could be banned. In each case, courts emphasized that concealed carry did not vindicate the interests of legitimate self-defense that underscored the right to keep and bear arms.")

[28] *See* Meltzer, *supra* note 11, at 1518-20.

carry was banned, there is a general Second Amendment right to public carry.[29]

To support their theory, gun rights advocates point to the Southern historical evidence discussed in this section, while ignoring not only the Northern tradition entirely, but also all evidence suggesting open carry was virtually nonexistent in populated areas of both the North and South. As noted above, they are correct that many Southern states adopted prohibitions on carrying concealed weapons that did not include openly carrying weapons.[30] And others explicitly excepted open carry from the scope of laws prohibiting concealed carry.[31] These laws, however, are sharply contrasted by a series of Northern and Western laws — which the gun rights narrative ignores — that either prohibited all carry absent good cause or completely prohibited the carrying of weapons in populated areas.[32]

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[29] *Id.* at 1518-19.

[30] *See, e.g.*, 1841 Ala. Laws 148-49 ch. 7, § 4 (prohibiting concealed carry of firearms and deadly weapons without "good cause to apprehend an attack"); 1838 Ark. Acts 280 (making the carrying of a concealed firearm or other weapon a misdemeanor); 1862 Colo. Sess. Laws 56 § 1 (making concealed carry of a firearm or weapon punishable by a fine); 1840 Fla. Laws 423 (prohibiting the carrying of "arms of any kind. . .secretly. . .or known to be secreted upon the person"); 1861 Ga. Laws 859 tit. 1, div. 9, § 4413 (prohibiting the carrying of weapons "unless in an pen manner and fully exposed to view"); 1909 Idaho Sess. Laws 6 no. 62, § 1 (making the concealed carry of a weapon or firearm within "limits or confines of any city, town, or village, or in any public assembly"); 1874 Ill. Laws 360 ch. 38, § 56 (punishing concealed carry of a weapon by a fine); 1819 Ind. Acts 39 ch. 23, § 1 (making the carrying of a concealed weapon a misdemeanor); 1897 Iowa Sess. Laws 574, tit. 24, ch. 3, § 4775 ("If any person carry upon his person any concealed weapon. . .shall be guilty of a misdemeanor"); 1813 Ky. Acts 100 ch. 89, § 1 (fining any person who carries a concealed weapon); 1871 Ky. Acts 89 ch. 1888, § 1 (prohibiting the concealed carry of "any deadly weapons upon their persons"); 1872 Md. Laws 57 ch. 42, § 240 (prohibiting carrying a concealed weapon in Annapolis specifically); 1887 Mich. Pub. Acts 144 no. 129, § 1 ("[I]t shall be unlawful for any person. . .to go armed with a. . .dangerous weapon or instrument concealed upon his person"); 1859 Ohio Laws 56, § 1 (making carrying a concealed weapon a misdemeanor); 1872 Wis. Sess. Laws 17 ch. 7, § 1 (making carrying of a concealed pistol or revolver a misdemeanor).

[31] *See, e.g.*, 1837 Ga. Laws 90 § 1 ("[p]rovided, also, that no person or persons, shall be found guilty of violating the before recited act, who shall openly wear, externally, Bowie Knives, Dirks, Tooth Picks, Spears, and which shall be exposed plainly to view"); 1813 La. Acts 172 § 1 ("that do not appear in full open view"); JOHN P. DUVAL, COMPILATION OF THE PUBLIC ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA PASSED PRIOR TO 1840, at 423 (1839) ("[p]rovided, however, that this law shall not be so construed as to prevent any person from carrying arms openly, outside of all their clothes.").

[32] *See Firearm Regionalism*, *supra* note 20, at 130.

Gun rights proponents next point to a body of case law, again primarily adjudicated in the South, that facially supports their view.[33] The most significant of these cases is *Nunn v. State*, a challenge to a wide-ranging Georgia law prohibiting both the sale and carrying of handguns in Georgia.[34] The poorly drafted Georgia law prohibited any person "to keep or to have about their persons, or elsewhere, any . . . Bowie or any other kinds of knives . . . pistols, dirks, sword-canes, spears, &c." with an exception for "horsemen's pistols that would be used in militia service."[35] Like other Southern states, the Georgia legislature included an exception for openly carried weapons, which said, "no person or persons, shall be found guilty of violating the before recited act, who shall openly wear, externally, Bowie Knives, Dirks, Tooth Picks, Spears, and which shall be exposed plainly to view."[36] However, in an apparent drafting error, this exception neglected to include pistols, which was included in the concealed carry prohibition, and added "toothpicks," a kind of knife, which had not been expressly listed in the prohibition.[37] The Georgia Supreme Court noted this incongruity saying: "It would seem to have been the intention of the Legislature to make the *proviso* in the 4th section as broad as the enacting clause in the 1st. But such is not the fact."[38]

The Georgia Supreme Court used the federal Second Amendment to find that:

> [S]o far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*.[39]

Notably, applying the Second Amendment to state legislation was in contravention of the Supreme Court's decision in *Barron v. Baltimore*.[40] After Nunn, Georgia maintained a prohibition on carrying concealed

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[33] *See Meltzer*, *supra* note 11, at 1510-16.

[34] Nunn v. State, 1 Ga. 243, 247 (1846).

[35] Act of Dec. 25, 1837, § 1, 1837 Ga. Laws 90, 90.

[36] *Id.* § 4.

[37] *Id.*

[38] *Nunn*, 1 Ga. at 246.

[39] *Id.* at 251.

[40] 32 U.S. 243 (1833); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 154 (1998) (discussing Nunn as an example of state courts rejecting the *Barron v. Baltimore* decision).

weapons while allowing for open carry.[41] In 1870, during Reconstruction, the Georgia legislature limited the impact of the *Nunn* decision by creating a broad sensitive places law, prohibiting carrying guns "at a court of justice or an election ground or precinct, or any place of public worship, or any other public gathering in this State."[42] This law was part of a broader national movement to enact stronger firearms regulation, particularly in the case of public carry.[43] The Georgia Supreme Court upheld the law, saying:

> The practice of carrying arms at courts, elections and places of worship, etc., is a thing so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil, that it would be strange if the framers of the constitution have used words broad enough to give it a constitutional guarantee.[44]

In *State v. Reid*, the Alabama Supreme Court endorsed the idea that openly carrying arms was protected by the Alabama version of the Second Amendment.[45] The case challenged a conviction under Alabama's law prohibiting carrying concealed weapons.[46] The court found the law did not violate the state constitutional provision protecting a right to "bear arms, in defence of himself and the State," because it still allowed for the carrying of weapons in self-defense.[47] In an aside, the court also said that if there were two laws, one prohibiting concealed carry and one prohibiting open carry, the court would strike

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[41] GA. CODE ANN. § 4413 (1861) ("Any person having or carrying about his person, unless in an open manner and fully exposed to view, any pistol, (except horseman's pistols,) dirk, sword in a cane, spear, bowie-knife, or any other kind of knives, manufactured and sold for the purpose of offence and defence, shall be guilty of a misdemeanor, and, on conviction, shall be punished by fine or imprisonment, or both, at the discretion of the court."). Courts in Alabama, Louisiana, and Indiana took a similar approach to the *Nunn* court, although applying their own state constitutions, upholding complete prohibitions on carrying concealed weapons because the option to carry weapons openly was still available.

[42] GA. CODE ANN. § 348 (1914).

[43] *See* Saul Cornell, Symposium, *The Right to Regulate Arms in the Era of the Fourteenth Amendment: The Emergence of Good Cause Permit Schemes in Post-Civil War America*, 55 UC DAVIS L. REV. ONLINE 65, 70 (2021).

[44] Hill v. State, 53 Ga. 472, 475 (1874). The *Hill* court also called into question the correctness of *Nunn* on various grounds, noting that the Second Amendment did not run against the states — which was true when *Nunn* was decided, but untrue when *Hill* was decided — and stating "I have always been at a loss to follow the line of thought that extends the guarantee to the right to carry pistols[.]" *Id.* at 474; *see* Andrews v. State, 50 Tenn. (3 Heisk) 165, 183 (1871).

[45] State v. Reid, 1 Ala. 612 (1840).

[46] *Id.* at 614.

[47] *Id.* at 614-16.

down the law prohibiting open carry because "it is only when carried openly, that they can be efficiently used for defence."[48]

The Indiana Supreme Court upheld the state's concealed carry prohibition, with the reported decision stating only: "It was *held* in this case, that the statute of 1831, prohibiting all persons, except travellers, from wearing or carrying concealed weapons, is not unconstitutional."[49] Another case a decade later clarified that carrying a gun in full open view would not violate the terms of Indiana's law.[50]

In *State v. Chandler*, the Louisiana Supreme Court rejected a challenge to the state's concealed carry prohibition, stating that the law was necessary to "counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons."[51] The *Chandler* court contrasted this with open carry, which was "calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."[52] A decade later, the Louisiana Supreme Court again upheld the law prohibiting concealed carry, finding it a "measure of police, prohibiting only a particular mode of bearing arms which is found dangerous to the peace of society."[53]

The Kentucky Supreme Court took a more extreme line in *Bliss v. Commonwealth*.[54] In *Bliss*, the court struck down Kentucky's prohibition on carrying concealed weapons, finding that the right protected by the state's constitution contained "no limits short of the moral power of the citizens to exercise it."[55] *Bliss* was the high-water mark for claims to a right to carry arms in public, and its interpretation was uniformly rejected by other states.[56] It was also rejected by the people of Kentucky, who when they revised their state constitution in 1850, amended their Second Amendment analogue to include, "but the General Assembly may pass laws to prevent persons from carrying concealed arms."[57]

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[48] *Id.* at 619.

[49] State v. Mitchell, 3 Blackf. 229, 229 (Ind. 1833).

[50] Walls v. State, 7 Blackf. 572, 573 (Ind. 1845).

[51] State v. Chandler, 5 La. Ann. 489, 490 (1850).

[52] *Id.*

[53] State v. Jumel, 13 La. Ann. 399, 400 (1858).

[54] Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822).

[55] *Id.* at 92.

[56] Commonwealth v. Murphy, 166 Mass. 171, 173 (1896) (noting that Bliss's interpretation of the right "has not been generally approved"); Meltzer, *supra* note 11, at 1513.

[57] KY CONST. of 1850, art. XIII, § 25.

Taking these Southern laws and cases together, there was clearly a constitutional tradition in parts of the South, and a legal tradition that existed more broadly, which allowed for the complete prohibition on carrying concealed weapons, but left openly carrying weapons largely unregulated.[58] This tradition has been consistently used by gun rights lawyers to argue that laws limiting the issuance of public carry permits only to individuals who face a specific threat are unconstitutional.[59] However, these arguments are made based on an insufficient historical record — namely, the handful of cases cited above. To truly understand how people during the relevant historical periods viewed the Second Amendment right, we have to understand what carrying weapons in public actually looked like at the time. The next Section of this Article will show that openly carrying weapons in populated public places without a specific need was never viewed as socially acceptable behavior.

II. THE HISTORICAL REALITY OF OPEN CARRY

The above-discussed laws and cases provide nominal support for the idea that some degree of open carry was acceptable in certain Southern states during the nineteenth century. However, gun rights advocates seek to use those materials to make a broader constitutional claim. They claim that the Second Amendment does not simply protect some right to carry guns in public, such as when hunting, when facing a specific need for self-defense, or when taking part in militia activity. Instead, they argue it protects a right to carry guns virtually all the time, with exceptions only for specific sensitive places and when prohibited by private property owners.[60] This broader claim to a right to always carry guns to protect against generalized risks requires more proof than the absence of regulation in several states. If gun rights advocates want to use this regional tradition to block states from regulating the carrying

[58] *See generally* Meltzer, *supra* note 11, at 1519 (noting that state courts approved of self-defense guaranteed by open carry but rejected a right to concealed carry).

[59] *See, e.g.*, Transcript of Oral Argument at 19-20, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 333 (2021) (No. 20-843) (argued Nov. 3, 2021) (arguing that the limitations of awarding open carry permits to specific circumstances was unconstitutional); Appellants' Opening Brief at 28, Flanagan v. Becerra, 2018 WL 6330679 (9th Cir. Oct. 2, 2018) (No. 18-55717) (noting the historical interpretation of the Second Amendment suggests that the right to bear arms must guarantee some right of self-defense in the public setting).

[60] *See, e.g.*, Brief for Petitioners at 2, *N.Y. State Rifle & Pistol Ass'n*, 142 S. Ct. 333 (2021) (No. 20-843) ("The Second Amendment makes the right to carry arms for self-defense the rule, not the exception, and fundamental rights cannot be left to the whim of local government officials.").

of weapons in public, they should at least be required to show some historical tradition of consistently openly carrying guns in public.

On this front, their historical arguments are sorely lacking. There is virtually no evidence that anyone at the Founding or during the nineteenth century regularly openly carried firearms in populated areas. Gun rights advocates have failed to identify any examples. Searches of contemporary newspapers show none, instead identifying guns being openly carried as a sign of the collapse of social order.[61] In contrast, there are innumerable examples of guns being carried concealed, even when it was prohibited by law.[62] The evidence strongly suggests that openly carrying firearms was shocking and outrageous conduct that was a measure of last resort only in extreme circumstances.[63]

A. Case Law and Other Primary Legal Sources Acknowledge that Open Carry Was Unusual

Nineteenth century case law and other legal sources discuss the rarity of openly carrying firearms in public. These cases provide critical nuance to the open carry line of cases. Even where it was believed a right to open carry existed, virtually no one viewed that right as a right to openly carry in populated places during a person's ordinary activities.

The most clear-cut discussion of the frequency of open carry comes in *State v. Smith*, an 1856 Louisiana Supreme Court case interpreting the state's 1813 statute against carrying concealed weapons.[64] The question in the case was the correctness of a judge's instruction that a jury could convict a defendant for carrying a concealed weapon if the weapon was "in the pocket, under the clothes, although partially exposed."[65] The court found the instruction accurately characterized the reach of the statute, which covered "weapons as ordinarily worn . . . where the partial exposure is the result of accident or want of capacity in the pocket to contain, or clothes fully to cover the weapon."[66] The court contrasted this prohibited carrying with "the extremely unusual case of the carrying of such weapon in full open view, and partially covered by the pocket or clothes."[67] Notably, the Louisiana Supreme

[61] *See infra* Part III.D.

[62] *See infra* Part III.B.

[63] *See infra* Part III.

[64] State v. Smith, 11 La. Ann. 633 (1856).

[65] *Id.* at 633.

[66] *Id.* at 634.

[67] *Id.* (emphasis added).

Court did not believe it was required to read the scope of the law narrowly because:

> [The Second Amendment] was never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke.[68]

A half century later, Judge James Campbell Moise of New Orleans expressed similar views in a grand jury charge.[69] Judge Moise criticized the state's prohibition on carrying concealed weapons, stating that "the law abiding citizen is at the mercy of desperate characters who disregard the law and stalk abroad armed."[70] The proto-gun rights judge then stated that when an "emergency" forces a respectable man into "dangerous contact with such men," prudence may require him to be "armed in self defense."[71] However, he continued, "he cannot, without being absurd, walk the public streets with his pistol exposed upon his person."[72] So in order to "avoid being ludicrous," respectable men responded to threats by breaking the concealed weapon law.[73] Judge Moise then urged the grand jurors to work to change public sentiment about carrying weapons in public rather than "direct your efforts towards enforcement of the law."[74]

In *State v. Reid*, discussed in detail above, the Alabama Supreme Court acknowledged that carrying weapons openly would not be something a person would do except in situations of exigency.[75] In *Reid*, the defendant asked for a jury charge saying that if he carried a weapon concealed to meet a specific threat, the jury should find him innocent.[76] This requested instruction assumed that carrying openly was not a

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[68] *Id.* at 633.

[69] For a brief biography of Judge Moise, see 3 LOUISIANA: COMPRISING SKETCHES OF PARISHES, TOWNS, EVENTS, INSTITUTIONS, AND PERSONS, ARRANGED IN CYCLOPEDIC FORM 305-07 (Alice Fortier eds., 1914).

[70] *Judge Moise Makes Up His Grand Jury*, DAILY PICAYUNE, Dec. 3, 1895.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] State v. Reid, 1 Ala. 612, 621 (1840).

[76] *Id.*

viable option. The court upheld the trial court's rejection of the jury charge but accepted the premise that carrying arms openly would be unusual conduct, saying, "[i]f the emergency is pressing, there can be no necessity for concealing the weapon."[77] On a longer timeline, the court said that a person should seek to have their threatener "arrested and constrained to find sureties to keep the peace, or committed to jail."[78]

Similarly, in *State v. Huntly*, the North Carolina Supreme Court upheld a conviction for the common-law crime of "riding or going armed with unusual and dangerous weapons, to the terror of the people."[79] Huntly appealed his conviction, arguing going armed was not a crime and that a gun was not an unusual weapon.[80] The court found that, while North Carolina had repealed the English Statute of Northampton, which prohibited carrying weapons in public, the common-law crime of carrying weapons to the terror of the people remained in effect.[81] The court also found that while "there is scarcely a man in the community who does not own and occasionally use a gun of some sort," a "gun is an 'unusual weapon,' where with to be armed and clad."[82] The court continued:

> No man amongst us carries it about with him, as one of his every day accoutrements--as a part of his dress--and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment.[83]

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[77] *Id.*

[78] *Id.*

[79] State v. Huntly, 25 N.C. 418, 418 (1843) (The substance of Huntly's crime was that he "did arm himself with pistols, guns, knives and other dangerous and unusual weapons, and, being so armed, did go forth and exhibit himself openly, both in the day time and in the night, to the good citizens of Anson aforesaid, and in the said highway and before the citizens aforesaid, did openly and publicly declare a purpose and intent . . . to beat, wound, kill and murder, which said purpose and intent, the said Robert S. Huntley, so openly armed and exposed and declaring, then and there had and entertained, by which said arming, exposure, exhibition and declarations of the said Robert S. Huntley, divers good citizens of the State were terrified, and the peace of the State endangered, to the evil example of all others in like cases offending, to the terror of the people, and against the peace and dignity of the State.").

[80] *Id.* at 420.

[81] *Id.* at 420-21.

[82] *Id.* at 422.

[83] *Id.*

The Huntly court went on to acknowledge that carrying a gun for "lawful purpose--either of business or amusement" was legal, but not in a manner "as will naturally terrify and alarm [] a peaceful people."[84]

Mirroring the language of the North Carolina Supreme Court in *Huntley*, one South Carolina grand jury issued a statement saying: "It is apparent to every good citizen and man of sense, that any gentleman would blush and feel deeply ashamed to be caught parading the streets on a public occasion, or, for the matter of that, on a private occasion, with a revolver swinging around his neck like a powder horn, or sticking vulgarly and threateningly out of his hip pocket, making him the picture of a pirate."[85] The grand jury went on to call carrying weapons openly "wrong and unmanly" and stated that "the best, most honored, bravest and most intelligent acquaintances, condemn it as ridiculous, and unnecessarily dangerous to the peace of the state and the lives of individuals."[86]

Smith, *Reid*, *Huntly*, and the grand jury materials support the view that openly carrying firearms during the course of one's everyday activities was not conduct that was viewed as normal or acceptable. With open carry off the table, a prohibition on carrying concealed weapons would have functioned much like a prohibition on carrying a weapon in public under most circumstances.

B. Many Laws Prohibiting Concealed Carry Make Little Sense if Open Carry Was a Viable Option

Additional support for the understanding that open carry was not acceptable conduct comes from the text of statutes prohibiting concealed carry. Many of these laws contained exceptions allowing concealed carry in certain circumstances. These exceptions make little sense if people understood openly carrying arms to be a viable and appropriate way to carry weapons. If it was a widely accepted practice to carry weapons openly, exceptions to the concealed carry prohibition would have been unnecessary.

Kentucky, the first state to enact a complete prohibition on carrying concealed weapons, included an exception for those carrying weapons "when travelling on a journey."[87] Similar standards existed in Arkansas,

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[84] *Id.*

[85] *Presentment of the Grand Jury*, WKLY. UNION TIMES (S.C.), June 25, 1879, at 2.

[86] *Id.*

[87] An Act to Prevent Persons in this Commonwealth from Wearing Concealed Arms, Except in Certain Cases, ch. 89, § 1, 1813 Ky. Acts 100.

Tennessee, Wyoming,[88] Arizona,[89] and Boise, Idaho.[90] Indiana excluded "travelers" from its 1819 prohibition on carrying concealed weapons.[91] California and the City of Los Angeles did the same.[92] Many states effectively excluded travelers from their concealed carry prohibition coverage by limiting the concealed carry prohibition to populated areas.[93]

Like other states, in 1841, Alabama excluded from its concealed weapons statute those "travelling, or setting out on a journey," but also excluded any "person [who] shall be threatened with, or have good cause to apprehend an attack."[94] This mirrored language that had been adopted by Massachusetts and Wisconsin in 1836 and 1838, respectively, both of which excluded from general prohibitions on carrying weapons those who had "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property."[95]

[88] JOSIAH A. VAN ORSDEL & FENIMORE CHATTERTON, REVISED STATUTES OF WYOMING, IN FORCE DECEMBER 1, 1899, at 1253 (Chaplin, Spafford & Mathison 1899).

[89] Crimes Against the Public Peace, 1901 Ariz. Sess. Laws 1251-53, tit. 11, §§ 381, 385, 390 ("Persons travelling may be permitted to carry arms within settlements or towns of the territory, for one-half hour after arriving in such settlements or towns, and while going out of such towns or settlements; and sheriffs and constables of the various counties of this territory and their lawfully appointed deputies may carry weapons in the legal discharge of the duties of their respective offices.").

[90] JOSIAH GOULD, A DIGEST OF THE STATUTES OF ARKANSAS ALL LAWS OF A GENERAL AND PERMANENT CHARACTER IN FORCE THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY 395 (1858) (prohibiting carrying concealed weapons "unless upon a journey."); JAMES H. SHANKLAND, PUBLIC STATUTES OF THE STATE OF TENNESSEE, SINCE THE YEAR 1858. BEING IN THE NATURE OF A SUPPLEMENT TO THE CODE 94 (1871).

[91] An Act to Prohibit the Wearing of Concealed Weapons, 1819 Ind. Acts 39, ch. 23, sec. 1; 1905 Ind. Acts 687-68, sec. 449.

[92] WILLIAM. M. CASWELL, REVISED CHARTER AND COMPILED ORDINANCES AND RESOLUTIONS OF THE CITY OF LOS ANGELES 85 (Evening Express Steam Printing Establishment 1878); THEODORE HENRY HITTELL, THE GENERAL LAWS OF THE STATE OF CALIFORNIA, FROM 1850 TO 1864, at 261 (H.H. Bancroft & Co. 1868).

[93] An Act To Prevent The Carrying Of Concealed Deadly Weapons In The Cities And Towns Of This Territory, 1862 Colo. Sess. Laws 56, § 1; An Act to Prevent the Carrying of Concealed Deadly Weapons in the Cities and Towns of This Territory, 1864 Mont. Laws 355, § 1; An Act Prohibiting the Carrying a Certain Class of Arms, within the Settlements and in Balls, 1852 N.M. Laws 67, § 1.

[94] Of Miscellaneous Offences, 1841 Ala. Laws 148-49, ch. 7, § 4. A few decades later Montgomery, Ala. enacted a local ordinance along the same lines. J.M. Falkner, THE CODE OF ORDINANCES OF THE CITY COUNCIL OF MONTGOMERY, WITH THE CHARTER 148-49 (Barrett & Brown 1879) (excluding from prohibition on carrying those "being threatened with or having good reason to apprehend an attack, or travelling or setting out on a journey.").

[95] 1836 Mass. Acts 750, ch. 134 § 16; 1838 Wis. Sess. Laws 381, § 16.

A similar standard was adopted in Ohio in 1859, which prohibited concealed carry but created an affirmative defense for those who:

> [A]t the time of carrying any of the weapon or weapons aforesaid, engaged in the pursuit of any lawful business, calling or employment and that 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. . .[96]

Kentucky adopted a similar standard in 1871, allowing the carrying of concealed weapons if a "person has reasonable grounds to believe his person, or the person of some of his family, or his property, is in danger from violence or crime," while also adopting a more limited traveler exception for those "required by their business or occupation to travel during the night."[97] In 1878, Mississippi adopted a law with nearly identical exceptions, and by 1881, Nebraska did the same.[98] In 1872, Wisconsin passed a complete prohibition on carrying concealed weapons with an exception for when a person had "reasonable cause to fear an assault or other injury or violence to his person, or to his family or property, or to any person under his immediate care or custody, or entitled to his protection or assistance."[99] The Wisconsin statute also included a catchall exception for when "it be made to appear that his possession of such weapon was for temporary purposes and with harmless intent."[100]

Again, these exceptions for travelers and people facing a specific threat make no sense in a world where openly carrying arms was viewed as acceptable and constitutionally protected conduct. State legislatures

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[96] 1859 Ohio Laws 56, § 2.

[97] An Act to Prohibit the Carrying of Concealed Deadly Weapons, 1871 Ky. Acts 89, ch. 1888, §§ 1-2, 5.

[98] An Act to Prevent the Carrying of Concealed Weapons and for Other Purposes, 1878 Miss. Laws 175, ch. 46, § 1; Guy Ashton Brown, THE COMPILED STATUTES OF THE STATE OF NEBRASKA, COMPRISING ALL LAWS OF A GENERAL NATURE IN FORCE JULY 1, 1881, § 25, at 666 (1881) (stating "engaged 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"). Omaha, Nebraska enacted an ordinance along the same lines. *See* W. J. CONNELL, THE REVISED ORDINANCES OF THE CITY OF OMAHA, NEBRASKA, EMBRACING ALL ORDINANCES OF A GENERAL NATURE IN FORCE, APRIL 1, 1890, TOGETHER WITH THE CHARTER FOR METROPOLITAN CITIES, THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF NEBRASKA 344 (Gibson, Miller & Richardson 1890).

[99] 1872 Wis. Sess. Laws 17, ch. 7, § 1.

[100] *Id.*

would not create these narrow carveouts to their concealed carry prohibitions if openly carrying arms was a viable way to go about a person's life.

In the later nineteenth century, many states began to adopt concealed carry licensing systems while leaving open carry unregulated. This was true even in some Northern states that had historically regulated all carry, likely because there was no need to regulate open carry for the reasons discussed in this Article. Colorado broadly prohibited carrying concealed weapons but allowed local law enforcement to issue licenses for people to carry concealed weapons.[101] New Jersey,[102] Oregon,[103] California,[104] Delaware,[105] Connecticut,[106] and New York[107] did the same. Virginia and North Dakota gave the authority to issue licenses to local judges.[108] The cities of Buffalo, New York.; Evanston, Illinois; Lincoln, Nebraska; Fresno, California;[109] Spokane, Washington;[110] and Oregon City, Oregon,[111] also had discretionary licensing systems allowing for the carrying of concealed weapons.[112]

By 1881, New York City enacted a general prohibition on carrying concealed weapons, with a licensing system allowing any person "who

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[101] CHARLES HAYDEN & PAUL WAYNE LEE, THE COMPILED LAWS OF COLORADO, 1921, § 248, at 1774 (The Smith-Brooks Printing Company 1922).

[102] A Supplement to an Act Entitled "An Act for the Punishment of Crimes," 1905 N.J. Laws 324-25, ch. 172, § 1.

[103] An Act Prohibiting the manufacture, sale, possession, carrying, or use of any blackjack, slungshot, billy, sandclub, sandbag, metal knuckles, dirk, dagger or stiletto, and regulating the carrying and sale of certain firearms, and defining the duties of certain executive officers, and providing penalties for violation of the provisions of this Act, 1917 Or. Laws 804-08, § 1, 3-A, 4, 4-A, 4-B, 4-C.

[104] Statutes of California, 1917 Cal. Stat. 221-25, ch. 145, § 6.

[105] Of Offences Against Public Justice, 1911 Del. Laws 739, ch. 275, § 1.

[106] Sale and Use of Pistols and Revolvers, 1923 Conn. Acts 3707, ch. 252, § 2-3.

[107] An Act to Amend the Penal Law, in Relation to the Sale and Carrying of Dangerous Weapons, 1911 N.Y. Laws, ch. 195, § 1.

[108] An Act to Amend and Re-Enact Section 3780 Of the Code in Relation to Carrying Concealed Weapons, 1908 Va. Acts 381, § 3780.

[109] Fresno, Cal., Ordinances of the City of Fresno § 8 (1896).

[110] Spokane, Wash., An Ordinance to Punish the Carrying of Concealed Weapons Within the City of Spokane § 1 (1896).

[111] Or. City, Or., An Ordinance Providing for the Punishment of Disorderly Persons, and Keepers, and Owners of Disorderly Houses § 2 (1898).

[112] An Act to Revise the Charter of the City of Buffalo, 1891 ch. 105, tit. 7, ch. 2, § 209, 1891 N.Y. Laws 129; EVANSTON, ILL., Concealed Weapons §§ 531, 537 (1893); Lincoln, Neb., Laws of Nebraska Relating to the City of Lincoln, An Ordinance Regulating and Prohibiting the Use of Fire-arms, Fire-works and Cannon in the City of Lincoln . . . Prescribing Penalties for Violation of the Provisions of This Ordinance, and Repealing Ordinances in Conflict Herewith, Art. XVI, § 6 (1895).

has occasion to carry a pistol for his protection" to apply to the local precinct commander for a license to carry.[113] In the 1890s, Evansville, Missouri adopted a concealed carry prohibition with exceptions for "persons moving or travelling peaceably through this state" and anyone "threatened with great bodily harm, or [who] had good reason to carry the same in the necessary defense of his home, person or property."[114] Oregon City, Oregon, excepted those who carried "in self-defense, in protection of property."[115]

In the early 1920s, the United States Revolver Association, in an effort to preempt legislatures from adopting more stringent restrictions, proposed a model law regulating firearms.[116] The USRA Model Act prohibited carrying concealed weapons but allowed for the issuance of licenses to carry concealed if "the applicant has good reason to fear an injury to his person or property or for any other proper purpose, and that he is a suitable person to be so licensed."[117] This standard was adopted in California,[118] North Dakota,[119] Oregon,[120] and Indiana.[121]

Beginning in 1924, the National Conference of Commissioners on Uniform State Laws took up firearms legislation.[122] In 1926, the Conference selected the USRA Model Act "as the model of the draft of the Uniform Act," because it had "already gained ground" in the states.[123] The Conference expressed its belief that "the provisions of the proposed law present no constitutional obstacles" and "constitute no

[113] N.Y.C., N.Y., Carrying of Pistols §§ 264, 265 (1881) (stating "engaged in the pursuit of 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").

[114] Huntsville, Mo., An Ordinance in Relation to Carrying Deadly Weapons §§ 1, 2 (1894).

[115] Or. City, Or., § 2.

[116] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING 1, 728 (1924).

[117] *Id.* at 729.

[118] Act of June 13, 1923, ch. 339, § 8, 1923 Cal. Stat. 695, 698-99.

[119] Act of Mar. 7, 1923, Pistols and Revolvers, ch. 266, § 8, 1923 N.D. Laws 379, 381.

[120] Act of Feb. 26, 1925, ch. 260, § 8, 1925 Or. Laws 468, 471.

[121] Act of Mar. 12, 1925, ch. 207, § 7, 1925 Ind. Acts 495, 497.

[122] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING, *supra* note 116, at 729 (1924).

[123] REPORT OF COMM. ON ACT TO REGULATE THE SALE & POSSESSION OF FIREARMS, NAT'L CONF. ON UNIFORM STATE LAWS 569 (1930) (Conf. Rep.).

radical changes in existing laws."[124] After making modest revisions to the law, it was dubbed the Uniform Firearms Act and approved by both the National Conference of Commissioners and the American Bar Association.[125] The UFA, which retained the USRA Model Act's licensing provisions, was passed in Pennsylvania,[126] South Dakota,[127] Washington,[128] and Alabama.[129]

Again, the exceptions to the general rule prohibiting the carrying of concealed weapons in the USRA Model Act and UFA make little sense in a world where openly carrying firearms was viewed as acceptable conduct, let alone a world where it was common. No one would risk fine or imprisonment on the strength of their self-defense justification to carry a concealed handgun if openly carrying a gun was viewed as virtuous. There would be no reason to create exceptions for travelers if the normal way to carry arms was fully exposed. There would certainly be no need to create stringent licensing systems for the issuance of permits to carry concealed weapons if openly carrying firearms was viewed as a viable alternative. These laws only make sense if openly carrying firearms was not something people were willing to do in their everyday lives.

C. Carrying Weapons in Public, Especially Openly, Was Viewed as a Sign of Social Disorder and Chaos

The historical evidence shows people rarely talked about openly carrying weapons, but when they did, it was almost entirely negatively.[130] People carrying weapons in public, and especially openly carrying weapons, was understood to be a sign of anarchic conditions or a breakdown in social order.[131] Rather than being an exercise of a respected right, openly carrying guns was a sign that a place had devolved into chaos.[132]

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[124] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING, at 574 (1926).

[125] REPORT OF COMM. ON ACT TO REGULATE THE SALE & POSSESSION OF FIREARMS, NAT'L CONF. ON UNIFORM STATE LAWS, at 568.

[126] Uniform Firearms Act, No. 158, § 7, 1931 Pa. Laws 497, 498-99.

[127] Adopting the Uniform Firearms Act, 1935 S.D. Sess. Laws ch. 208, § 7, 355, 356.

[128] Short Firearms, ch. 172, § 7, 1935 Wash. Sess. Laws 599, 601, 600-601.

[129] Act of Apr. 6, 1936, No. 82, § 7, 1936 Ala. Laws 51, 52.

[130] *See infra* Part III.C.

[131] *Id.*

[132] *Id.*

When setting the scene for a semi-mythical story about frontier outlaws in Texas, the American Review, a literary magazine, described the anarchic state of society in Shelby County:

> Every body knows that Texas has been the peculiar and favorite resort of restless adventurous men, and not those of this stamp simply, but as well the vicious and unprincipled, of nearly all nations . . . the quick wrath and bloody hand should be often simultaneous, *where the most formidable weapons were openly worn*, law and its restraints little regarded, and general sentiment favored a resort to them on trivial occasions.[133]

A newspaper editor in Louisiana described "a sad state of affairs" in Shreveport where "the citizens all, or nearly all, go armed."[134] And, in describing the chaos in Utah during the Mormon Wars, a newspaper correspondent noted that "[b]oth Mormons and Gentiles carry weapons openly in the streets."[135]

The open carrying of firearms during political activity was viewed as especially outrageous. In describing the "riot, disorder, violence and bloodshed" that accompanied an 1860 municipal election in D.C., the aggrieved candidate pointedly noted that "some of my opponents openly displayed their weapons, while many of them were known to the police to have weapons concealed."[136] In describing the alleged abuses of the Republican Party, one Democratic newspaper in Nashville noted: "Circulars of an inflammatory character have been freely distributed, falsehoods of the most outrageous character have been freely circulated, deadly weapons have been openly carried, and threats of personal violence indulged in[.]"[137]

In describing the highest casualty lynching in U.S. history, one D.C. newspaper noted that "the citizens [were] openly bearing weapons."[138] Another newspaper described "[a] [s]tate bordering on anarchy" where union strikers had gone "openly about with loaded weapons in their hands."[139]

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[133] Charles Winterfield, *Jack Long; or, Lynch-Law and Vengeance*, 1 AM. REV.: A WHIG J. POL., LITERATURE, ART & SCI. 121, 121 (1845).

[134] *Murder*, BATON ROGUE GAZETTE, July 30, 1842.

[135] *Mormons Won't Rent Nor Buy*, CLEVELAND MORNING LEADER, Aug. 2, 1858.

[136] *To the Board of Aldermen and Common Council of the City of Washington*, EVENING STAR (D.C.), June 11, 1860.

[137] *Yesterday's Work*, NASHVILLE UNION & AM., Aug. 7, 1874.

[138] *Like a Weird Dream,* SUNDAY HERALD & WKLY. NAT'L INTELLIGENCER (D.C.), Mar. 22, 1891, at 6.

[139] *Not Wanted in the Borough*, WATERBURY EVENING DEMOCRAT, July 12, 1892.

Inversely, the fact that people no longer carried weapons in public, either openly or concealed, was frequently described as a sign that law and order had been established in a community. A Nevada vigilance committee announced the restoration of order in its area by noting "our elections on three occasions have been peaceable and untainted by fraud, quiet and order reign in our streets; virtue is not openly outraged on the highways; deadly weapons are no longer publicly displayed and defiantly used."[140] In 1876, General August Kautz issued a report on the status of the Arizona Territory that began: "I am pleased to be able to state that peace and quiet prevails throughout the Territory, and that the inhabitants no longer think of going armed whilst pursuing their various avocations as was the case a few years ago."[141] Similarly, a Bozeman, Montana newspaper noted that people in the east thought that in Montana "people have to go armed to protect themselves," "while in fact, life and property are more secure here than elsewhere."[142] A Texas livestock trade publication suggested that the Texas beef industry should run ads informing people that "it was no longer essential that cowboys should go armed" in order to spur investment into the purportedly pacified state.[143]

The Wheeling Register in West Virginia laid out this dichotomy in an editorial criticizing the practice of carrying weapons in public, stating that carrying weapons might be appropriate"[i]f there were no law; if there were no officers of the law; and if the community were made up of lawless and uncivilized people."[144] The editorial further stated that if there is not "ample protection of life and property in the civil law," then a person is "entitled to arm himself and carry his weapons of defense openly and conspicuously—to strap them about him as the savage does in his native forest."[145] The paper, however, made clear that "there is, in fact, no occasion for this barbarous habit of going about with pistols and knives. It is an insult to civilization."[146] The paper noted that "even the custom of wearing swords, which for a long time was countenanced in European countries, and was supposed to give dignity and position

[140] *Address of the Executive Committee of Vigilance*, NEV. J., Oct. 23, 1857.

[141] *Gen. Kautz's Report*, ARIZ. WKLY. MINER, Dec. 15, 1876.

[142] Samuel W. Langhorne ed., *Weekly Chronical Bozeman, Mont.*, BOZEMAN WKLY. CHRON. (Dec. 5, 1883).

[143] *See The Apportionment Bill*, WKLY. STATESMAN (Austin, Tex.), Feb. 16, 1882, at 4 (summarizing a piece from the "Live Stock Journal").

[144] *See The Pistol*, WHEELING REG., (Wheeling, W. Va.), July 11, 1879, at 2.

[145] *Id.*

[146] *Id.*

to the possessor, has been frowned down by the good sense of mankind three quarters of a century ago."[147]

An Oregon paper adopted a similar line, stating, "to carry fire-arms, or other dangerous weapons, is itself a crime; it proved murderous thoughts and intentions; it shows a latent disposition to slay if occasion arise, and it is not, except in rare cases, justified by personal danger."[148] The paper went on to say, "[a] man who carries pistols among men without pistols is not merely a coward—he is every unarmed man's enemy, and he ought to be driven out of the society he outrages."[149] In calling for enforcement of the prohibition on carrying weapons, the anonymous author stated: "Either let us all wear weapons openly, as in old times, or let the coward who concealed one be treated as a premeditating murderer, to whom is due neither clemency nor toleration."[150] An editorial in an Austin, Texas paper stated, "cowardly bullies go armed and the honest and upright obey the country's laws and are unarmed."[151] The piece went on to say, "no good and worthy citizen will bear arms, not only because it is violative of the law, but because it is a constant confession either of cowardice or of the purpose to kill."[152]

Taking these materials together, it is difficult to believe that openly carrying weapons during ordinary activities was understood as acceptable, constitutionally protected activity. It is hard to believe that conduct was understood to be a "venerable, widely understood libert[y]" when doing so was viewed as a sign of civilizational collapse.[153]

D. When Open Carry Did Occur, It Was Viewed as Bizarre and Newsworthy

While proving a negative, especially with incomplete historical records, is always difficult, there is virtually no evidence that anyone in the late eighteenth or nineteenth century consistently carried a gun

147 *Id.*

148 *Thou Shalt Not Kill*, DAILY ASTORIAN, Oct. 10, 1882, at 2.

149 *Id.*

150 *Id.*

151 *Fighting Played Out*, WKLY. DEMOCRATIC STATESMAN (Austin, Tex.), Oct. 24, 1878, at 1.

152 *Id.*

153 *See* District of Columbia v. Heller, 554 U.S. 570, 605 (2008).

openly in public.[154] There is certainly no evidence that openly carrying a gun in populated areas was viewed as acceptable conduct.

In an 1846 speech, future Senator Charles Sumner distinguished between the past, when "the sword was the indispensable companion of the gentleman, wherever he appeared," with the present, when a person would be "deemed a madman or bully" if he wore a gun in public.[155]

The small number of cases where people did openly carry received media coverage ranging from outraged to condescending. One example came in Omaha, Nebraska, where Tom Keeler, "a notorious rough and daring desperado" who "never was seen without a revolver openly strapped to his hip belt," was arrested for openly carrying a handgun.[156] The baffled authorities arrested him for carrying concealed weapons but were forced to release him because his conduct did not fall within the state's concealed carry prohibition.[157] The court did issue a reprimand before releasing Keeler "on condition that he not make an open exhibition of his arsenal."[158] Shortly afterward, Keeler was killed in a duel by a man who went armed in response to Keeler's threats.[159]

In D.C., the arrest of a man "with a pistol sticking out of his waist belt somewhat intoxicated looking like some bold knight" garnered a story in the local paper under the title, "A Dangerous Person."[160] The man was fined twenty dollars and, failing payment, was compelled to work on the D.C. penal farm for ninety days.[161] In another example from D.C., a young black man fearing "night doctors," mythical doctors who would abduct black people for medical experiments, openly carried a pistol in his hand while walking at night.[162] He was arrested and, presumably because his carrying did not technically violate D.C.'s prohibition on carrying concealed weapons, warned to "leave your weapons at home" and made to pay a bond for his future good

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154 The author extensively searched the Library of Congress, Chronicling America newspaper archive. LIBR. OF CONG., https://chroniclingamerica.loc.gov/ [https://perma.cc/DA2H-2K4H].

155 CHARLES SUMNER, THE TRUE GRANDEUR OF NATIONS: MR. SUMNER'S ORATION 76 (J. H. Eastburn, City Books 1845).

156 *How a Feud Was Settled in Nebraska—Dueling Without Formalities*, CHI. DAILY TRIB., Dec. 11, 1874, at 2.

157 *Id.*

158 *Id.*

159 *Id.*

160 *A Dangerous Person*, EVENING STAR (D.C.), Aug. 26, 1858, at 3.

161 *Id.*

162 *Afraid of Night Doctors*, EVENING STAR (D.C.), Dec. 5, 1887, at 5.

behavior.[163] A New York man openly carrying a pistol was apparently unusual enough that it made national news. When he was confronted by police while standing outside of a bank, the man explained that openly carrying was not technically illegal and said he was there to murder someone (this was likely sensationalized as the story made its way away from New York). The less-than-entertained police instructed him to move along.[164]

Another story that gained national attention was when "Babe" Hawkins, an Indiana "desperado of the worst character" who "terrorized the county for years" openly carried guns around town after being denied a reduction in his bond for a prior assault.[165] The story was apparently noteworthy enough that it was reported three states over in an Omaha paper.[166] Another story in a North Carolina paper discussed how wagons "guarded by three men with openly displayed weapons, naturally aroused much astonishment and inquiry" among New Yorkers.[167]

If openly carrying weapons in populated public places was widely understood to be socially acceptable, constitutionally protected conduct, then it would be odd for the exercise of the right to be met with shock and outrage. One would expect the exercise of a "venerable, widely understood liberty" to be viewed as normal rather than shocking. As far as the author can tell, there is no time in American history where that was the case.

E. Carrying Weapons Was Only Deemed Acceptable When a Person Faced a Specific Threat

Most commentators did not seem to believe that it was never acceptable to carry weapons in public; rather, they believed weapons should only be carried when a person faced a specific threat. In this context — a person faced with a specific threat — some commentators advocated for open rather than concealed carry. But such commentary does not support the gun rights view that there is a Second Amendment right to carry a weapon all the time. Rather, it shows the right was historically limited to carrying weapons when facing a specific danger. There are almost innumerable examples of newspapers advising people of specific threats and telling them to go armed in response.

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163 *Id.*

164 *See He Carried His Big Revolver*, LANCASTER DAILY INTELLIGENCER, Feb. 7, 1889, at 1.

165 *Carried His Guns in Sight*, OMAHA DAILY BEE, June 14, 1893, at 6.

166 *See id.*

167 *Uncle Sam's Gold Train*, FISHERMAN & FARMER (Edenton, N.C.), Aug. 19, 1892, at 7.

For example, in one newspaper editorial criticizing the practice of carrying concealed weapons, the editor stated: "If a man is really in danger of assault let him openly carry such weapons as he needs."[168] The editorial then strongly implied that carrying weapons openly would have been seen as unusual, saying: "There is no disgrace in doing whatever is essential for public safety. Nothing would tend more powerfully to exhibit the defective protection of the laws, and to induce reform, than for everybody who is in danger of personal assault, or conceives himself to be, to appear armed in the streets."[169] Similarly, the Interior Journal, a Kentucky paper, stated: "If a man is afraid someone will hurt him, and feels the necessity of carrying a weapon let him do it openly and above board by strapping it on the outside of his clothing."[170] A West Virginia paper stated:"[t]he man who has necessity for carrying a weapon is free to do so, provided he is frank and manly enough not to conceal it—not to hide it about him that he take some one unawares, or shoot him in the back."[171]

Newspaper articles warning readers of a particular danger and advising them to go armed in certain places or situations were also common.[172] These threats ranged from generic crime[173] to run-away slaves,[174] pro-slavery vigilantes,[175] members of Congress,[176] ghosts,[177]

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168 *Concealed Weapons*, DAILY STATE J. (Alexandria, Va.), Feb. 17, 1872, at 2.

169 *See id.*

170 INTERIOR J. (Stanford, Ky.), Jan. 25, 1878, at 2.

171 *The Pistol*, WHEELING REG., July 11, 1879, at 2. West Virginia's law followed the Massachusetts model, "If any person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property, he may be required to give a recognizance." 1870 W. Va. Code 703, For Preventing the Commission of Crimes, ch. 153, § 8.

172 *See, e.g.*, *Daring Attempt to Rob the Mail*, BOS. WKLY. MESSENGER (Bos., Mass.), Jan. 26, 1837, at 4 (reporting on a robbery attempt of mailman and call for citizens of D.C. to go armed because of out of control crime); CAIRO BULL. (Cairo, Ill.), Jan. 28 ,1869. at 1 (Call for people to carry firearms due to a rabid dog).

173 *E.g.*, *Daring Attempt to Rob the Mail*, *supra* note 172 at 4; STAR OF THE N. (Bloomsburg, Pa.), Oct. 28, 1857, at 2; DAILY NAT'L REPUBLICAN (D.C), July 27, 1865, at 1; OMAHA DAILY BEE, Dec. 11, 1884, at 6; WASHINGTON CRITIC (D.C.), July 10, 1885, at 1; ARIZ. SILVER BELT, Nov. 13, 1886, at 1; EVENING BULL. (Maysville, Ky.), Feb. 16, 1888, at 1.

174 *E.g.*, PLANTERS BANNER (Franklin, La.), July 17, 1852, at 2.

175 *E.g.*, KAN. HERALD OF FREEDOM (Wakarusa, Kan.), Dec. 13, 1856, at 1.

176 *E.g.*, *English and Montgomery Again*, MEIGS CNTY. TEL. (Pomeroy, Ohio), Dec. 28, 1858, at 2; *The Pistol Scene in Congress*, PORTAGE CNTY. DEMOCRAT (Raveena, Ohio), Jan. 25, 1860, at 2.

177 *E.g.*, *The Connecticut Ghosts Again*, PENNY PRESS (Cin., Ohio), Feb. 17, 1860, at 1.

rabid dogs,[178] Democrats,[179] mountain lions,[180] garroters,[181] heavyweight champion John L. Sullivan,[182] a defendant's co-conspirators,[183] an escaped gorilla,[184] wolves,[185] wild dogs,[186] vagrants,[187] a half-bear half-man monster,[188] refugees from a flood,[189] and a mayor suffering from mental illness.[190] Other sources called for stronger enforcement of the laws to prevent society from spiraling far enough for carrying to become necessary.[191]

In the Iron County Register, Thomas Calahan wrote a series on the right to bear arms in Missouri.[192] Calahan rejected the popular claim that "the practice of carrying weapons openly is the action of a bully and a coward," mentioning that he had recently openly carried a shotgun when facing threats from a group of mounted desperadoes.[193] The Opelousas Courier criticized the practice of carrying weapons as cowardly, saying, "it looks cowardly to go armed when there is no immediate peril to the person from an enemy. Even then, we think the

[178] *E.g.*, *Abbreviated Telegrams*, ROCK ISLAND ARGUS (Ill.), Nov. 14, 1889, at 2; *Hydrophobia*, CAIRO BULL. (Ill.), Jan. 28, 1869, at 1.

[179] *E.g.*, *Presentment of Points by the Republican Counsel, Crimes of Bulldozers*, HELENA WKLY. HERALD (Mont.), Dec. 28, 1876, at 5.

[180] *E.g.*, *If Not a Mexican Lion, What Is It?*, DALLAS HERALD, Jan. 13, 1878, at 1.

[181] *E.g.*, *Crimes and Casualties*, SAINT LANDRY DEMOCRAT (Opelousas, La.), Feb. 4, 1882, at 2.

[182] *E.g.*, *Bostonians Arming to Meet Sullivan*, OMAHA DAILY BEE, Feb. 2, 1885, at 7.

[183] *E.g.*, *Wanted to Catch the Governor*, ST. PAUL DAILY GLOBE, Dec. 23, 1885, at 1.

[184] *E.g.*, *Scared by a Big Gorilla*, DAILY EVENING BULL. (Maysville, Kent.), Nov. 3, 1886, at 4. Racist caricatures often used great apes as stand ins for Black people. *See* Brent Staples, *The Racist Trope That Won't Die*, N.Y. TIMES (June 17, 2018), https://www.nytimes.com/2018/06/17/opinion/roseanne-racism-blacks-apes.html [https://perma.cc/45AR-2365] (tracing the history of the use racist caricature and its continued prevalence today). There is no indication that is occurring in this article.

[185] *E.g.*, *Chased by Wolves*, ST. PAUL DAILY GLOBE, Apr. 1, 1888, at 7 (advising that citizens go armed for fear of wolves).

[186] *E.g.*, *Bismarck in Brief*, BISMARCK WKLY. TRIB., Apr. 27, 1888, at 5 (advising going armed for fear of wild dogs).

[187] *E.g.*, *Prepare for Them*, SALT LAKE HERALD, Aug. 3, 1888, at 4.

[188] *E.g.*, *The Corner Lounger*, MEM. APPEAL, Apr. 2, 1889, at 4.

[189] *E.g.*, *A Valley of Death*, EVENING STAR (D.C.), June 4, 1889, at 1.

[190] *E.g.*, *Reign of Terror*, DAILY TOBACCO LEAF CHRON. (Clarksville, Tenn.), May 15, 1890, at 1 (describing how citizens armed themselves because of the mentally ill mayor).

[191] *See, e.g.*, Editorial, *Capital Punishment*, COLUMBIAN CENTINEL (Boston, Mass.), Mar. 15, 1837, at 2; *Court Proceedings*, The Yorkville Enquirer (Yorkville, S.C.), Apr. 9, 1890, at 2.

[192] Thomas Calahan, *The Right to Bear Arms*, IRON CNTY. REG., Sept. 22, 1881, at 1.

[193] *Id.*

weapon should be carried openly, which would be no violation of the letter or spirit of the statute."[194]

In contrast to the specific instances when going armed was appropriate, generally going armed was viewed as reprehensible and criminal conduct.[195] Critiques of people for "habitually going armed" were widespread.[196] One Lexington, Missouri paper made the distinction between acceptable carry for immediate self-defense and condemnable habitually going armed, stating: "No truly brave man will go about habitually armed, year in and year out, or even for a short time, unless his life is in danger from someone who has sworn to take it."[197] Similarly, a Kentucky paper stated, "no brave or honorable gentleman would make a practice of wearing concealed about his person deadly weapons, unless his life was in danger from some particular person . . . none but bullies and brawlers habitually go armed."[198]

There seems to have been a clear distinction between purposive carry — carry to meet a specific threat — and habitual carry — carry as part of one's everyday activities. This distinction seems to have been applied beyond states where it was expressly part of their public carry statutory regime. For example, a Missouri court dismissed charges against a reporter for carrying concealed weapons after he presented "several witnesses that threats had been made against him" and the judge decided he "had sufficient reason for going armed."[199] Notably, necessity justified the reporter to carry a concealed weapon even when the law left openly carrying arms unregulated.[200] A West Virginia newspaper expressed a similar view when discussing the shooting of a former West Virginia congressman by a reporter who had been bullied and abused by the congressman for years after the reporter exposed an

194 *Concealed Weapons*, OPELOUSAS COURIER, Jan. 28, 1888, at 1.

195 *A Plea for a Higher Civilization*, PUB. LEDGER (Memphis, Tenn.), Jan. 27, 1883, at 3; *Weekly Intelligencer*, LEXINGTON WKLY. INTELLIGENCER, July 8, 1876, at 3.

196 *See, e.g.*, *Enforce the Law*, WASH. CRITIC, Mar. 3, 1890, at 2 (criticizing habitually going armed and calls for stricter enforcement); *Local A.B.C.'s*, WKLY. CAUCASIAN (Lexington, Mo.), Dec. 3, 1870, at 2 (discussing the scourge of carrying concealed weapons habitually); *The Pistol*, LEXINGTON WKLY. INTELLIGENCER, Feb. 10, 1877, at 3 (complaining about those who go habitually armed); *What Others Say*, ABBERVILLE PRESS & BANNER, Mar. 26, 1879, at 2 (criticizing the Southern culture of violence and going armed).

197 *Carrying Concealed Weapons*, WKLY. CAUCASIAN (Lexington, Mo.), Feb. 19, 1870, at 2.

198 *The Pistol*, LEXINGTON WKLY. INTELLIGENCER, Feb. 10, 1877, at 3.

199 Editorial, FAIR PLAY (St. Genevieve, Mo.), July 6, 1889, at 2.

200 1883 Mo. Laws 76 § 1274 (prohibiting "any person" from "carry[ing] concealed, upon or about his person, any deadly or dangerous weapon") (amended 1879).

affair.[201] In Los Angeles, permits appear to have been issued based on need as well. An 1888 Los Angeles Daily Herald article discussed a man seeking a permit to carry concealed weapons after being twice "held up by footpads" and having his house "three times burglarized."[202]

This tradition brings the Southern concealed carry tradition of regulation much more in line with the more expressly prohibitory traditions in the North and West.[203] Openly carrying guns in the ordinary course of business would have been viewed as anti-social behavior everywhere in the country outside of situations where carrying was needed for immediate self-defense.

III. THE IMPACT OF A LACK OF OPEN CARRY TRADITION ON SECOND AMENDMENT DOCTRINE

So, why does any of this matter?

In *Heller*, Justice Scalia stated that the Second Amendment did not create a new right but instead protected "venerable, widely understood liberties." More broadly, modern originalism, of the type used by the Supreme Court in *Heller*, looks for the "original public understanding" of a right.[204] The gun rights argument is that there is a Second Amendment right to carry guns in public virtually all the time for any reason because open carry was historically the socially acceptable way to carry firearms and was traditionally not regulated. This Article shows that virtually no one understood open carry as part of a person's everyday activities to be acceptable conduct, let alone "a venerable, widely understood liberty." The absence of a law regulating conduct that no one engaged in, and most deemed unacceptable, is not a strong argument that such conduct is constitutionally protected. In contrast, concealed carry *was* widely regulated, and such regulations often included exceptions if people showed a specific need to carry a firearm. The presence of exceptions to broad concealed carry restrictions further undermines the gun rights narrative, as it hardly makes sense to set up rules and exceptions for concealed carry if everyone was free to bypass those and carry firearms openly.

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201 *The Truth About Kincaid and Taulbee*, WHEELING DAILY INTELLIGENCER, Mar. 3, 1890, at 2.

202 *Fire Commissioners*, L.A. DAILY HERALD, Dec. 23, 1888, at 8.

203 *See, e.g.*, Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121, 127 (2015) (discussing distinct Northern tradition).

204 District of Columbia v. Heller, 554 U.S. 570, 605 (2008).

The Supreme Court is currently considering whether to strike down New York's law requiring applicants for permits to carry firearms in public to show a specific need to carry.[205] The gun rights argument about the history of open carry is at the core of the NRA's argument for why the law is unconstitutional.[206] When the Court considers the historical scope of the Second Amendment outside of the home, it should take into account what public carry actually looked like during the relevant historical period. In the nineteenth century, as today, openly carrying guns in public was not normal or acceptable conduct.

Second Amendment doctrine, especially public carry Second Amendment doctrine, is already among the most originalist and history-focused in American law.[207] Assuming this trend of originalist Second Amendment analysis continues, whether the Supreme Court accepts the view that open carry was an acceptable and widely practiced exercise of the Second Amendment right could have an enormous effect on what kinds of regulations state and local governments are allowed to impose on the carrying of firearms in public. The historical materials discussed above undermine one of the central historical arguments made in support of a broad right to carry in public. Rather than a nineteenth century where openly carrying weapons was a commonly accepted activity, such conduct was viewed as outrageous and only acceptable when a person faced an immediate threat. The Supreme Court should not ignore this history and strike down laws that clearly fit within the historical tradition.

[205] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 333 (2021).

[206] Brief for Petitioners at 9, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 333 (No. 20-843).

[207] *See generally* Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325 (2009) (discussing the impact of *Heller* with respect to its originalist interpretation and reliance on the history of the gun rights in America).