

# THE SECOND AMENDMENT AND THE BASIC RIGHT TO TRANSPORT FIREARMS FOR LAWFUL PURPOSES

*Patrick J. Charles\**

I.	WHY THE QUESTION BEFORE THE SUPREME COURT SHOULD BE A NARROW ONE .....	128
II.	THE HISTORY OF REGULATING THE TRANSPORTATION OF FIREARMS .....	143
III.	THE CASE FOR STRIKING DOWN NEW YORK CITY'S HANDGUN TRANSPORT RESTRICTION AS UNCONSTITUTIONAL PER SE.....	171

For the first time in nearly a decade, with the recent grant of certiorari in *New York State Rifle & Pistol Association, Inc. v. City of New York, New York*, the Supreme Court will take up a Second Amendment case. There are several reasons the case may prove significant as a matter of constitutional law, but two aspects of the case will undoubtedly receive the bulk of attention. This first is how the case will provide jurists, scholars, and legal commentators with some insight as to how the Second Amendment applies outside the home.<sup>1</sup> The second is how the case may finally provide

---

\* Patrick J. Charles is the author of numerous articles and books on the Constitution, legal history, and the use of history-in-law as a jurisprudential tool. Charles received his L.L.M. in Legal Theory and History from Queen Mary University of London with distinction, J.D. from Cleveland-Marshall College of Law, and his B.A. in History and International Affairs from George Washington University. Charles currently serves as a senior historian for United States Special Operations Command (USSOCOM). The contents of this article are not those of USSOCOM or the Department of Defense and are solely the author's. The author would like to thank Joseph Blocher for providing useful feedback and comments.

1. See, e.g., Adam Liptak, *Supreme Court Will Review New York City Gun Law*, N.Y. TIMES, Jan. 22, 2019, <https://www.nytimes.com/2019/01/22/us/politics/supreme-court-guns-nyc-license.html>; Richard Wolf, *Supreme Court Agrees to Hear Gun Rights Case After Nearly a Decade of Inaction on Second Amendment*, N.Y. TIMES, Jan. 22, 2019,

a standard of review through which the lower courts can adjudicate similarly situated Second Amendment cases and controversies.<sup>2</sup> While few, if anyone, will dispute these two aspects of the case are important, they distract from the central question before the Supreme Court—whether the Second Amendment protects some right to transport firearms for lawful purposes.

---

<https://www.usatoday.com/story/news/politics/2019/01/22/supreme-court-will-hear-gun-rights-case/2482910002/>. Thus far, the Supreme Court has yet to provide a meaningful answer. *See* *Drake v. Filko*, 724 F.3d 426, 430 (3d Cir. 2013) (“It remains unsettled whether the individual right to bear arms for the purpose of self-defense extends beyond the home.”); *Kachalsky v. County of Westchester*, 701 F.3d 81, 88 (2d Cir. 2012) (“*Heller* provides no categorical answer to this case. And in many ways, it raises more questions than it answers.”); *id.* at 89 (“What we do not know is the scope of [the Second Amendment] beyond the home and the standards for determining when and how the right can be regulated can be regulated by a government.”); *United States v. Masciandaro*, 638 F.3d 458, 466 (4th Cir. 2011) (“But in [deciding *Heller*], the Court did not define the outer limits of the Second Amendment right to keep and bear arms.”). The only constitutional question that the Supreme Court has thus far answered is that the Second Amendment protects an actionable individual right to “keep and bear arms,” and it is a right that expressly prohibits the federal, state, and local governments from banning the ownership of common use firearms for armed self-defense of one’s home. *See* *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).

2. *See, e.g.*, First Mondays Podcast, *OT2018 #16: “From Scratch”*, SCOTUSBLOG, Jan. 28, 2019, <https://www.scotusblog.com/2019/01/ot2018-16-from-scratch/>; Garrett Epps, *Supersizing the Second Amendment*, ATLANTIC, Jan. 23, 2019, <https://www.theatlantic.com/ideas/archive/2019/01/court-hears-gun-rights-case-ny-rifle-pistol-association-v-city-ny/581017/>; Elizabeth Slattery and Amy Swearer, *Supreme Court to Hear First Gun Rights Case in Nearly a Decade*, DAILY SIGNAL, Jan. 22, 2019, <https://www.dailysignal.com/2019/01/22/supreme-court-to-hear-first-gun-rights-case-in-nearly-a-decade/>; Ruthann Robson, *SCOTUS Grants Certiorari on New York City Gun Regulation*, CONST. L. PROF. BLOG, Jan. 22, 2019, <https://lawprofessors.typepad.com/conlaw/2019/01/scotus-grants-certiorari-on-new-york-city-gun-regulation.html>. Neither *District of Columbia v. Heller* nor *McDonald v. City of Chicago* provide an answer, and therefore the circuit courts have been left to fashion a standard of their own. *See, e.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010). For some useful commentary debating the applicability and soundness of the circuit courts’ standard of review in Second Amendment cases, see David B. Kopel and Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 ST. LOUIS L.J. 193, 196-314 (2017); Allen Rostron, *The Continuing Battle over the Second Amendment*, 78 ALB. L. REV. 819 (2015); Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. F. 223 (2014) [hereinafter Gura, *Normal Right*]; Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012).

To be clear, at issue in *New York State Rifle & Pistol Association, Inc. v. City of New York, New York* is not the entire scope of the Second Amendment outside the home. Rather, it is whether a municipality can severely restrict the transportation of “licensed, locked, and unloaded” firearms outside of its jurisdiction.<sup>3</sup> It is also worth pointing out that it is only upon determining whether the Second Amendment protects a right to transport firearms for lawful purposes that the Supreme Court can even fashion a standard of review. This is assuming, of course, that fashioning a standard of review is even necessary. The Supreme Court could very well decide the case in much the same way as *Heller*—that is determine that New York City’s transport restriction is one of the few “severe” laws in United States history as to make it unconstitutional per se.<sup>4</sup>

In this author’s opinion, such an outcome is not only highly likely, but also seems to be the most prudent. For one, New York City’s handgun transportation restriction is currently the only law of its kind, thus making it highly susceptible to being struck down regardless of whatever constitutional test or tier of scrutiny applied. More importantly though, as a matter of history-in-law, New York City’s handgun transportation restriction disregards one of America’s most longstanding arms bearing traditions—allowing individuals some means to transport their firearms for lawful purposes.

This article is comprised of three parts. Part I discusses why *New York State Rifle & Pistol Association, Inc. v. City of New York, New York* should be decided on narrow grounds, particularly if the Supreme Court should adopt a history-in-law approach to adjudicating the case. Part II examines the history of regulating the transportation of firearms and other deadly weapons. Lastly, Part III makes the brief case for striking down New York City’s transportation restriction as unconstitutional per se.<sup>5</sup>

---

3. N.Y. State Rifle & Pistol Ass’n., Inc. v. City of New York, 883 F.3d 45, 52-55 (2d. Cir. 2018).

4. 554 U.S. at 629.

5. What this author means by history-in-law should not be conflated with the practice of textually based originalism. The former—history-in-law—is the historical 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 is important for the

I. WHY THE QUESTION BEFORE THE SUPREME COURT SHOULD BE A NARROW ONE

In *New York State Rifle & Pistol Association, Inc. v. City of New York, New York*, the constitutional question presented to the Supreme Court reads as follows: “Whether the City’s ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment...”<sup>6</sup> On its face, the question is a narrow one. The contents within the petition for writ of certiorari confirms it. In the petition, there is not even the slightest indication that New York City’s “licensed, locked, and unloaded” handgun transportation requirement is being challenged.<sup>7</sup> Rather, it is only the restriction on transporting handguns outside New York City limits.<sup>8</sup> Still, despite the limited nature of the petition, it is almost certain that

---

courts when adjudicating constitutional questions. See generally Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEV. ST. L. REV. 23 (2014) [hereinafter Charles, *History in Law*]; PATRICK J. CHARLES, *HISTORICISM, ORIGINALISM AND THE CONSTITUTION: THE USE AND ABUSE OF THE PAST IN AMERICAN JURISPRUDENCE* (2014) [hereinafter CHARLES, *HISTORICISM*]. Meanwhile, the latter—textually based originalism—is about harnessing the authoritative power of historical text to provide definitive answers to constitutional questions at a fixed point in time. See JOHN O. MCGINNIS & MICHAEL RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 117 (Harvard Univ. Press, 2013) (“Originalist interpretive theories argue that the actual meaning of the Constitution is fixed as of the time of its enactment.”); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 647 (2013) (“According to the originalist model of authority, constitutional interpretations are legitimate to the extent that they are consistent with what is fixed at the time of adoption; they are illegitimate to the extent that they are not.”); Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 412 (2013) (“New Originalism stands for the proposition that the meaning of a written constitution should remain the same until it is properly changed.”); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377–78 (2013) (stating that originalists agree that the text “historically fixed” is at the heart of originalism).

6. Petition for Writ of Certiorari at i, *New York State Rifle & Pistol Association, Inc. v. City of New York*, New York, No. 18-280 (U.S. Sep. 9, 2018).

7. *Id.* at 12-17.

8. *Id.* See also Reply of Petitioners at 3-10, *New York State Rifle & Pistol Association, Inc. v. City of New York*, New York, No. 18-280 (U.S. Nov. 28, 2018); Brief of Amici Curiae Western State Sheriffs’ Association et al at 7-26, *New York State Rifle & Pistol Association, Inc. v. City of New York*, New York, No. 18-280 (U.S. Oct. 9, 2018).

several outside actors will urge the Supreme Court to address a much broader constitutional question—this question being, “What is the scope of the Second Amendment outside the home?”<sup>9</sup>

But if past is prologue, it would be unwise for the Supreme Court to accept such an invitation.<sup>10</sup> Not only are there a number of doctrinal reasons for the Supreme Court deciding the case on narrow grounds, such as the doctrines of judicial restraint and judicial minimalism, but also, as will be outlined below, there are at least two history-in-law justifications (and perhaps others). The first is that if *District of Columbia v. Heller* taught us anything, it is that the objective use and application of history-in-law is not as easy as some have made it out to be, and therefore it would be in the Supreme Court’s best interests to proceed carefully and consciously if it should choose to delve into the lessons of the past for use in the present.<sup>11</sup> The second is that—much like any legal

---

9. One amicus brief filed at the petition stage has already asserted that the case is the proper vehicle to do so. See Brief of Amici Curiae States of Louisiana, Alabama, Arizona et al at 3-4, *New York State Rifle & Pistol Association, Inc. v. City of New York*, New York, No. 18-280 (U.S. Oct. 9, 2018) (“This petition provides an excellent vehicle for the Court to break its silence and ameliorate the deep division within the circuit courts on two different but related issues: The scope of “core” of the Second Amendment right and the level of scrutiny courts should apply to laws limiting that right.”); *id.* at 13-14 (asking the Supreme Court to take up the broader issue of the right of armed self-defense outside the home).

10. *Heller* itself has been characterized by some scholars as minimalist in such a fashion. See J. Harvie Wilkinson, III, *Of Guns, Abortions and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008).

11. For some scholarly discussions on the difficulty of using history-in-law accurately and objectively, see Robert W. Gordon, *The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023 (1997); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court’s Uses of History*, 73 J.L. & POL. 809 (1997); JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996); Martin H. Redish, *Interpretivism and the Judicial Role in a Constitutional Democracy*, 19 HARV. J.L. & PUB. POL’Y 525 (1996); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* (1988); William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1987); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Raoul Berger, *Mark Tushnet’s Critique of Interpretivism*, 51 GEO. WASH. L. REV. 532 (1983); Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981). For some helpful discussions on history-in-law by jurists, see Amanda L. Taylor et al., *A Dialogue*

or constitutional question<sup>12</sup>—the broader one frames any history-in-law question, the more difficult it is to get it *right*—that is frame the historical evidence in a way that is both impartial and accurate.<sup>13</sup>

It is no secret that in the more than a decade since *Heller* was decided, there has been much criticism regarding the Supreme Court majority's invocation of history-in-law in the case.<sup>14</sup> Some have highlighted how the majority cherry-picked historical evidence to fashion a very one-sided narrative.<sup>15</sup> Others have noted that the majority fashioned an opinion that is nothing more than Whiggish history—that is a historical narrative that inaccurately depicts an unbroken chain of custom or tradition from

---

*with Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889 (2012); Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173 (2009); Robert H. Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945).

12. See J. Christopher Rideout, *Discipline Building and Disciplinary Values: Thoughts on Legal Writing at Year Twenty-Five of the Legal Writing Institute*, 16 LEGAL WRITING 477 (2010); Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1 (1994); see also Martha F. Davis, *Law, Issue Frames and Social Movements: Three Case Studies*, 14 J.L. & SOC. CHANGE 363, 364–68 (2011).

13. This is largely because the broader one frames a history-in-law question, the more likely it is that conflicting history will arise. For more on how courts should handle conflicting history, see CHARLES, HISTORICISM, *supra* note 5, at 115–20, 133, 136, 138, 142, 150–51.

14. See 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 (2012) [hereinafter Charles, *Historiographical Crisis*]; David Thomas Konig, *Heller, Guns, and History: The Judicial Invention of Tradition*, 3 NORTHEASTERN L.J. 175 (2011); William G. Merkel, *Heller as Hubris, and How McDonald v. City of Chicago May Well Change the Constitutional World as We Know It*, 50 SANTA CLARA L. REV. 1221 (2010); 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 (2009); Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss”*, 56 UCLA L. REV. 1095 (2009); Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267 (2008); Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. PA. J. CONST. L. 413 (2008).

15. See, e.g., Saul Cornell and Justine Florence, *The Right to Bear Arms in the Era of the Fourteenth Amendment: Gun Rights or Gun Regulation?*, 50 SANTA CLARA L. REV. 1043 (2010).

one distant point in time to another.<sup>16</sup> Meanwhile, at least one commentator has taken the majority to task for characterizing several twentieth-century firearms restrictions as historically longstanding, and therefore presumptively constitutional.<sup>17</sup> There are indeed other history-in-law based criticisms that have been levied at *Heller*, but each is in a way linked to the majority's decision to address the historical scope question in the case broadly.<sup>18</sup> For it was this decision that placed the Supreme Court in the precarious position of having to choose between centuries of conflicting historical narratives, which in turn placed the lower courts in the even more difficult position of having to make sense of it all, including determining how, if at all, new historical information exhumed after *Heller* is supposed to be weighed and incorporated.<sup>19</sup>

One does not have to be a constitutional historian or legal scholar to see the history-in-law conundrum created in the wake of *Heller*. Consider for instance the majority's claim that the Second Amendment was in part ratified to protect the "citizens'

---

16. See, e.g., Joshua Stein, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J.L. & HUMAN. 359 (2013); Alison LaCroix, *The Thick Edge of the Wedge*, SCOTUSBLOG, Jun. 29, 2010, <https://www.scotusblog.com/2010/06/the-thick-edge-of-the-wedge/>; William G. Merkel, District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism, 13 LEWIS & CLARK L. REV. 349 (2009). For what qualifies as Whiggish history, see generally HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1931).

17. See Nelson Lund, *No Conservative Consensus Yet: Douglas Ginsburg, Brett Kavanaugh, and Diane Sykes on the Second Amendment*, 13 ENGAGE 30 (2012); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009).

18. There were a number of alternative approaches the *Heller* majority could have taken to arrive at the same conclusion—approaches that would have resulted in far less conflict among the lower courts, as well ensure that history is properly preserved. See, e.g., CHARLES, *HISTORICISM*, *supra* note 5, at 105 (noting that the *Heller* majority would have been on far better historical footing by constitutionalizing the castle doctrine, which had long been part of the English common law before the 1791 ratification of the Second Amendment).

19. See Charles, *Historiographical Crisis*, *supra* note 14, at 1842-64. The Seventh Circuit Court of Appeals case *Moore v. Madigan* provides a useful example. Compare *Moore v. Madigan*, 702 F. 3d 933, 936-37 (7th Cir. 2012), with 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. 227, 233-36 (2019) [hereinafter Charles, *Faces, Take Three*].

militia.”<sup>20</sup> It is unclear how exactly the lower courts are supposed to interpret this. Are the lower courts supposed to read it as constitutionally protecting the establishment of citizen militias independent of government?<sup>21</sup> Does it mean the anti-tyranny view of the Second Amendment should be given constitutional credence?<sup>22</sup> If one views the Second Amendment through either one of these prisms, seeing that military grade firearms will be needed in order for the people to effectively provide for the national defense or serve as an effective counterpoise to government tyranny, are not bans on military, assault-style rifles unconstitutional per se?<sup>23</sup> Or, given that the *Heller* majority also acknowledged the validity of the 1886 Supreme Court decision in *Presser v. Illinois*, is the phrase “citizens’ militia” nothing more than meaningless dicta?<sup>24</sup> These are very difficult questions and how the Supreme Court answers them will have far-reaching political, societal, historical, and legal consequences.

Perhaps the most obvious post-*Heller* history-in-law conundrum, created in the wake of majority’s decision to address the Second Amendment’s historical scope question broadly, is how the lessons of history and tradition are to guide the lower courts.<sup>25</sup> On the one hand, *Heller* can be read to infer that the lower courts should first look to Anglo-American history and tradition, and this

---

20. 554 U.S. at 597.

21. See, e.g., David T. Hardy, *Ducking the Bullet: District of Columbia v. Heller and the Stevens Dissent*, 2010 CARDOZO L. REV. DE NOVO. 61, 67 (advancing the argument that the Second Amendment protects a right to associate and drill in independent militias); STEPHEN P. HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 182-83* (2008) (same). But 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, 374–90 (2011) (placing the history of independent militias in historical context).

22. For more on what the anti-tyranny Second Amendment entails, see David C. Williams, *Civic Republicanism and the Citizens Militia*, 101 YALE L. REV. 551 (1991).

23. See, e.g., *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016) (upholding Maryland’s assault weapons ban as constitutional on intermediate scrutiny grounds).

24. *Heller*, 554 U.S. at 620-21; *Presser v. Illinois*, 116 U.S. 252 (1886).

25. See, e.g., Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2012).

should serve as the primary guide.<sup>26</sup> On the other hand, given that *Heller* provided lower courts with a qualified list of longstanding and presumptively lawful firearms regulations, *Heller* can be read to infer that the history of modern firearms regulations—that is firearms regulations born in the late nineteenth- and early twentieth-centuries—is equally relevant.<sup>27</sup>

As it stands today, the post-*Heller* history-in-law conundrum has produced some contradictory, head-scratching results. Consider the Second Amendment jurisprudence of the District of Columbia Circuit Court of Appeals (hereafter DC Circuit). In multiple cases, the D.C. Circuit partially relied on *Heller*'s “longstanding” regulations language to uphold restrictions on assault weapons, as well as restrictions such as firearms licensing, fingerprinting, and registration.<sup>28</sup> And by “longstanding,” what the D.C. Circuit understood this to mean were laws that came into existence in the early twentieth-century.<sup>29</sup> Applying this line of judicial reasoning to its logical end, one would presume that any firearms regulations born out of the mid-nineteenth century would survive constitutional scrutiny. However, as was seen in *Wrenn v. District of Columbia*, which examined the constitutionality of the District of Columbia's “good cause” armed carriage licensing law, a category of law that was first placed on the District of Columbia's statutes books in 1892,<sup>30</sup> and enacted by cities and municipalities

---

26. 554 U.S. at 579-609.

27. *Id.* at 626-27.

28. *Heller v. District of Columbia*, 801 F.3d 264, 273, 280–81 (D.C. Cir. 2015); *Schrader v. Holder*, 704 F.3d 980, 981, 988 (D.C. Cir. 2013); *Heller*, 670 F.3d at 1253, 1262–64.

29. Such laws would include restrictions on the mail ordering of firearms and machine guns. The first law regulating the mail order sale of firearms was enacted in 1927. See PATRICK J. CHARLES, *ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY* 212 (2018) [hereinafter CHARLES, *ARMED IN AMERICA*]. The first laws regulating machine guns appeared not long after with the spread of the Uniform Machine Gun Act, which was subsequently canonized in federal law with the passage of the 1934 National Firearms Act. *Id.* at 215.

30. “Carrying or Selling of Deadly or Dangerous Weapons Within the District of Columbia, and for Other Purposes,” 30 Stat. L. 405, reprinted in *SUPPLEMENT TO THE REVISED STATUTES OF THE U.S.* at 753 (vol. 2, no. 6, 54th Cong. 1st Sess. 1895–1896). For a useful legislative history, see Mark Anthony Frassetto, *The First Congressional Debate on Public Carry and What It Tells Us About Firearms Regionalism*, 40 *CAMPBELL L. REV.* 335, 342-52 (2018).

across the country as early as the 1860s,<sup>31</sup> this turned out not to be the case.<sup>32</sup> In fact, the DC Circuit went so far as to strike down the District of Columbia's "good cause" armed carriage law on historical grounds.<sup>33</sup>

Here, it is worth noting that the Second Amendment history-in-law dichotomy that now exists in the D.C. Circuit is just one of many developing within the circuit courts.<sup>34</sup> And the problem is particularly acute when it involves the circuit courts adjudicating Second Amendment outside the home claims.<sup>35</sup> While some circuit courts use of history-in-law has led to the conclusion that the Second Amendment must protect some right to preparatory armed carriage outside one's home,<sup>36</sup> others have concluded that whatever Second Amendment rights exists outside the home are substantially less than inside.<sup>37</sup> There are indeed other history-in-

---

31. CHARLES, ARMED IN AMERICA, *supra* note 29, at 157–58, 174–76; 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, 419–22 n.245 (2016) [hereinafter Charles, *Faces, Take Two*].

32. *Wrenn v. District of Columbia*, 864 F.3d 650, 664 (D.C. Cir. 2017); *see also* at 661 (“the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment protections.”).

33. *Id.* at 657–62.

34. *See* JOSEPH BLOCHER AND DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT 123-34 (2018) [hereinafter BLOCHER AND MILLER, POSITIVE SECOND AMENDMENT] (summarizing how the circuits courts have varied approaches in utilizing precedent, history, and tradition adjudicating Second Amendment claims).

35. For some useful history-in-law commentary not included elsewhere within this article, see Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95 (2016) [hereinafter Frassetto, *Firearms Regulation in Reconstruction Texas*]; Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH U. L. REV. 1187 (2015); Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 89 IND. L.J. 1587 (2014); Patrick J. Charles, *The Statute of Northampton by the Late Eighteenth Century: Clarifying the Intellectual Legacy*, 41 FORDHAM URB. L.J. CITY SQUARE 10 (2013).

36. *See, e.g., Young v. Hawaii*, 896 F.3d 1044, 1051–61 (9th Cir. 2018); *Moore*, 702 F. 3d at 936-37; *see also* Charles, *Historiographical Crisis*, *supra* note 14, at 1846–47 (outlining why *Heller*'s history-in-law analysis could be interpreted as legally binding).

37. *See, e.g., Kachalsky*, 701 F.3d at 89–97; *Peruta v. Cty. of San Diego (Peruta II)*, 824 F.3d 919, 929-38 (9th Cir. 2016) (en banc); *see also* Charles,

law interpretations of the Second Amendment outside the home. In virtually every instance, however, regardless of the respective circuit court's history-in-law approach, a number of historical errors and missteps are being committed, including the cherry-picking historical evidence, minimizing or discarding of conflicting historical evidence as insignificant and unpersuasive, and even making up history altogether.<sup>38</sup> In some instances, the errors and missteps would have done little, if anything, to impact the final judgment of the case.<sup>39</sup> Yet in others, the historical errors and missteps resulted in constitutional analysis that would have turned out very differently if all the historical evidence was provided and weighed objectively.<sup>40</sup>

The point to be made is simply this—despite the best efforts of some 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.<sup>41</sup> This in turn can have dire consequences from both a history and law perspective. From a history perspective, one historical error or misstep often leads to another, and another, and can therefore facilitate a perpetual chain of historical mythmaking.<sup>42</sup> Similarly, from a law perspective, one historical error or misstep can consequentially change the outcome of a case, which subsequently impacts other cases, and can therefore facilitate a perpetual chain of ill-founded jurisprudence.<sup>43</sup> Given the high likelihood of such consequences, it

---

*Historiographical Crisis*, *supra* note 14, at 1848–54 (providing prudential reasons why much of *Heller*'s history-in-law analysis should not be legally binding).

38. Charles, *Faces, Take Three*, *supra* note 19, at 291.

39. Compare *Kachalsky*, 701 F.3d at 89–97, with Charles, *Faces, Take Three*, *supra* note 19, at 239–46; compare *Peterson v. Martinez*, 707 F.3d 1197, 1209–12 (10th Cir. 2013), with Charles, *Faces, Take Three*, *supra* note 19, at 254–55.

40. Compare *Young*, 896 F.3d at 1052–68, with Charles, *Faces, Take Three*, *supra* note 19, at 281–90; compare *Wrenn*, 864 F.3d at 657–61, with Charles, *Faces, Take Three*, *supra* note 19, at 266–81.

41. For more on this point, see Gordon S. Wood and Scott D. Gerber, *The Supreme Court and the Uses of History*, 39 OHIO N.U. L. REV. 435 (2013); Buckner F. Melton, *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377 (1998); John Philip Reid, *Law and History*, 27 LOY. L. A. L. REV. 193 (1993); Charles E. Wyzanski, Jr., *History and Law*, U. CHI. L. REV. 237, 239 (1959).

42. CHARLES, *HISTORICISM*, *supra* note 5, at 116–18.

43. Charles, *History in Law*, *supra* note 5, at 53 (“It is no secret that the

is extremely important for the courts—and this author believes it is their constitutional duty—to do their utmost to get historical facts right, or, at the very least, work to minimize the number historical errors and missteps.<sup>44</sup> This not only ensures that the courts are fashioning opinions with as many verifiable historical facts as possible, but in doing so it makes it far less likely that the legitimacy of the opinion will come into question.<sup>45</sup> In other words,

---

practice of history in law is often portrayed as a legitimate means to preserve the Constitution's integrity and purpose, yet with just a minor misstep one enters into the foray of illegitimate mythmaking.”).

44. See Helen Irving, *Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 *FORDHAM L. REV.* 957, 967 (2015) (“[Judges] should learn. . . that there is no single historical methodology and no single object of historical research. If they purport to rely on history, they should make principled decisions about the methodology they employ. They should understand that cherry-picking from historical “facts” or the utterances of individuals is not doing history. . . They should recognize anachronisms and discipline themselves to avoid them, no matter how convenient these may be. They should also avoid reliance on. . . “endogenous corroboration”—namely drawing meaning from what members of a dedicated purposive community. . . said about each other’s propositions. They must never assume that they know what the historical research will reveal and should be skeptical about historical claims based on limited research or limited sources.”); Charles, *Historiographical Crisis*, *supra* note 14, at 1849 (“Maintaining historical accuracy in this regard is not something only historians should care about. Seeing that jurisprudence relies on history for accuracy, it is also important that the judiciary make the attempt to get history right.”); *id.* at 1855 (“It is indeed impossible for the judiciary to get history right all the time. Errors will be made either through insufficient pleadings, the use of ideological scholarship masquerading as “history,” the lack of a historical consensus on a subject matter, and even the judge’s own personal bias. The best anyone can hope for is that jurists maintain some form of historical consciousness when interpreting the Constitution. This requires understanding the Constitution’s historical origins and sins before importing the past for use in the present.”); Charles, *History in Law*, *supra* note 5, at 36 (“There are indeed objectivity problems with the general practice of history in law, but as long as these problems are acknowledged and the practice is reformed in a way that minimizes subjectivity to the greatest extent, history in law can provide an invaluable tool from which to legally reason.”). It is also the duty of historians to ensure the courts are furnished with adequate and reliable information. See, e.g., Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *SUP. CT. REV.* 119 (1965); Paul Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 *AM. HIST. REV.* 64 (1963); JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)*, at xxxiii-xxxiv (Patterson Smith eds., 1944); Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 *COLUM. L. REV.* 555 (1938).

45. See Charles, *History in Law*, *supra* note 5, at 34 (“If one pauses to

the more verifiable historical facts there are from which to judicially reason the more legitimate the legal opinion will be.<sup>46</sup>

The fact that the circuit courts have committed several historical errors and missteps in fashioning their respective Second Amendment opinions will undoubtedly lead some lawyers and legal commentators to argue that this is exactly why the Supreme Court must now intervene and address the broader Second Amendment outside the home question. Only then, it will

---

consider, it is impossible to proclaim that any historically based argument is legitimate if it contradicts what a thorough examination of the evidentiary record provides. It is the equivalent of a court deciding a civil or criminal case based upon inaccurate or false statements. For in those civil and criminal cases where a court lays an inaccurate factual foundation, the subsequent legal analysis and holding will most certainly be insufficiently reasoned and therefore illegitimate.”); *id.* at 34 (“Constitutional constructs are illegitimate when they are based on illegitimate historical foundations. Eliciting historical context to the greatest detail is the only means of alleviating this dilemma.”); *see also* Alfred L. Brophy, *Introducing Applied Legal History*, 31 *LAW & HIST. REV.* 233 (2012); Helen Irving, *Constitutional Interpretation, the High Court, and the Discipline of History*, 41 *FED. L. REV.* 95 (2013); Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *FORDHAM L. REV.* 721 (2013).

46. *See, e.g.*, Patrick J. Charles, *The ‘Originalism is Not History’ Disclaimer: A Historian’s Rebuttal*, 63 *CLEV. ST. L. REV. ET CETERA* 1 (2015) (noting that to claim the opposite as true would be “the equivalent of proclaiming that less-than-factual information about the past produces better interpretive outcomes than an inquiry involving more factual information.”); Charles, *History in Law*, *supra* note 5, at 34 (“when applying history in law the goal should be to employ the evidentiary record thoroughly, accurately, and objectively. This in turn provides the best foundation from which to legally reason.”); Jack Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 *SAN DIEGO. L. REV.* 575, 580 (2011) (“the only possible way in which one could satisfactorily reconstruct the original meaning of a constitutional text must necessarily involve an essentially historical inquiry. Such an inquiry would have to take careful account of the sources, explaining how and why a document was drafted, debated, and finally approved. It would involve immersion in the kinds of sources that historians ordinarily use and would need to consider the array of purposes shaping their action.”); 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.”); JAMES WILSON, 1 *COLLECTED WORKS OF JAMES WILSON* 467 (Kermit L. Hall & Mark David Hall eds., 2007) (“The more accurately and the more ingeniously men reason, and the farther they pursue their reasonings, from false principles, the more numerous and inveterate will their inconsistencies, nay, their absurdities be.”).

be argued, will the lower courts be able to adequately and consistently adjudicate Second Amendment outside the home claims.<sup>47</sup> While there is indeed some merit to this argument, it completely ignores the potential consequences. For one, as outlined earlier, if past is prologue, should the Supreme Court decide to answer the broader Second Amendment outside the home question, there is a high probability that it will only create even more constitutional issues than it resolves, thus further continuing the history-in-law conundrum created by *Heller*. Moreover, if history-in-law has some role to play in adjudicating the Second Amendment outside the home (which this author

---

47. There is already a wide array of constitutional scholarship addressing the Second Amendment outside the home, and therefore one might also argue that the issue is ripe for consideration by the Supreme Court. For a list of such scholarship that is not incorporated elsewhere within this article, see, Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433 (2018); Nicholas Griepsma, *Concealed Carry Through Common Use: Extending Heller's Constitutional Construction*, 85 GEO. WASH. L. REV. 284 (2017); Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295 (2016); Alice Marie Beard, *Gay Rights Strengthen Gun Rights*, 57 S. TEX. L. REV. 215 (2016); Justine E. Johnson-Makuch, *Statutory Restrictions on Concealed Carry: A Five-Circuit Shoot-Out*, 83 FORDHAM L. REV. 2757 (2015); Brian Enright, *The Constitutional "Terra Incognita" of Discretionary Concealed Carry Laws*, 2015 U. ILL. L. REV. 909 (2015); Elizabeth Beaman, *Who Gets to Determine If You Need Self Defense?: Heller and McDonald's Application Outside the House*, 12 SETON HALL CIR. REV. 139 (2015); Joseph A. Gonnella, *Concealed Carry: Can Heller's Handgun Leave the Home?*, 51 CAL. W. L. REV. 111 (2014); Nicholas Moeller, *The Second Amendment Beyond the Doorstep: Concealed Carry Post-Heller*, 2014 U. ILL. L. REV. 1401 (2014); Robert Leider, *Our Non-Originalist Right to Bear Arms*, 123 YALE L.J. 1486 (2014); Ryan Notarangelo, *Carrying the Second Amendment Outside the Home: A Critique of the Third Circuit's Decision in Drake v. Filko*, 64 CATH. U.L. REV. 235 (2014); Owen McGovern, *The Responsible Gun Ownership Ordinance and Novel Textual Questions About the Second Amendment*, 102 J. CRIM. L. & CRIMINOLOGY 471 (2013); John C. Frazer, *Home, Sweet Home: The Second Amendment and the Right to Carry Arms in Public*, 4 REGENT J. L. & PUB. POL'Y 1 (2012); Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 NW. U. L. REV. COLLOQUY 85 (2010); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009); Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225 (2008).

believes it does),<sup>48</sup> there is the issue of what historical era or eras should be constitutionally controlling or instructive.<sup>49</sup>

It is this latter issue that generates a series of history-in-law questions. For instance, should the Supreme Court decide that the Founding Era is instructive,<sup>50</sup> will future lawmakers be bound by eighteenth-century firearms policy when crafting twenty-first century firearms laws?<sup>51</sup> Is adjudicating the constitutionality of today's firearms laws according to the late eighteenth-century standards really what the founding generation wanted us to take away from the Second Amendment—a generation that firmly believed in passing weapons laws in the interest of the “public good”—that is to prevent potential firearms-related affrays, assaults, and deaths?<sup>52</sup> And by making such a constitutional

---

48. See Charles, *Faces, Take Three*, *supra* note 19, at 230-32.

49. See Charles, *Faces, Take Two*, *supra* note 31, at 475-81.

50. At least one sitting Supreme Court Justice has suggested such an approach. See *Heller*, 670 F.3d at 1274–75 (Kavanaugh, J., dissenting). For a full background of the history of the law and armed carriage up through the 1791 ratification of the Second Amendment, and the academic debates surrounding it, see Charles, *Faces, Take Two*, *supra* note 31, at 378-401 (examining the law and armed carriage up through the late eighteenth century, accord CHARLES, ARMED IN AMERICA, *supra* note 29, at 112-21 (supplementing Charles, *Faces, Take Two* and correcting the record on Sir John Knight's case). See also 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 (2018); Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 LAW & CONTEMP. PROB. 11 (2017); David B. Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J.L. & PUB. POL'Y 127 (2016) [hereinafter Kopel, *First Century*]; Saul Cornell, *The Right to Carry Firearms Outside the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695 (2012); Patrick J. Charles, *The Faces of the Second Amendment Outside of the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1 (2012) [hereinafter Charles, *Faces of the Second Amendment*].

51. Such an interpretation would essentially create a double-standard for state and local governments in passing firearm restrictions, for it would allow what qualifies as “arms” to continually expand yet deny state and local governments any additional means—other than those applied by the founding generation—to curtail firearms-related violence.

52. See, e.g., 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 (2011); Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. U.L. REV. 1821 (2011).

choice, would it not sufficiently call into constitutional question most, if not all, modern firearms restrictions?

A similar, and arguably a more difficult series of history-in-law questions presents itself should the Supreme Court look to the Antebellum Era for constitutional guidance. At that point in American history, culturalism and regionalism had taken hold, and as a result differing interpretations as to what the Second Amendment did and did not protect were commonplace.<sup>53</sup> In light of this fact, the Supreme Court would then have to explain why one interpretation was more constitutionally prevalent than the others.<sup>54</sup> Also, hypothetically speaking, if the Supreme Court selected say the more permissive Antebellum South interpretation of the Second Amendment outside the home as the constitutional baseline,<sup>55</sup> the Supreme Court would then have to expound on why the subsequent, reasonable regulation interpretation of the right to arms—an interpretation that dominated the public, political, and legal discourse from the late nineteenth-century through most of the twentieth-century—was historically insignificant, and therefore constitutionally null and void.<sup>56</sup>

Certainly, it is possible that the Supreme Court could

---

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

54. See CHARLES, ARMED IN AMERICA, *supra* note 29, at 139-50.

55. For the argument that the Antebellum South's interpretation should indeed be the standard, see Michael O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U.L. REV. 585, 586 (2012). See also Kopel, *First Century*, *supra* note 50, at 140-58.

56. Here, the use of the term "right to arms" is meant to suggest how both the Second Amendment and state constitution "bear arms" analogues were interpreted and understood to allow for reasonable regulation. This interpretation was universally accepted by the courts, legal commentators, and even gun rights advocates. For more on this, see Patrick J. Charles, *The "Reasonable Regulation" Right to Arms: The Gun Rights Second Amendment Before the Standard Model*, A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT (Jennifer Tucker, Barton C. Hacker, and Margaret Vining eds., forthcoming 2019) [hereinafter Charles, *The "Reasonable Regulation" Right to Arms*]; Charles, *Faces, Take Three*, *supra* note 19, at 249-52, 285-89; Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007); Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597 (2006).

effectively sidestep these difficult history-in-law questions by embracing something that resembles a more holistic, historical guidepost approach to the Second Amendment outside the home.<sup>57</sup> What this would entail is the Supreme Court recognizing that the Second Amendment does indeed extend beyond one's doorstep, but an individual's right to "keep and bear arms" in public places can be sufficiently restricted by governmental police power.<sup>58</sup> This is indeed the one common feature that binds the history of the law and armed carriage for more than six centuries.<sup>59</sup> But should the Supreme Court decide to issue such a broad, historical proclamation, the Justices would need to remain cognizant of the key history-in-law lesson learned in the wake of *Heller*—a narrow, contextual, and exacting history-in-law approach will almost always produce far more accurate results than any broad history-in-law approach. And therefore, taking into account this lesson learned, the Justices would need to ensure that the lower courts are given sufficient latitude to adjudicate other, unforeseen Second Amendment issues should new historical evidence arise.

One Second Amendment issue that will particularly require some historical unpacking is that of firearms localism. It is a

---

57. See CHARLES, HISTORICISM, *supra* note 5, at 122-47.

58. Charles, *Faces, Take Three*, *supra* note 19, at 294 ("There is one common thread that binds this history together, namely, armed carriage in public places has always been subject to some form of governmental regulation. Only the policies and politics guiding them have changed."); Charles, *Faces, Take Two*, *supra* note 31, at 480 ("if history is dispositive in adjudicating the Second Amendment outside the home, the history of armed carriage laws strongly informs us that the government is within its authority to prohibit the preparatory carrying of dangerous weapons in public places as a means to both preserve the peace and prevent public injury. At the very least, the historical evidence conveys that the government retains a substantial, if not a compelling interest in regulating the carriage of dangerous weapons outside the home; that is the government should be given deference to prescribe time, place, and manner conditions on preparatory armed carriage, as well as prescribe reasonable training requirements on the obtainment of an armed carriage license. Additionally, the historical evidence conveys that the government retains a substantial interest in regulating the transportation of firearms for lawful purposes, such as from one's home to business or from one's home to the shooting range. Under this standard, the government would be within its police power in ensuring that firearms are transported safely and securely, but could not prohibit firearm transportation altogether, nor could the government place an undue burden on the transportation of firearms.").

59. See generally Charles, *Faces, Take Two*, *supra* note 31.

longstanding federalism construct that allows lawmakers to tailor firearms regulations in a way that takes into account local considerations.<sup>60</sup> Firearms localism has been most acute when comparing and contrasting the firearms laws of urban areas with that of rural areas. Historically speaking, although not always the case, the former—urban areas—has generally maintained more restrictive firearms regulations than the latter—rural areas.<sup>61</sup> There are sound reasons for this, and for much of American history this was the norm, including throughout much of the twentieth-century.<sup>62</sup> But in the late twentieth-century—at the behest of gun rights advocates—firearms localism was largely, but not completely superseded by model firearms preemption laws.<sup>63</sup> There is much to historically unpack in discussing firearms localism,<sup>64</sup> but that is beyond the scope of this article—except to say it is a Second Amendment issue all to itself, and therefore the Supreme Court should give the lower courts sufficient latitude so that firearms localism will have its own day before the courts.<sup>65</sup>

In summary, the overall point to be made is simply this—if history-in-law has an important role to play in *New York State Rifle & Pistol Association, Inc. v. City of New York, New York*, the potential consequences of the Supreme Court taking a broad approach to the Second Amendment outweighs the potential benefits. Furthermore, as will be outlined below in Section II, taking the broad approach makes little sense when one considers America’s longstanding tradition of the law affording individuals some outlet to transport firearms for lawful purposes.

---

60. See generally Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013).

61. *Id.*

62. See Charles, *Faces, Take Two*, *supra* note 31, at 378-431.

63. *Id.* at 449, 471-72; CHARLES, ARMED IN AMERICA, *supra* note 29, at 156-62, 301, 307-8.

64. Compare Michael P. O’Shea, *Why Firearms Federalism Beats Firearms Localism*, 123 YALE L.J. ONLINE 359 (2014), with Blocher, *Firearms Localism*, *supra* note 60, at 82-146.

65. See BLOCHER AND MILLER, POSITIVE SECOND AMENDMENT, *supra* note 34, at 29 (noting that like First and Fifth Amendment jurisprudence, Second Amendment jurisprudence does not have to “generate a one-size-fits-all regime of legal rights and restrictions”).

## II. THE HISTORY OF REGULATING THE TRANSPORTATION OF FIREARMS

As early as the late thirteenth-century, English law began imposing restrictions on the carrying of dangerous weapons in public places.<sup>66</sup> By the late seventeenth century, the same body of law began appearing in the American Colonies.<sup>67</sup> Yet despite the Anglo-American antecedents of restricting armed carriage in public places, there is nothing in the evidentiary record to suggest that the necessary transportation of dangerous weapons from one residence to another, from a residence or business to repair, or for legitimate business purposes was ever prohibited.<sup>68</sup> If anything, the historical evidence suggests that the law was flexible enough to carve out certain exceptions, even in populated cities, towns, and settlements. The earliest evidence of this can be found in a 1686 New Jersey statute titled *An Act Against Wearing Swords, & c.* Although the statute flatly prohibited the carrying of “Swords, Daggers, Pistols, Dirks, Stilladoes, Skeines, or any other unusual and unlawful weapons” in public places—because such carrying was known to induce “great Fear and Quarrels” among the inhabitants—it excepted anyone carrying or transporting said weapons for lawful purposes, such as by magistrates, the militia for government sanctioned militia musters or training, and by “all Strangers, Travelling upon their lawful Occasions thro’ this Province, behaving themselves peaceably.”<sup>69</sup>

---

66. See Charles, *Faces, Take Two*, *supra* note 31, at 378-401.

67. *Id.*

68. See CHARLES, ARMED IN AMERICA, *supra* note 29, at 141 (“The Statute of Northampton essentially restricted the preparatory carriage of dangerous weapons in the public concourse, with the common law exceptions being government officials, militia musters and training, the hue and cry, and so forth. This is not to say the Statute of Northampton restricted armed carriage outright. Up through the late eighteenth century, it was common for individuals to carry arms for trade, repair, on travels, and for hunting. However, should an individual carry dangerous weapons into the public concourse. . . it was within the discretion of the justice of the peace, sheriff, or constable to detain the offending individual, confiscate their weapons, or seek surety of the peace.”); Charles, *Faces of the Second Amendment*, *supra* note 50, at 43 (noting that the Statute of Northampton should not be interpreted as “prohibiting the transport of arms—lethal or non-lethal—for lawful purposes”).

69. THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTION OF THE PROVINCE OF NEW-JERSEY 289-90 (1759).

From the late seventeenth-century through mid-nineteenth century, with the exception of slave codes,<sup>70</sup> laws expressly restricting the necessary transportation of dangerous weapons for lawful purposes were virtually non-existent.<sup>71</sup> It was not until the mid-to-late nineteenth century that such laws began to appear on the statute and ordinance books with regularity. The reason for the sudden, regular appearance of such laws is two-fold: 1) changes in America's legal system, and 2) technological developments in both travel and firearms.

As it pertains to changes in America's legal system, beginning in the mid-to-late nineteenth century, what constituted the chief pillars of American law was undergoing a drastic transformation. For nearly two centuries, these chief pillars were largely built upon the common law. But from the mid-nineteenth century until the turn of the twentieth century, American law rapidly became more reliant upon tangible, statutory principles.<sup>72</sup> The impact of this legal transformation was particularly acute within those jurisdictions that subscribed to the Massachusetts Model,<sup>73</sup> which

---

70. See, e.g., "An Act Directing the Trial of Slaves. . .and for the Better Government of Negros, Mulattos, and Indians, Bond or Free," May 1923, in 4 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 126, 131 (William Waller Hening ed., 1820) (prohibiting slaves from keeping or carrying "any gun, powder, shot, or any club, or other weapon whatsoever, offensive or defensive").

71. See, e.g., *State v. Huntly*, 3 Ired. 418, 422 (N.C. 1843) (stating that the carrying of arms for lawful purposes such as "business or amusement" were not a violation of the Statute of Northampton).

72. See, e.g., Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 1 (1912); William Draper Lewis, *The Study of the Common Law*, 46 AMER. L. REG. 465 (1898). 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.

73. See 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

was a early to late nineteenth-century armed carriage law fashioned on the longstanding legal tenets of the 1328 Statute of Northampton.<sup>74</sup> In accord with the Statute of Northampton, the Massachusetts Model made it unlawful for individuals to carry dangerous weapons in the public concourse, and even retained the discretionary common-law surety of the peace.<sup>75</sup> What distinguished the Massachusetts Model from its English predecessor was that the former provided an express legal exception should the offending individual demonstrate that they carried the weapon due to an “imminent” or “reasonable” fear of assault or injury to their person, family or property.<sup>76</sup>

---

MAY, ONE THOUSAND EIGHT HUNDRED AND SIXTY-ONE, at 250 (Frederick C. Brightly ESQ. ed., 9th ed.1862) (“If any person, not being an officer on duty in the military or naval service of the state or of the United States shall go armed with a dirk, dagger, sword or pistol, or other offensive or dangerous weapon, without reasonable cause to fear an assault or other injury or violence.”); THE REVISED STATUTES OF THE STATE OF MAINE PASSED OCTOBER 22, 1840, 709 (1841) (“Any person, going armed with any dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without 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 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.

74. 2 Edw. 3, c. 3 (1328) (Eng.).

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

76. See A PRACTICAL TREATISE, OR AN ABRIDGEMENT OF THE LAW APPERTAINING TO THE OFFICE OF JUSTICE OF THE PEACE 184 (C.A. Mirick & Co. West Brookfield 1841); PETER OXENBRIDGE THACHER, TWO CHARGES TO THE GRAND JURY OF THE COUNTY OF SUFFOLK FOR THE COMMONWEALTH OF MASSACHUSETTS, AT THE OPENING OF TERMS OF THE MUNICIPAL COURT OF THE CITY OF BOSTON, ON MONDAY, DECEMBER 5TH, A.D. 1836 AND ON MONDAY, MARCH 13TH, A.D. 1837, at 27–28 (Dutton & Wentworth, Boston 1837). For some examples of how these nineteenth-century variants of the Statute of Northampton were adjudged by nineteenth-century courts, see CHARLES, ARMED IN AMERICA, *supra* note 29, at 143–45, 154–55; State v. Barnett, 11 S.E. 735 (W. Va. 1890); Tipler v. State, 57 Miss. 365 (1880); State v. Duke, 42 Tex. 455 (1875); see also M.W. Hopkins, *Concealed Weapons*, 8 CRIM. L. MAG. & REP. 403, 413-14 (October 1886) [hereinafter Hopkins, *Concealed Weapons*] (summarizing the rule of law as to when there was an “imminent” threat and armed carriage was “reasonable”). Both the DC Circuit and Ninth Circuit erroneously interpreted Massachusetts Model armed carriage

For much of the nineteenth century, the Massachusetts Model seems to have satisfied the public health and safety needs of the respective jurisdictions that adopted it.<sup>77</sup> However, beginning in the 1860s, corresponding with the growth of statutory law, the Massachusetts Model was gradually 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 armed carriage licensing laws.<sup>78</sup> These laws, which rapidly became a fixture in cities and towns across the country, required individuals to first obtain a license before carrying dangerous weapons in public.<sup>79</sup> In most cases, the granting of these licenses was at the discretion of a local government official, and the person applying for the license had to demonstrate a good cause or justifiable need to do so, as well as provide proof of their good character.<sup>80</sup> 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.<sup>81</sup>

---

laws—which they refer to as “surety laws”—as protecting “robust carry rights.” *Wrenn*, 864 F.3d at 661; *see also Young*, 896 F.3d at 1061–62. Such an interpretation falters for a variety of reasons, which this author has outlined in a separate article. *See Charles, Faces, Take Three*, *supra* note 19, at 270–73.

77. For more on this, see CHARLES, ARMED IN AMERICA, *supra* note 29, at 143–45.

78. *See Charles, Faces, Take Two*, *supra* note 31, at 419–22 n.245.

79. *Id.*

80. *Id.*

81. *See, e.g., THE CODE OF WEST VIRGINIA 897–08* (John A. Warth ed., 2d ed., W. Va. Prtg. Co. 1891) (“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

The second reason for the arrival and spread of laws restricting the transportation of dangerous weapons from the mid-

---

and back again. And if upon the trial of an indictment for carrying any such pistol, dirk, razor or bowie knife, the defendant shall prove to the satisfaction of the jury that he is a quiet and peaceable citizen, of good character and standing in the community in which he lives, and at the time he was found with such pistol, dirk, razor or bowie knife, as charged in the indictment he had good cause to believe and did believe that he was in danger of death or great bodily harm at the hands of another person, and that he was in good faith, carrying such weapon for self-defense and for no other purpose, the jury shall find him not guilty. But nothing in this section contained shall be so construed as to prevent any officer charged with the execution of the laws of the State, from carrying a revolver or other pistol, dirk or bowie knife.”); NEW ULM, MINN., ORDINANCE 22, *Ordinance Relating to the Promotion of the Public Peace*, (Feb. 7, 1888), in THE CHARTER AND ORDINANCES OF THE CITY OF NEW ULM, MINNESOTA 110–11 (Jos. A. Eckstein ed., New Ulm Post Print 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.”); HASTINGS, MINN., ORDINANCE 74, *An Ordinance Relating to Breaches of the Peace, Disorderly Conduct and the Carrying of Concealed Weapons* (May 24, 1870), in 1884 CITY CHARTER OF THE CITY OF HASTINGS: TOGETHER WITH ORDINANCES OF SAID CITY 75 (Hastings Daily News Printers, 1884) (“Any person who shall go armed within the incorporated limits of said city of Hastings with a dirk, dagger, sword, pistol or pistols, or shall carry a slung-shot or metal knuckles or other offensive or dangerous weapon, without reasonable cause to fear an assault or other injury to his person or to his family or property, shall, upon conviction before said justice, be punished by a fine not exceeding one hundred dollars, or by imprisonment not exceeding three months, or both, in the discretion of the justice.”); BOTTINEAU, DAKOTA, *Ordinances of Breaches of the Peace* (Dec. 13, 1888), BOTTINEAU PIONEER, Dec. 13, 1888 (“Any person found armed within the corporate limits of the village of Bottineau with a dirk, dagger, sword, pistol or pistols, or other offensive or dangerous weapons, without reasonable cause to fear an assault or other injury of violence to his person or to his family or property, shall, upon conviction before said justice, be punished by a fine not exceeding ten dollars, or by imprisonment in the village jail not exceeding term of thirty days.”); see also *State v. Workman*, 14 S.E. 9 (W. Va. 1891).

to-late nineteenth century was technological advancements in both travel and firearms. As it pertains to the former—travel—the mid-to-late nineteenth century was time when technological advances in trains and the production of steel made westward settlement a viable reality for more Americans than ever before.<sup>82</sup> Naturally, with this westward expansion and growth came brand new population centers.<sup>83</sup> And with the arrival of new population centers came the need for localized laws regulating the health, safety and welfare of their inhabitants, which often included weapon laws meant to mitigate the negative effects of firearms related crime, homicides, and injuries.<sup>84</sup> The need for weapon laws

---

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

83. See Gilbert Stelter, *The City and Westward Expansion: A Western Case Study*, 4 W. HIST. Q. 187 (1974); CARL ABBOTT, *HOW CITIES WON THE WEST: FOUR CENTURIES OF URBAN CHANGE IN WESTERN NORTH AMERICA* 32-33 (1949).

84. The need for such laws—including firearms laws—to be localized for the inhabitants' health, safety and welfare can be found in late nineteenth-century city charters. See, e.g., 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"); 1 GENERAL STATUTES OF THE STATE OF KANSAS 421 (1897) (authorizing cities within Kansas to "prohibit and punish the carrying of firearms, or other deadly weapons, concealed or otherwise"); 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 (Chas. F. Haney ed., 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"); 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, at 300, 305 (recognizing the

was only further exasperated by the fact that advances in technology had made firearms substantially more lethal, as well as more readily available.<sup>85</sup> And this need for weapons laws ultimately gave rise to many of the categories of firearms laws that we know today—categories that would help set the stage for both federal and model state firearms regulation in the century to come.<sup>86</sup> These mid-to-late nineteenth century categories of

---

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 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 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 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").

85. For a history of advances of firearms technology by the late nineteenth-century, see FIREARMS: AN ILLUSTRATED HISTORY 86-138 (2014).

86. This includes the antecedents of firearms licensing. See, e.g., *An Act to Regulate the Carrying of Firearms*, Jun. 2, 1893, in ACTS AND RESOLUTIONS ADOPTED BY THE LEGISLATURE OF FLORIDA AT ITS FOURTH REGULAR SESSION, UNDER THE CONSTITUTION OF A.D. 1885, at 71 (1893) ("That in each and every county in

firearms laws included everything from restrictions on minors, juveniles, vagrants, and other undesirable classes from either obtaining or purchasing firearms, to requirements on firearms dealers, including that they register and records all firearms sales, to the aforementioned justifiable need or good cause armed carriage licensing laws, to rules governing the transportation of firearms.<sup>87</sup>

Focusing specifically on the last category—rules governing the transportation of firearms—the general rule was that the law must be flexible enough to allow individuals some means to transport their firearms for lawful purposes, especially during travels from one destination to another.<sup>88</sup> Consider for example California’s armed carriage law of 1863.<sup>89</sup> Although California’s law broadly prohibited the concealed carrying or wearing of “any dirk, pistol, sword in cane, slungshot, or other dangerous or deadly weapons,” it also provided a list of exceptions, one of which was travelers.<sup>90</sup> Initially, the California law did not state how exactly

---

this State, it shall be unlawful to carry or own a Winchester or other repeating rifle. . . without first taking out a license from the County Commissioners of the respective counties, before such person shall be at liberty to carry around him on his person and in his manual possession such Winchester rifle or other repeating rifle.”); CHARLES, ARMED IN AMERICA, *supra* note 29, at 174.

87. CHARLES, ARMED IN AMERICA, *supra* note 29, at 157-65.

88. In 1859, Indiana appears to have been the first state to include a traveler’s exception in their armed carriage law. *An Act to Prevent Carrying Concealed or Dangerous Weapons, and to Provide Punishment Therefor*, Feb. 23, 1959, in LAWS OF THE STATE OF INDIANA, PASSED AT THE FORTIETH SESSION OF THE GENERAL ASSEMBLY 129 (1859) (“That every person not being a traveler, who shall wear or carry any dirk, pistol, bowie-knife, dagger, sword in cane, or any other dangerous or deadly weapon concealed, or who shall carry or wear any such weapon openly, with the intent or avowed purpose of injuring his fellow man, shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars.”). It appears that Indiana localities adopted the same law as an ordinance, but when doing so made sure to cap the fine to a lower dollar amount. See, e.g., *An Ordinance to Preserve Peace and Good Order, to Prevent Vice and Immorality, to Define Certain Crimes and Misdemeanors, and Prescribe the Punishment Thereof*, Aug. 23, 1870, in THE CHARTER AND ORDINANCES OF THE CITY OF RICHMOND 75 (1871) (capping the fine for carrying concealed weapons at a hundred dollars); *Ordinance No. 1: Protecting Public Morality, Order and Safety*, in ORDINANCES IN THE TOWN OF BEDFORD 3 (1869) (capping the fine for carrying concealed weapons at ten dollars).

89. 1 THE GENERAL LAWS OF THE STATE OF CALIFORNIA, FROM 1850 TO 1864, INCLUSIVE 261 (Theodore H. Hittell ed., 1870).

90. *Id.* (excepting “peace-officer[s], provost-marshal[s], enrolling-officer[s],

a person would qualify as a traveler. A year later, however, California amended the law to define travelers as any person “actually engaged in making a journey at the time.”<sup>91</sup>

Texas also included a traveler exception within its armed carriage law of 1871. In accord with the Massachusetts Model,<sup>92</sup> the 1871 Texas law prohibited the carrying of “any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife manufactured or sold for the purpose of offense or defense, unless he has reasonable grounds for fearing an unlawful attack on his person, and that such ground of attack shall be immediate and pressing. . .”<sup>93</sup> However, what distinguished the 1871 Texas law from the Massachusetts Model was the former provided an express list of exceptions, to include militiamen in “actual service,” peace officers, policemen, persons carrying on their own property or in their place of business, and “persons traveling” with weapons in their “baggage.”<sup>94</sup> It was not long after the 1871 Texas law went into effect that the Texas Supreme Court was presented with several legal challenges, and

---

or officer[s] acting under the laws of the United States in the department of the provost-marshals of this State, State and Federal assessors, collectors of taxes and licenses while in performance of official duties, or traveler[s]).

91. *Id.*

92. *See supra* notes 73-81.

93. *An Act Regulating the Right to Keep and Bear Arms*, Apr. 12, 1871, in GEORGE W. PASCHAL, 2 A DIGEST OF THE LAWS OF TEXAS 1322 (1873). Similar to the overarching intent behind Massachusetts Model armed carriage laws, the purpose of the 1871 Texas law was to stop the habitual and promiscuous toting of dangerous weapons in public places. *See* Edmund J. Davis, Message from Governor, Apr. 29, 1870, in H.J. of Tex., 12th Leg., 1st C.S. 19 (1870) (“I . . . call your attention to the provisions of section thirteen of the Bill of Rights, on the subject of bearing arms. The legislature is there given a control over the privileges of the citizen, in this respect, which was not in the old constitution. There is no doubt that to the universal habit of carrying arms is largely to be attributed the frequency of homicides in this State. I recommend that this privilege be placed under such restrictions as may seem to your wisdom best calculated to prevent the abuse of it. Other than in a few of the frontier counties there is no good reason why deadly weapons should be permitted to be carried on the person.”); Frassetto, *Firearms Regulation in Reconstruction Texas*, *supra* note 35, at 97-108. For a summary of how courts up to 1885 were determining whether a person’s preparatory armed carriage was “reasonable” and based on an “imminent attack,” see Hopkins, *Concealed Weapons*, *supra* note 76, at 413-14.

94. “An Act Regulating the Right to Keep and Bear Arms,” in PASCHAL, 2 A DIGEST OF THE LAWS OF TEXAS, *supra* note 93, at 1322.

in every case the court upheld the law's constitutionality.<sup>95</sup> As it pertained specifically to the 1871 Texas law's transportation provision, in the 1873 case *Waddell v. State*, the court—without specifically expounding upon its constitutionality—inferred it was consistent with right to arms, but only so long as it was not enforced in a manner as to prohibit the transportation of arms in the course of purchasing, repairing, or moving said arms from one's residence to another, or from one's residence to one's business, and vice-versa.<sup>96</sup>

In addition to California and Texas, several other state and territorial governments enacted a traveler's exception within their respective armed carriage law. In 1870 Tennessee for example, although it was unlawful for any person to carry deadly weapons to any "election, fair, race or other public gathering,"<sup>97</sup> as well as to carry concealed any "dirk, sword-cane, Spanish stiletto, [and] belt or pocket pistol" in both public and private, there was a traveler's exception should a person be "on a journey to a place out of his county or State."<sup>98</sup> In 1875, Wyoming exempted sojourners from its prohibition on the carrying, "openly or concealed, [of] any fire arm or other deadly weapon, within the limits of any city, town or village."<sup>99</sup> Meanwhile, in 1887, New Mexico enacted a law

---

95. See, e.g., *State v. Duke*, 42 Tex. 455 (1874); *English v. State*, 35 Tex. 473 (1872); see also Frassetto, *Firearms Regulation in Reconstruction Texas*, *supra* note 35, at 112-20.

96. 37 Tex. 354 (1873). A decade later, a Texas Appellate Court echoed the Texas Supreme Court's sentiments in weighing the validity of an indictment under the 1871 law, writing: "Now, if A. fines or buys a pistol, he has the right to take the same home or to his place of business. Or, if he carries his pistol to the shop to be repaired, or from the shop after it has been repaired, he does not violate the statute, whether the same be loaded or unloaded." *Pressler v. State*, 19 Tex. App. 52, 53 (1885). See also *Andrews v. State*, 50 Tenn. 165, 178-79 (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, without violating this clause of the Constitution.").

97. PUBLIC STATUTES OF THE STATE OF TENNESSEE, SINCE THE YEAR 1858, at 94 (James H. Shankland ed., 1871).

98. *Id.*

99. *An Act to Prevent the Carrying of Fire Arms and Other Deadly Weapons*, Dec. 2, 1875, in THE COMPILED LAWS OF WYOMING 352 (1876).

prohibiting the carrying of any deadly weapon, “either concealed or otherwise, on or about the settlements,” unless the person was transporting the weapon to and from a residence, to and from a business, or for the purpose of self-defense should the person be “threatened with danger. . .”<sup>100</sup> As it pertained to traveling specifically, the law stipulated that any person qualifying as a traveler “may carry arms for their own protection while actually prosecuting their journey and may pass through settlements on their road without disarming; but if such travelers shall stop at any settlement for a longer time than fifteen minutes they shall remove all arms from their person or persons, and not resume the same until the eve of departure.”<sup>101</sup>

In addition to state and territorial governments, several municipalities adopted some form of official business or traveler exception within their respective armed carriage law.<sup>102</sup> Take for

---

100. *An Act to Prohibit the Unlawful Carrying and Use of Deadly Weapons*, Feb. 18, 1887, in ACT OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF NEW MEXICO 55, 55 (1887) [hereinafter *Prohibit Unlawful Carrying*, in LEGISLATIVE ASSEMBLY NEW MEXICO].

101. *Id.* at 57. See also *An Act Defining and Punishing Certain Offenses Against the Public Peace*, in SESSION LAWS OF THE FIFTEENTH LEGISLATIVE ASSEMBLY OF THE TERRITORY OF ARIZONA 16, 17 (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”); WILL T. LITTLE, L.G. PITMAN, AND R.J. BARKER, THE STATUTES OF OKLAHOMA 495 (1891) (excepting from the state’s concealed weapons law persons carrying “shot-guns or rifles for the purpose of hunting, having them repaired, or of killing animals, or for the purpose of using the same in public muster or military drills, or while travelling or removing from one place to another, and not otherwise.”).

102. See, e.g., *Centennial City Law*, Apr. 4, 1897, in TENNESSEAN (Nashville, TN), Apr. 5, 1897, at 8 (“Every person found carrying a pistol, bowie knife, dirk knife, sling-shot, brass knucks or other deadly weapon shall be deemed guilty of a misdemeanor, and upon conviction of such first offense shall be fined not less than ten nor more than fifty dollars. . . It is expressly understood that the provisions of the above sections relating to the carrying of deadly weapons do not extend to. . . the act of handling or moving such deadly weapons in an ordinary business way.”); *An Ordinance Regulating the Carrying of Concealed Weapons in the City of Lincoln, Prohibiting the Carrying of the Same Under Certain Conditions, Prescribing Penalties for Violation of the Provisions of this Ordinance, and Repealing Ordinances in Conflict Herewith*, Aug. 26, 1895, in REVISED

ORDINANCES OF LINCOLN, NEBRASKA 209-10 (“It shall be unlawful for any person within said city to carry about the person any concealed pistol, revolver, dirk. . .or other dangerous or deadly weapons of any kind. . .The prohibitions of this ordinance shall not apply to. . .persons whose business or occupation may seem to require the carrying of weapons for their protection, and who shall have obtained from the Mayor a license to do so.”); W.J. CONNELL, COMPILED MISDEMEANOR ORDINANCES OF THE CITY OF OMAHA 14-15 (1894) (“It shall be unlawful for any person to wear under his clothes, or concealed about his person, any pistol or revolver, colt. . .or any other dangerous or deadly weapon within the corporate limits of the city of Omaha. . .*Provided, however,* If it shall be proved from the testimony on the trial of any such case, that the accused was, at the time of carrying any weapon as aforesaid, engaged in the pursuit of any lawful business, calling or employment. . .the accused shall be acquitted.”); *Carrying Concealed Weapons—Firing Guns, Pistols, Fire Crackers, Etc.*, May 22, 1890, in GENERAL ORDINANCES OF THE TOWN OF COLUMBIA, IN BOONE COUNTY, MISSOURI 34-35 (1890) (exempting from the prohibition of “carrying concealed. . .any pistol, bowie knife, dirk, dagger. . .or other deadly or dangerous weapon” any “persons moving or traveling peaceably through the state.”); *An Ordinance to Provide for the Punishment of Certain Misdemeanors*, Mar. 13, 1886, in ORDINANCES OF THE CITY OF IRONTON 54, 57 (C.A. Thompson ed., 1896) (Ironton, Ohio ordinance prohibiting the concealed carriage of “any pistol, bowie-knife, dirk, or other dangerous weapons” except for persons “engaged in a lawful calling under circumstances to justify a prudent man in carrying the weapon”); CHARTER AND CODE OF LAWS FOR THE CITY OF UNIONTOWN, ALABAMA 49 (1885) (“Any person not being threatened with, or having good reason to apprehend attack, or traveling, or setting out on a journey, who carries concealed about his person, a bowie knife, dirk, or knife of like kind, or a pistol or fire-arm of any kind or description, or any air gun, sword cane, brass knucks or sling shot, must, on conviction, be fined, fined and imprisoned, or sentenced to hard labor for the city.”); *Ordinance No. 97: Ordinance Related to Carrying Deadly Weapons*, May 17, 1882, in BURLINGTON DEMOCRAT (KS), May 26, 1882, at 2 (“That it 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 said 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.”); *Ordinance No. III: Crimes and Misdemeanors*, Aug. 9, 1881, in WEEKLY DEMOCRAT-TIMES (Greenville, MS), Dec. 31, 1881, at 2 (“That it shall not be lawful for any person to carry, concealed in whole or in part, any bowie-knife, dirk-knife, brass or metal knuckler, pistol, slung-shot, or other deadly weapon, (unless the party so carrying such weapon shall be threatened with, or have good and sufficient cause to apprehend an attack, or traveling, or setting out on a journey, or peace officer in the discharge of his duty”); *An Ordinance Prohibiting the Unlawful Carrying of Arms*, May 4, 1880, in AUSTIN-AMERICAN STATESMAN (TX), May 9, 1880, at 2 (“That if any person in this city shall carry on or about his person, saddle, or in his saddle bags 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, he shall be punished by fine of not less than twenty-five nor more than one hundred dollars. . .That the preceding section shall

instance Nashville, Tennessee, which adopted an ordinance prohibiting the carrying of any “pistol, bowie, knife, dirk-knife, slung-shot, brass knucks or other deadly weapon” unless the person was a police officer, “entitled by law to carry such deadly weapons,” or was in the “act of handling or moving such deadly weapons in any ordinary business way.”<sup>103</sup> In Walla Walla, Washington, the council adopted an ordinance that prohibited the carrying of “concealed weapons within the corporate limits,” with the exception of 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. . .”<sup>104</sup> Meanwhile, in several of California’s more populous localities it was common to see a traveling exception within their good cause or justifiable need armed carriage licensing laws. Such laws prohibited any person from “wear[ing] or carry[ing] concealed. . .any pistol, dirk or other dangerous or deadly weapon” unless they were either 1) a “peaceable person, whose profession or occupation may require him to be out at late hours of the night, to carry concealed deadly weapons for his own protection,” or 2) a traveler “actually engaged in making a journey at the time.”<sup>105</sup>

---

not apply to. . .the carrying of arms on one’s own premises or place of business, nor to persons travelling. . .”); THE CODE OF ORDINANCES OF THE CITY COUNCIL OF MONTGOMERY, WITH THE CHARTER 151 (1879) (“Any person who, not being threatened with or having good reason to apprehend an attack, or travelling or setting out on a journey, carries concealed about his person a bowie-knife or any other knife of like kind or description, or a pistol or fire-arms of any other kind or description, air gun, slung-shot, brass-knuckles, or other deadly or dangerous weapon, must, on conviction, be fined not less than one nor more than one hundred dollars.”); *Miscellaneous Ordinance*, Jun. 24, 1871, in ABILENE WEEKLY CHRONICLE (KS), Jun. 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.”).

103. THE CODE OF NASHVILLE 221-22 (1885).

104. *An Ordinance Defining Offenses and Fixing the Punishment Thereof*, Aug. 16, 1878, in AMENDED CITY CHARTER AND ORDINANCES OF THE CITY OF WALLA WALLA 165, 170 (1896) [hereinafter *An Ordinance Defining Offenses*, in ORDINANCES OF THE CITY OF WALLA WALLA].

105. *Prohibiting the Carrying of Concealed Deadly Weapons*, Sep. 17, 1880, in GENERAL ORDERS OF THE BOARD OF SUPERVISORS PROVIDING REGULATIONS FOR THE GOVERNMENT OF THE CITY AND COUNTY OF SAN FRANCISCO 8 (1884). See also *Prohibiting the Carrying of Concealed Weapons*, Nov. 6, 1878, in CHARTER AND

As the United States entered the twentieth-century, armed carriage exceptions for travelers, sojourners, or persons whose official business required it continued to gain traction in statute and ordinance books.<sup>106</sup> This is not to say, however, that each and

---

REVISED ORDINANCES OF THE CITY OF EUREKA 251 (1905); *Prohibiting the Carrying of Concealed Deadly Weapons*, Apr. 24, 1876, in CHARTER AND ORDINANCES OF THE CITY OF SACRAMENTO 173 (1896); *An Ordinance to Prohibit the Carrying of Concealed Weapons*, May 15, 1890, in CITY CHARTER OF THE CITY OF OAKLAND, CALIFORNIA 332 (1898); *An Ordinance Declaring, and Providing for the Punishment of Misdemeanors*, Jun. 10, 1891, in CHARTER AND ORDINANCES OF THE CITY OF FRESNO, CALIFORNIA 52, 53 (1916).

106. See, e.g., 1 MUNICIPAL CODE OF THE CITY OF MADISON, NEBRASKA 200-1 (1919) (prohibiting the carrying of weapons concealed unless the person was “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 a weapon or weapons”); LAWS OF CALIFORNIA AND ORDINANCES OF THE COUNTY AND CITIES OF LOS ANGELES COUNTY RELATING TO MINORS 45, 85-86, 121-22, 129-30, 186 (1914) (showing that the cities of Alhambra, El Monte, Inglewood, Long Beach, and Redondo Beach, California all maintained an exception for travelers in their respective justifiable need or good cause armed carriage licensing laws); *A Further Supplement to and Act Entitled “An Act for the Punishment of Crimes”*, Mar. 17, 1909, in ACTS OF THE ONE HUNDRED AND THIRTY-THIRD LEGISLATURE OF THE STATE OF NEW JERSEY 34-35 (1909) (prohibiting the carrying of concealed weapons unless the person obtained a license from the mayor or local governing body, and that the law “shall not prevent any person from keeping or carrying about his or her place of business, dwelling house or premises such weapons. . .or from carrying the same from any place of purchase to his or her dwelling house or place of business, or from his or her dwelling house or place of business to any place where repairing is done, to have the same repaired and returned”); *City Ordinance No. 45*, Aug. 29, 1905, in RENO GAZETTE-JOURNAL (NV), Aug. 30, 1905, at 6 (prohibiting the carrying of concealed weapons unless the person obtained a license from the city council “showing the reason. . .or the purpose for which any concealed weapon is to be carried,” or was “traveling through the state”); *An Ordinance to Create and Define Certain Offenses Against the Mayor and Aldermen of the City of Vicksburg, and to Provide Penalties for the Violation Thereof*, Jul. 11, 1905, in VICKSBURG HERALD (MS), Jul. 12, 1905, at 5 (“Any person who carries concealed in whole or in part any bowie knife. . .or other deadly weapon shall be guilty of a misdemeanor and on conviction shall be punished by a fine of not less than twenty-five dollars, nor more than one hundred dollars, or imprisoned not more than one month in the city work house, or both. Any person charged with a violation. . .may show as a defense. . .that he was traveling. . .engaged in transporting valuable for an express company or bank”); *An Act to Prohibit the Carrying of Concealed Weapons, and to Provide for the Punishment Thereof*, Mar. 17, 1903, in STATUTES OF THE STATE OF NEVADA PASSED AT THE TWENTY-FIRST SESSION OF THE LEGISLATURE 1903, at 208-9 (1903) (prohibiting the carrying of concealed weapons unless the person obtained a license by “showing the reason. . .or the purpose for which. . .it is to be carried,” or if the person is “engaged in the business of common

every one of these exceptions operated in the same way. To state this differently, in the late nineteenth- and early twentieth centuries there was no one-size-fits-all conception as to who was and who was not legally excepted as a traveler, sojourner, or person transporting weapons in the course of ordinary business. In some jurisdictions, determining who did and who did not qualify was a matter to be decided by the courts based on the particular facts of the case.<sup>107</sup> Meanwhile, in other jurisdictions, it was principally the law itself that decided the matter.<sup>108</sup> For instance, in New Mexico, a traveler that stopped in any settlement for more than fifteen minutes was no longer excepted under the law.<sup>109</sup> In Walla Walla, Washington the exception could last as long as five days.<sup>110</sup> Conversely, in places like Tombstone, Arizona and Dodge City, Kansas,<sup>111</sup> as well as several municipalities within Utah,<sup>112</sup>

---

carries in this State, or. . .traveling through the State.”).

107. See Hopkins, *Concealed Weapons*, *supra* note 76, at 414-18.

108. See, e.g., *Blanket Ordinance: Ordinance No. 97*, Feb. 8, 1916, in BORDER VIDETTE (Nogales, AZ), Feb. 12, 1916, at 3 (“It shall be unlawful for any person within the town of Nogales, Arizona. . .to have or carry concealed on or about his person any pistol or other firearms. . .provided, that bona fide travelers and persons coming into the town may be permitted to carry their arms for one half hour after arriving in town, and for one-half hour prior to their departure.”).

109. *Prohibit Unlawful Carrying*, in LEGISLATIVE ASSEMBLY NEW MEXICO, *supra* note 100, at 57.

110. *An Ordinance Defining Offenses*, in ORDINANCES OF THE CITY OF WALLA WALLA *supra* note 104, at 170.

111. See Blocher, *Firearms Localism*, *supra* note 60, at 117; ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 13, 172-73 (2011) [hereinafter WINKLER, GUNFIGHT].

112. Throughout the nineteenth century, Utah did not pass a statute regulating armed carriage. The decision to regulate armed carriage was left entirely to city councils. See THE REVISED STATUTES OF THE STATE OF UTAH IN FORCE JAN. 1, 1898, at 130 (1898) (stating it is at the discretion of cities to “regulate and prohibit the carrying of concealed weapons”). And, by the close of the nineteenth-century, several Utah city councils chose to prohibit armed carriage within their respective city’s limits, whether such carriage was done openly or concealed. See 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.”); See THE REVISED ORDINANCES OF PAYSON CITY, UTAH 84 (1893) (“Every person who shall wear, or carry upon his person any

any traveling exception immediately ceased upon entering the city limits.<sup>113</sup>

Still, despite the lack of any late nineteenth-century/early twentieth-century uniformity as to when a person carrying weapons would qualify as a traveler, sojourner, or person conducting ordinary business, there were two common features that bound all laws governing the transportation of firearms. First, in each statute or ordinance there was at least some legal outlet for individuals to transport firearms from one place to another, so long as it was in fact for legitimate and lawful purposes, i.e. to and from residences, from one's residence to place of business and vice-versa, for repair, militia service, and the like. Second and equally important, each statute or ordinance reinforces the fact that—under governmental police power—state and local governments were given broad discretion in determining the standard for the transportation of firearms in public places. In this respect, laws governing the transportation of firearms were virtually one and the same with armed carriage laws as a whole—localism was the norm, not the exception.<sup>114</sup>

---

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.”).

113. See, e.g., *Ordinance No. 9: Carrying Deadly Weapons*, Jan. 28, 1873, in ARIZONA WEEKLY CITIZEN (Tucson, AZ), Feb. 8, 1873, at 2 (“Every person not being a peace officer, who shall wear or carry any dirk-knife, gun, pistol, sword in a cane, slung-shot or other dangerous or deadly weapon, contrary to the provisions of this ordinance, within the inhabited portions of the corporate limits of the Village of Tucson, shall upon conviction before the Recorder be fined in any sum not exceeding ten dollars, or be imprisoned for a period not exceeding ten days, or by both such fine and imprisonment in the discretion of the court.”).

114. See CHARLES, ARMED IN AMERICA, *supra* note 29, at 161-63. See also THE PISTOL AS A WEAPON OF DEFENSE: IN THE HOUSE AND ON THE ROAD 9-10 (1875) (“It is not every one that has the right to carry an instrument which may at any moment be so used to cause the death of others; without hesitation we exclude from this category children and imbeciles, but the further question arises: Shall

Being cognizant of these two common legal features is rather important for they would guide the next evolution of the law and armed carriage—restricting the transportation of firearms in automobiles. It was not long after Henry Ford honed his mass-production techniques that millions of automobiles were operating across the United States. Naturally, with the advent of the automobile came the need for laws governing it. The same bode true for the transportation of firearms via the automobile. This is because with the advent of the automobile came the capability to transport firearms more rapidly and over longer distances in one day than ever before. To sportsmen, hunters, and recreational shooters, this new transportation capability was a godsend. The automobile afforded them the ability to travel to a variety of hunting and shooting destinations in a fraction of the time. But to law enforcement officials, this new transportation capability presented new, significant challenges in stopping criminals.<sup>115</sup>

It is against this historical backdrop that lawmakers considered, debated, and enacted the first laws governing the transportation of firearms in automobiles. There to initially assist

---

every man that in ordinary business matters is accounted of sound mind, be allowed to carry a pistol, when he chooses to do? So far as legal enactments are concerned, nothing can be done to discriminate between the most nervous individual, and the coolest and bravest man in existence. But upon those with whom moral and prudential considerations have as great weight as the laws of the statute book, we would urge that no man has a right to carry such a terribly efficient instrument of destruction unless he is perfectly assured of his power of self control, and of his ability to use the weapon without incurring the danger of injuring friends and innocent persons. Nervous and excitable persons; those who in any trying emergency are liable to lose their self control, and to fire at random, should never carry a pistol under any circumstances whatever.”): John Forrest Dillon, *The Right to Keep and Bear Arms for Public and Private Defense*, 1 CENT. L.J. 259, 286 (1874) (“It is within common experience that there are circumstances under which to disarm a citizen would be to leave his life at the mercy of a treacherous and plotting enemy. If such a state of facts were clearly proven, it is obvious it would be contrary to all our notions of right and justice to punish the carrying of arms [in that instance], although it may have infringed the letter of some statute.”); *id.* at 287 (“the peace of society and the safety of the peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons.”); *id.* at 296 (noting that state and local governments are acting within their authority “to regulate the bearing of arms in such manner as [they] may see fit, or restrain it altogether”).

115. See generally JOHN TOLAND, *THE DILLINGER DAYS* (1965).

lawmakers with this task was the United States Revolver Association (USRA). Established in 1900, and later incorporated in 1904, the USRA's mission was to foster the art of revolver and small-arm shooting, largely through the promotion of pistol matches.<sup>116</sup> Not long after, when it became apparent that several state and local firearms regulations were negatively impacting pistol competition, the USRA felt obligated to oppose "anti-pistol" legislation and replace it with "sane" firearms legislation.<sup>117</sup> In making this decision, the USRA became the first organization to advocate for Second Amendment rights<sup>118</sup>—one of which, both the USRA and the broader gun rights community believed, was the ability to transport firearms for lawful purposes.<sup>119</sup> This belief was reflected in the provisions of the USRA's model state firearms legislation, which was more commonly known as the Capper Bill for having been first introduced to Congress for passage in the District of Columbia by Kansas Senator Arthur Capper.<sup>120</sup>

As it pertained to the carrying and transportation of firearms in automobiles, the Capper Bill essentially borrowed from the armed carriage licensing laws of the mid-to-late nineteenth century.<sup>121</sup> First, in accord with armed carriage licensing laws, the Capper Bill stipulated that anyone who wanted to carry concealed firearms in public or transport a concealed firearm in an automobile needed to apply to a local government official to obtain a license. And in doing so, the applicant needed to show the local government official a "good reason" for it being granted.<sup>122</sup> Also,

---

116. CHARLES, ARMED IN AMERICA, *supra* note 29, at 189.

117. *Id.*

118. *Id.* at 189-91.

119. See A Bill to Provide for Uniform Revolver Sales: Based Upon Senate Bill 4012 Introduced in the U.S. Senate, Sept. 20, 1922, in Charles Lewis Gilman Papers Box 2, Gun Law Correspondence (St. Paul, MN: Minnesota Historical Society) [hereinafter Gilman Papers].

120. CHARLES, ARMED IN AMERICA, *supra* note 29, at 191-92.

121. A Bill to Provide for Uniform Revolver Sales, *supra* note 119, at §§ 7-8, in Gilman Papers Box 2, Gun Law Correspondence.

122. *Id.* at §§ 6-8. If the applicant provided false information to retrieve the license, the applicant could be imprisoned for "not less than five nor more than ten years." *Id.* at § 13. Moreover, should a person not obtain a license and decide to carry concealed firearms in public or transport a concealed firearm in an automobile, the Capper Bill provided a penalty of one year imprisonment. *Id.* at § 6. The USRA justified the severity of the penalties by noting: "The fact that any

similar to many of the armed carriage licensing laws of the mid-to-late nineteenth century, the Capper Bill included a list of lawful transportation exceptions. These exceptions included USRA and National Rifle Association (NRA) affiliated members actively taking part in club activities or shooting events, “the regular and ordinary transportation of pistols or revolvers as merchandise, or to any person while carrying a pistol unloaded in a wrapper from the place of purchase to his home or place of business, or to a place of repair or back to his home or place of business, or in moving goods from one place of abode or business to another.”<sup>123</sup>

Congress ultimately decided against enacting the Capper Bill for the District of Columbia.<sup>124</sup> It was, however, positively received elsewhere by proponents of gun rights and gun control alike.<sup>125</sup> This led to what was, at the time, the largest contemporaneous

---

person found carrying a concealed weapon without a license would be subject to a mandatory sentence of not less than a year in prison, instead of a moderate fine, would practically do away with the carrying of arms by any but those entitled to do so.” Bulletin from U.S. Revolver Ass’n, Same Regulation of Revolver Sales: Why Revolver Sales Should be Uniform, Bulletin No. 2, Jan. 24, 1923, in Gilman Papers, box 2, folder Gun Law Correspondence.

123. A Bill to Provide for Uniform Revolver Sales, *supra* note 119, at § 7, in Gilman Papers Box 2, Gun Law Correspondence. The Capper Bill was not the first instance where an exception was included for USRA and NRA affiliated members taking part in club activities or competitions. New York’s Sullivan Law included such an exception, and it remained in subsequent amendments to the law. See, e.g., *An Act to Amend the Penal Law, in Relation to the Carrying, Use and Sale of Dangerous Weapons*, May 21, 1913, in 3 LAWS OF THE STATE OF NEW YORK, PASSED AT THE ONE HUNDRED AND THIRTY-SIXTH SESSION OF THE LEGISLATURE 1627, 1629 (1913) (amendment to New York’s Sullivan Law stating that the armed carriage licensing requirements “shall not apply to the regular and ordinary transportation of firearms as merchandise. . . nor to duly authorized military or civil organizations, when parading, nor to the members thereof when going to and from the place of meeting of their respective organizations.”); *The Sullivan Pistol Act*, FIELD AND STREAM, Feb. 1912, at 991-92 (urging that the Sullivan Law be amended to allow for the transportation of firearms in public places through luggage, and acknowledging that law currently allowed the “ordinary transportation of firearms as merchandise” and to “duly authorized military or civil organizations, when parading, [or] to the members thereof when going to and from the places of meeting of their respective organizations”).

124. HANDBOOK OF THE NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS AND THE PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 854 (1925) [hereinafter 1925 HANDBOOK ON UNIF. STATE LAWS].

125. CHARLES, ARMED IN AMERICA, *supra* note 29, at 192–93.

overhaul of state firearms laws in American history.<sup>126</sup> It also prompted the National Conference of Commissioners (NCC) to explore its own model firearms legislation—the Uniform Firearms Act (UFA).<sup>127</sup> It was here that the NRA entered the political fray.<sup>128</sup> The NCC’s first draft of the UFA was deemed unacceptable to the NRA.<sup>129</sup> What the NRA specifically disdained was the provision requiring a license to purchase a pistol.<sup>130</sup> The other provisions, however, were agreeable—that is so long as the NRA was able to tweak the language in a manner that was more favorable to sportsmen, hunters, and gun owners.<sup>131</sup> In the end, the NCC agreed to virtually all of the NRA’s changes, and in 1930 the final version of the UFA was formally adopted by a vote of 28-4.<sup>132</sup> Subsequently, with the backing of the NRA, the UFA was adopted by even a greater number of states than the Capper Bill.<sup>133</sup>

As it pertained to the carrying and transportation of firearms in automobiles, the UFA was virtually identical to the Capper Bill, with one exception.<sup>134</sup> Much like the Capper Bill, the UFA required an applicant to show good cause before being granted an armed carriage license.<sup>135</sup> Also, much like the Capper Bill, exempted from

---

126. See WINKLER, *GUNFIGHT*, *supra* note 111, at 208.

127. Charles V. Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767, 767–69 (1926).

128. See CHARLES, *ARMED IN AMERICA*, *supra* note 29, at 194–95. The NRA initially cooperated with the USRA in this regard. See, e.g., Jack Rohan, *N.R.A. Directors Meet*, AM. RIFLEMAN, Mar. 1927, at 101.

129. CHARLES, *ARMED IN AMERICA*, *supra* note 29, at 195.

130. See, e.g., Charles V. Imlay, *Uniform Firearms Act Reaffirmed*, 16 A.B.A. J. 799, 801 (1930) [Imlay, *Uniform Firearms Act Reaffirmed*]; Milton A. Reckord, *The Truth About the Firearms Situation and a Suggestion for Its Practical Solution*, AM. RIFLEMAN, Apr. 1, 1927, at 4.

131. CHARLES, *ARMED IN AMERICA*, *supra* note 29, at 195.

132. *Id.*

133. By the end of 1936, the UFA was adopted by 13 of the 48 states. See *Digest of State Firearms Laws, Part I and Part II*, AM. RIFLEMAN, Nov. 1936, at 26–27; *Digest of State Firearms Laws, Part III and Part IV*, AM. RIFLEMAN, Jan. 1937, at 32–33.

134. For a useful summary of state laws pertaining to the transportation of firearms, see HANDBOOK OF THE NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS AND THE PROCEEDINGS OF THE FORTIETH ANNUAL MEETING 538-44 (1930) [hereinafter 1930 HANDBOOK ON UNIF. STATE LAWS].

135. See UNIF. FIREARMS ACT: DRAFTED BY THE NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS 4 (1930). For the NCC’s explanation as to why it drafted the

the UFA's armed carriage licensing and automobile transportation requirement were any USRA and NRA affiliated members actively taking part in club activities or shooting events, the transportation of pistols or revolvers as merchandise, and several other activities presumably deemed lawful.<sup>136</sup> Where the UFA distinguished itself from the Capper Bill was the former no longer maintained the requirement that the firearm being transported in the automobile be in fact concealed.<sup>137</sup> Now, both the concealed and visible transportation of a pistol or concealable firearm in an automobile without a license was in violation of the law.<sup>138</sup> It was a change that the overwhelmingly majority of the NCC agreed to despite the objections of a few members.<sup>139</sup> According to the NCC's final report, the change was necessary to "remove the easy method by which a criminal on being pursued may transfer a weapon from his pocket to a concealed place in a vehicle."<sup>140</sup>

---

armed carriage provisions the way that it did, see *id.* at 10–12.

136. *Id.* at 4, § 6 (noting the armed carriage licensing and automobile transportation requirement "shall not apply to. . .the regularly enrolled members of any organization duly authorized to purchase or receive such weapons from the United States or from this state, provided such members are at or are going to or from their places of assembly or target practice. . .or to any person engaged in the business of manufacturing, repairing, or dealing in firearms or the agent or representative of any such person having in his possession, using, or carrying a pistol in the usual and ordinary course of such business, or to any person while carrying a pistol unloaded and in a secure wrapper from the place of purchase to his home or place of business or to a place of repair or back to his home or place of business or in moving from one place of abode or business to another. ").

137. Compare *id.* at 3, § 5, with A Bill to Provide for Uniform Revolver Sales, *supra* note 119, at § 2, in Gilman Papers Box 2, Gun Law Correspondence. See also John Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROBS. 400, 404 (1934).

138. UNIF. FIREARMS ACT, *supra* note 135, at 3, § 5 ("No person shall carry a pistol in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license therefor as hereinafter provided.").

139. See HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS AND THE PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 870-71 (1927); HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS AND THE PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 136-37 (1926) [hereinafter 1926 HANDBOOK ON UNIF. STATE LAWS]; 1925 HANDBOOK ON UNIF. STATE LAWS, *supra* note 124, at 320-22.

140. *Id.* at 12. See also *id.* at 10 ("The universal principle is adopted as in all state statutes forbidding the carrying of concealed weapons with a complete enumeration of classes of excepted persons and without sufficient exceptions to

It is important to note that neither the Capper Bill nor the UFA restricted the carrying or transporting of rifles and long guns.<sup>141</sup> This was intentional, for at that time the chief concern among lawmakers was regulating pistols, revolvers, and other concealable firearms—firearms that early twentieth-century criminologists and statisticians had shown to be disproportionately used in crimes.<sup>142</sup> But the fact that rifles and long guns were excluded from both the Capper Bill and UFA should not be interpreted as meaning that the open, operable carriage of rifles, long guns, or even pistols in public places, nor their transport on public roads was viewed as being acceptable or even safe.<sup>143</sup> For much of the twentieth-century, sporting, rifle,

---

suit special circumstances. It prohibits carrying pistols in a vehicle whether concealed or not.”); 1925 HANDBOOK ON UNIF. STATE LAWS, *supra* note 124, at 582 (“This section. . .adopts the modern theory of making the prohibition extend not only to weapons concealed on the person, but also in vehicles. It is intended thus to remove the easy method by which a criminal on being pursued may transfer a weapon from his pocket to a concealed place in a vehicle.”); Imlay, *Uniform Firearms Act Reaffirmed*, *supra* note 130, at 800 (“The final draft of the Uniform Act. . .prevents the possibility. . .of criminals placing pistols on the floor of automobiles and contending they are not concealed.”); W.H., *Uniform Firearms Act*, 18 VA. L. REV. 904, 906 n.14 (1932) (“This provision, forbidding the carrying of pistols in any vehicle, concealed or otherwise, is an addition to the 1926 draft of the Act and was designed to prevent a pursued criminal from transferring a weapon from his pocket to a hiding place in his automobile.”).

141. UNIF. FIREARMS ACT, *supra* note 135, at 10; 1930 HANDBOOK ON UNIF. STATE LAWS, *supra* note 134, at 531. The NCC never took up the issue of rifles and long guns, but did take up machine guns. See UNIFORM MACHINE GUN ACT DRAFTED BY THE NATIONAL CONFERENCE OF COMMISSIONERS (1932).

142. See, e.g., Frederick L. Hoffman, *The Increase in Murder*, 125 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 20 (May 1926); George P. Le Brun, *Fatalities in Manhattan*, WORLD ALMANAC AND ENCYCLOPEDIA (1916); Frederick L. Hoffman, *The Homicide of American Cities for 1914*, SPECTATOR, Dec. 23, 1915, at 388-90.

143. As early as 1921, the NRA conceded that it would accept a law restricting rifle and pistol club members from carrying small arms in the District of Columbia unless done so in “a package from which firing an aimed shot would be impossible, and that the weapons be carried unloaded; provided also that the member. . .have in his possession whenever carrying such a weapon a card or letter signed by the president or secretary of his rifle or pistol club showing him to be a member in good standing.” *Asks Care Be Used Framing Gun Law*, EVENING STAR (Washington, DC), Apr. 2, 1921, at 12. Two decades later, the NRA supported an amendment to the District of Columbia’s armed carriage law that prohibited the open carrying of pistols or concealable firearms, noting: “The amendment will merely make it easier to secure convictions in the case of

pistol, and hunting organizations openly stated as much.<sup>144</sup> This included the NRA, which in 1938 stated the second commandment of gun safety as follows: “Carry only empty guns, taken down or with the action open, into your automobile, camp and home. Do not load your gun until you are actually in the field and hunting. Unload it the moment you leave.”<sup>145</sup> Years later, the NRA

---

criminals carrying a concealed weapon who, upon the approach of police, remove the weapon from its concealed position and place it in the open. Courts in some jurisdictions have held that a person could not be convicted under a concealed-weapons statute if the weapon was carried openly in a holster or in the hand or if it was openly exposed in a vehicle. The amendment is designed to close this loophole. . . . It is the conclusion of the NRA that there is no objection from the standpoint of sportsmen to the existing bill or to the amendment.” *D.C. Legislation*, AM. RIFLEMAN, Dec. 1943, at 37.

144. See NATIONAL RIFLE ASSOCIATION, IS YOUR PET GUN HOUSEBROKE? 3 (1959) (encouraging gun owners, as a matter of “gun safety,” to always transport their firearms “unloaded—uncocked” and “carry cased or wrapped”); NATIONAL RIFLE ASSOCIATION, HUNTER SAFETY HANDBOOK 8 (1957) (“Guns should be unloaded before being put in a car. It is even better to case them as well . . . . Hunters stopping for any purpose should unload and open their guns . . . .”); SPORTING ARMS AND AMMUNITION MANUFACTURERS’ INSTITUTE, WHAT EVERY PARENT SHOULD KNOW WHEN A BOY OR GIRL WANTS A GUN!, at 16 (1954) (“*Guns carried into camp or home, or when otherwise not in use, must always be unloaded and taken down or have actions open; guns always should be carried in cases to the shooting area.*”); 1952 Uniform Hunter Casualty Report, AM. RIFLEMAN, Dec. 1952, at 21, 23 (“*Carry only empty guns, taken down or with the action open*”); NATIONAL RIFLE ASSOCIATION, RIFLE SHOOTING INSTRUCTION 20 (1940) (“I will never carry my gun loaded except when hunting and will then be sure that it is locked I the ‘safe’ position.”).

145. *Ten Commandments of Gun Handling—Going Hunting? Association Advises to Read Rules*, DES MOINES REGISTER (IA), Nov. 4, 1938, at 20. As early as 1927, when the Ten Commandments of Firearms Safety were first published by the New York Conservation Department, the very first amendment read, “Never carry loaded guns in automobiles or other vehicles.” See *Hunters’ Decalogue Given by Game Warden*, NEWS JOURNAL (Wilmington, DE), Oct. 13, 1927, at 3; *Chief Legge Gives Ten Commandments for Game Hunters*, ITHACA JOURNAL (NY), Oct. 12, 1927, at 6. From there the Ten Commandments of Firearms Safety spread and were even printed on the back of some hunting licenses. See, e.g., *Bog Angler, Fins, Furs, and Feathers*, BURLINGTON FREE PRESS (VT), Feb. 6, 1930, at 20; *More Care Needed While Hunting*, GREENE RECORDER (IA), Nov. 6, 1929, at 8; *Wise Rules*, WINONA TIMES (MS), Oct. 25, 1929, at 2; *Good Gun Safety Rules*, BURLINGTON FREE PRESS (VT), Oct. 15, 1929, at 6. It was not long before the NRA officially adopted the commandments and slightly revised them as their very own. See, e.g., *Gun Safety Rules Prevent Accidents*, BOSTON GLOBE (MA), Nov. 3, 1938, at 20; Paul Mickelson, *Going Hunting? Be Sure to Read the Following Rules*, DETROIT FREE PRESS (MI), Nov. 3, 1938, at 19; *Here, Nimrods, Read this Carefully and Your Life and Others May Be Saved*,

streamlined the commandment to read as follows: “When transporting firearms, break down whenever possible. Keep gun in a case or wrapped securely. Carry ammunition separately. Always carry guns—UNLOADED.”<sup>146</sup> And by 1970 the NRA revised the rule again to read: “A person should have little or no difficulty in transporting a target or hunting-type rifle or shotgun, provided that such firearms is unloaded and suitably cased or wrapped. It is suggested that the rifle or shotgun be carried in the back seat or trunk (preferably the latter) of the automobile.”<sup>147</sup>

An important qualifier in the 1970 version of the NRA firearms transportation rule worth highlighting is that a person should have “little to no difficulty” in transporting firearms for lawful purposes.<sup>148</sup> Ever since the mid-to-late 1920s, when the NRA first became involved in gun rights advocacy, the NRA was resolute in its belief that the Second Amendment must protect some basic right to transport firearms.<sup>149</sup> And it was this belief that principally guided the NRA’s legislative agenda, as well as its interpretation on the Second Amendment outside the home for decades. While the NRA and other gun rights advocacy groups conceded time and time again that the Second Amendment was subject to reasonable regulation under the police power,<sup>150</sup> and therefore did not protect a right to preparatory armed carriage in public places, either openly or concealed,<sup>151</sup> the NRA adamantly

---

CINCINNATI ENQUIRER (OH), Nov. 3, 1938, at 16.

146. NATIONAL RIFLE ASSOCIATION, GUNS IN YOUR HOME 3 (undated).

147. *Transporting Your Firearms*, AM. RIFLEMAN, June 1970, at 41 [hereinafter *Transporting Your Firearms*].

148. *Id.*

149. See, e.g., *NRA Policy Statement on . . . Firearms Legislation*, AM. RIFLEMAN, July 1958, at 35 (“The NRA is opposed to the theory that a target shooter, hunter, or collector, in order to transport a handgun for lawful purposes, should be required to meet the conditions for a permit to carry a weapon concealed on his person.”); Merritt A. Edson, *To Keep and Bear Arms*, AM. RIFLEMAN, Aug. 1952, at 16 (“The right to own a personal weapon amounts to little without the corresponding right to carry it from place to place—from home to range, from tournament to tournament, in the upland country in search for birds, or in the deepest wilds in the hunt for game.”).

150. See generally Charles, *The “Reasonable Regulation” Right to Arms*, *supra* note 56.

151. See Charles, *Faces, Take Three*, *supra* note 19, at 249-53, 285-89 (outlining the NRA’s historical position on armed carriage in public places); Charles, *Faces, Take Two*, *supra* note 31, at 459-66 (same).

opposed any law that unnecessarily restricted the transporting of firearms from one residence to another, from one's residence to place of business, or from one's residence to a firing range or hunting grounds.<sup>152</sup>

But for most of the twentieth-century, despite the NRA's commitment to ensuring that sportsmen, hunters, and firearms owners were able to transport firearms for lawful purposes with "little to no difficulty,"<sup>153</sup> the reality was that there was a hodgepodge of state firearms transportation regulations.<sup>154</sup> Certainly, if every state would have enacted the NRA endorsed UFA, the law pertaining to the transportation of firearms would

---

152. See, e.g., NATIONAL RIFLE ASSOCIATION, THE GUN LAW PROBLEM 13 (1967); NATIONAL RIFLE ASSOCIATION, AMERICANS AND THEIR GUNS 301 (James E. Serven ed., 1967); Frank C. Daniel, *The Gun Law Problem*, AM. RIFLEMAN, Feb. 1953, at 16, 46; Frank C. Daniel, *Firearms Legislation*, AM. RIFLEMAN, Jul. 1951, at 15, 32, 46; *Merry Christmas—And Gun Laws*, AM. RIFLEMAN, Dec. 1929, at 6.

153. *Transporting Your Firearms*, supra note 147, at 41. As a side note, in 1934 the NRA persuaded Congress against enacting legislation that would have required individuals to obtain a federal permit in order to transport firearms interstate. The NRA's principal argument to this effect was that Congress should avoid regulating the interstate traffic of firearms altogether, and instead adopt legislation making it illegal for a criminal to travel interstate in an automobile. See TO REGULATE COMMERCE IN FIREARMS: HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE OF COMMERCE UNITED STATES SENATE 19-20, 22-23, 59, 66, 69 (1934); NATIONAL FIREARMS ACT: HEARINGS BEFORE THE COMMITTEE ON WAYS AND MEANS HOUSE OF REPRESENTATIVES 54-55, 81 (1934). It is also worth mentioning that the NRA and other gun rights advocates frequently compared the total number of automobile deaths with firearms deaths as a means to convince lawmakers to forego enacting restrictive firearms legislation. See, e.g., Karl T. Frederick, *Pistol Regulation: Its Principles and History, Part 1*, 2 1 AMER. J. POLICE SCI. 440, 443, 449 (1931); Calvin Goddard, *The Pistol Bogey*, 1 AMER. J. POLICE SCI. 178, 180, 184, 187, 191-92 (1930); *Pistol Protection vs. Pistol Prohibition*, ADVENTURE, Sept. 30, 1923, at 178-180 (reprint of gun rights pamphlet co-written by the USRA and the editors of *Field and Stream*).

154. See, e.g., NATIONAL RIFLE ASSOCIATION, FIREARMS AND LAWS REVIEW 91-138 (1975) (summarizing the different state and local firearms controls, including those pertaining to the transportation of firearms); NATIONAL RIFLE ASSOCIATION, DIGEST OF FEDERAL AND STATE FIREARMS LAWS (1966) (on file with author) (identifying which states required a license to carry a handgun in a vehicle, whether done concealed or openly, which states prohibited the carrying of a loaded firearm in a vehicle three states required, and other firearms transportation variances among the states); J.J. Basil, *State Firearms Controls*, AM. RIFLEMAN, Dec. 1964, at 32-33 (providing a quick reference table on armed carriage laws and firearms transportation laws). See also *Basic Facts of Firearms Control*, AM. RIFLEMAN, Feb. 1964, at 14.

have been uniform throughout the country. However, even at the height of the UFA's popularity in the 1930's, only one-third of all states adopted it.<sup>155</sup> This remained largely unchanged in the years that followed.<sup>156</sup> As one legal commentator observed in 1950, the lack of state uniformity on the transportation of firearms was known to "cause embarrassment and inconvenience to travelers and sportsmen" who were trying to legally transport firearms from one jurisdiction to another.<sup>157</sup> To "eliminate" this problem, the legal commentator suggested the "redrafting of existing [firearms] statutes to make the law of the domicile applicable to interstate travelers. . ."<sup>158</sup>

Beginning in the mid-1960s, it was partly with this purpose in mind that gun rights advocacy groups began lobbying for "pro-gun" laws.<sup>159</sup> These laws were meant to serve as legislative affirmations of the "right. . .to buy, own, *transport*, sell, trade, and shoot firearms within minimum regulations *consistent with public safety*."<sup>160</sup> Here, the word "transport" and the phrase "consistent with public safety" are emphasized because they contextually frame the type of right that gun rights advocacy groups were lobbying for at the time. It was a narrowly tailored right to transport firearms for lawful purposes—a right that gun rights advocacy groups frequently conceded as being limited by governmental police power, and therefore subject to reasonable regulation.

This mid-1960s conception of a Second Amendment right to transport firearms can be found in a variety of contemporaneous sources. Take for instance the 1967 pro-gun resolution adopted by

---

155. *See supra* notes 133 and 134.

156. *See supra* notes 154.

157. F.J.K., *Restrictions on the Right to Bear Arms: State and Federal Firearms Legislation*, 98 U. PA. L. REV. 905, 909 (1950).

158. *Id.* *See also id.* at 919.

159. For some of the earliest calls for "pro-gun" laws, see E.B. Mann, *A Pro-Gun Firearms Act*, GUNS MAGAZINE, May 1964, at 16-17, 62; E.B. Mann, *The Second Amendment Is Not Enough!*, GUNS MAGAZINE, Jan. 1964, at 16-18; George W. North, *Support Your Right to "Keep and Bear Arms": Here's What You Can Do!*, GUNS & AMMO, Mar. 1963, at 18, 69; William B. Edwards, *Why Not Have a Pro-Gun Law?*, GUNS MAGAZINE, Sept. 1957, at 22-25, 52-58, 62.

160. Robert M. Price and E.B. Mann, *A Pro-Gun Law Now!*, GUNS MAGAZINE, Mar. 1964, at 17, 18 (emphasis added).

the National Shooting Sports Foundation (NSSF) and the National Police Officers Association of America (NPOAA).<sup>161</sup> Although the resolution unequivocally stated that the Second Amendment protects an individual right “to acquire, own, possess, transport, and lawfully use firearms,” it also conceded that any Second Amendment right to transport could be lawfully restricted by requiring the firearm being transported to be “securely encased and not in the person’s manual possession,” or “unloaded and in a secure wrapper, concealed or otherwise, from the place of purchase to his home or place of business, or to a place of repair or back to his home or place of business, or in moving from one place of abode or business to another[.]”<sup>162</sup>

Model “pro-gun” legislation booklets and pamphlets are other sources that illustrate the type of Second Amendment right to transport firearms that gun rights advocacy groups were lobbying for. Within these booklets and pamphlets were spelled out the various circumstances in which the transportation of firearms was lawful, and therefore needed to be protected.<sup>163</sup> Absent from these booklets and pamphlets was any right to preparatory armed carriage in public places.<sup>164</sup> Included, however, were acceptable

---

161. Harold Beeson, *Politicians Ammunition for Control*, TOWN TALK (Alexandria, VA), Jul. 30, 1967, section C, at 6. For a copy of the resolution, see *A Joint Resolution of the National Police Officers Association and the National Shooting Sports Foundation*, in NATIONAL SHOOTING SPORTS FOUNDATION, FACT PACK II ON FIREARMS OWNERSHIP 99–101 (1970) [hereinafter *1967 Joint Resolution of the NPOAA and NSSF*]. This was the second joint resolution. For the first resolution, see A JOINT RESOLUTION OF THE NATIONAL POLICE OFFICERS ASSOCIATION AND THE NATIONAL SHOOTING SPORTS FOUNDATION (1964).

162. *1967 Joint Resolution of the NPOAA and NSSF*, *supra* note 161, at 101.

163. See, e.g., Alan S. Krug, *Model Firearms Legislation* (2d ed., 1970), in NATIONAL SHOOTING SPORTS FOUNDATION, FACT PACK II ON FIREARMS OWNERSHIP *supra* note 161, at 32–34 [hereinafter Krug, *Model Firearms Legislation*]; James E. Edwards, “Positive Gun Laws,” *Florida Sportsmen’s Association* (Dec. 1965), in Robert L.F. Sikes Papers, box 282, folder Firearms 1966 (Pensacola, FL: University of West Florida Archives) [hereinafter Edwards, “Positive Gun Laws”].

164. See Krug, *Model Firearms Legislation*, *supra* note 163, at 32 (“This section shall not authorize carrying a concealed weapon without a permit”); *id.* at 33 (“the lawful transport bill does not prevent local governmental bodies from enacting registration and licensing laws”); Edwards, “Positive Gun Laws,” *supra* note 163, at 6 (“This act shall not . . . [a]uthorize carrying a concealed weapon without a permit, as prohibited by any local, state, or Federal law.”). See also Charles, *Faces, Take Three*, *supra* note 19, at 249–52, 285–89 (showing how mid-

requirements in order for a person to transport firearms. Among these requirements were ensuring the firearm is “securely encased” or “unloaded and in a secure wrapper, concealed or otherwise, from place of purchase to his home or place of business, or to a place of repair or back to his home or place of business.”<sup>165</sup> Such firearms transportation prerequisites were, in the words of one prominent mid-1960s gun rights advocate, “reasonable restrictions with which no gun owner has a quarrel.”<sup>166</sup>

Initially, other than in the state of Florida, attempts at lobbying for firearms transportation protections by mid-1960s gun rights advocacy groups did not produce any significant change. Over time, however, particularly after the enactment 1968 Gun Control Act, state governments, one-by-one, enacted several pro-gun measures that included more explicit protections for the transportation of firearms.<sup>167</sup> These efforts eventually culminated in Congress including an interstate firearms transportation protection in the 1986 Firearms Owners Protection Act.<sup>168</sup> And as

---

1960s gun rights advocates did not view the preparatory armed carriage of firearms in public places as being protected by the right to arms).

165. Krug, *Model Firearms Legislation*, *supra* note 163, at 34. *See also* Edwards, “Positive Gun Laws,” *supra* note 163, at 6-7 (listing the types of firearms transportation that are considered lawful and acceptable prerequisites in order to do so).

166. Stanley Spisiak, *Re: Proposition 253-B*, undated 1967, in Stanley Spisiak Papers, box 22, folder 8, Gun Legislation (Buffalo, NY: Buffalo History Museum) [hereinafter Spisiak Papers]. In 1967, Spisiak made this statement in urging the New York State Constitutional Convention to adopt an amendment that read: “The right to possession of firearms by the people of the state for protection of their homes and their persons and for recreational purposes having existed since the founding of the state and the nation, and that right having been guaranteed by the Constitution of the United States, it is hereby confirmed by this Constitution and the legislature shall make no law abridging the right of the people to possess and use firearms for lawful purposes.” *See No. 253: A Proposition to Amend Article One of the Constitution, In Relation to the Right to Bear Arms*, May 15, 1967, in Spisiak Papers, box 22, folder 8, Gun Legislation. Spisiak was not the only gun rights advocate to state that laws requiring firearms to be cased and unloaded for transportation were reasonable. *See* Oscar Godbut, *Wood, Field and Stream: Sportsmen Are Not Expected to Complain about Proposed Curbs on Weapons*, N. Y. TIMES, June 26, 1964, at 24 (stating that sportsmen would not object to a New York City law prohibiting the carrying of a “loaded rifle or shotgun” unless it was in a case, and similar laws were “ideal safety measures”).

167. *See* CHARLES, ARMED IN AMERICA, *supra* note 29, at 295-309.

168. 100 Stat. 449 (1986).

of today, so far as this author is aware, with the exception of New York City, all federal, state and local jurisdictions authorize some form of firearms transportation for lawful purposes.<sup>169</sup>

### III. THE CASE FOR STRIKING DOWN NEW YORK CITY'S HANDGUN TRANSPORT RESTRICTION AS UNCONSTITUTIONAL PER SE

In the more than a decade since *District of Columbia v. Heller* was decided, there has been much disagreement among legal scholars as to what a newly invigorated constitutional right to “keep and bear arms” should entail. Some have argued that because “self-defense has to take place wherever the person happens to be,” any prohibition on armed self-defense, even in public places, should be viewed as a “substantial burden” on the Second Amendment.<sup>170</sup> Conversely, others have argued that any Second Amendment rights to armed self-defense in public places should be viewed as being severely limited by governmental police power, and can even be outright prohibited in several instances.<sup>171</sup> Some legal scholars have argued that the Second Amendment

---

169. Ala. Code § 13A-11-73(a); Alaska Stat. § 18.65.800; Ariz. Rev. Stat. Ann. § 4-229; Ark. Code Ann. § 5-73-120; Cal. Penal Code § 25610; Colo. Rev. Stat. § 18-12-105(2); Conn. Gen. Stat. § 529:29-38; Del. Crim. Code § 5:1441; Fla. Stat. § 790.251; Ga. Code Ann. § 16-11-126 (unloaded, in a case); Haw. Rev. Stat. § 134-26; Idaho Code §§ 18-3302; 183302K; 430 Ill. Comp. Stat. Ann. §§ 65/2, 66/65; Ind. Code § 35-47-2-1; Iowa Code § 724.4; Kan. Stat. Ann. § 75-7c03; Ky. Rev. Stat. Ann. § 527.010; La. Stat. Ann. 32:292.1; Me. Stat. tit. 12 § 11212; Md. Code Ann., Crim. Law § 4-203; Mass. Ann. Laws ch. 140 § 131C; Mich. Comp. Laws § 750.227(d); Minn. Stat. Ann. § 624.714; Miss. Code Ann. § 45-9-55; Mo. Rev. Stat. § 571.215; Mont. Code Ann. § 45-3-111; Neb. Rev. Stat. § 69-2441; Nev. Rev. Stat. § 503.165; N.H. Rev. Stat. Ann. §§ 159.4, 159.6; N.J. Stat. Ann. §§ 23:4-24.1; 2C:39-6; N.M. Stat. Ann. § 30-7-2; N.C. Gen. Stat. § 35:14-269; N.D. Cent. Code §§ 62.1-02-13; 62.1-02-10; 62.1-02-10.1; Oh. Rev. Code § 2923.16; Okla. Stat. § 21-1289.13 (open or concealed if unloaded); Or. Rev. Stat. § 166.250; Pa. Cons. Stat. § 18-6106; R.I. Gen. Laws § 11-47-9; S.C. Code Ann. § 16-23-20; S.D. Codified Laws §§ 22-1410; 22-14-9; Tenn. Code Ann. § 39-17-1307; Tex. Penal Code Ann. § 46.02; Utah Code Ann. § 76-10-504; Vt. Stat. Ann. § 10-4705; Va. Code Ann. § 18.2-308; Wash. Rev. Code § 9.41.050; W. Va. Code § 61-7-7; § 20-2-; Wis. Stat. § 167.31; Wyo. Stat. Ann. § 6-8-104; D.C. Code § 22-4504.02.

170. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1515 (2009).

171. See Charles, *Faces, Take Two*, *supra* note 31, at 480.

should be likened to the First Amendment, and therefore any prior restraints on the ability of people to purchase, own, or use firearms should be subject to heightened constitutional scrutiny.<sup>172</sup> Conversely, others have argued that the First and Second Amendments are poor historical bed fellows, and therefore the importation of the former's jurisprudence into the latter's would create more constitutional problems than it resolves.<sup>173</sup> There are numerous other Second Amendment issues of disagreement among legal scholars. But for the sake of brevity, the point to be made is that it is rare when legal scholars agree on any Second Amendment issue. Yet it appears that one such issue is that the Second Amendment must protect some basic, ancillary right to transport firearms for lawful purposes.<sup>174</sup>

And, as Part II outlined, it is not just legal scholars that agree, but the history of regulating the transportation of firearms as well. Indeed, throughout all of American history, lawmakers have enacted and the courts have upheld a wide array of regulations

---

172. See David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417 (2014). See also Gura, *Normal Right*, *supra* note 2, at 227 (arguing that First Amendment prior restraint doctrine should be used by the courts to strike down "good cause" armed carriage laws).

173. See Charles, *Faces of the Second Amendment*, *supra* note 50, at 50-54.

174. See, e.g., Charles, *Faces, Take Three*, *supra* note 19, at 240 ("if the Second Amendment protects an individual's right to own what *Heller* describes as "common use" weapons, individuals must possess some basic ancillary right to acquire said weapons in commerce, transport them for lawful purposes, and so forth."); Charles, *Faces, Take Two*, *supra* note 31, at 488 ("the historical evidence conveys that the government retains a substantial interest in regulating the transportation of firearms for lawful purposes, such as from one's home to business or from one's home to the shooting range. Under this standard, the government would be within its police power in ensuring that firearms are transported safely and securely, but could not prohibit firearm transportation altogether, nor could the government place an undue burden on the transportation of firearms."); Glenn Harlan Reynolds, *Second Amendment Penumbra: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 249 (2012). (stating that the Second Amendment must protect "the right to transport [firearms] between gun stores, one's home, and such other places—such as gunsmith shops, shooting ranges, and the like—that are a natural and reasonable part of firearms ownership and proficiency."); Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 267 (1983) (stating that any "right to possess" firearms must come with some right to transport "between the purchaser or owner's premises and a shooting range, or a gun store or gunsmith and so on.").

pertaining to how, when, and where a person may transport or carry firearms, especially in densely populated public places.<sup>175</sup> At the same time, however, history also shows that the law has always allowed individuals some outlet to transport their personally owned firearms from one residence to another, from one's residence to one's business, as well as for other lawful purposes, to include hunting, commerce, repair, and recreational shooting.<sup>176</sup>

If one faithfully applies this history to determine the constitutionality of New York City's restriction on transporting handguns outside city limits, one cannot help but arrive at the conclusion that the restriction is unconstitutional *per se*. Such an outcome is further bolstered upon reading the Supreme Court's rationale in *Heller* for striking down the District of Columbia's ban on handguns—this rationale being that the ban as one of the “[f]ew laws” in American history that was so “severe.”<sup>177</sup> Easily the same, if not something worse, can be said of New York City's restriction on transporting handguns outside city limits.

This seemingly all-but-certain history-in-law conclusion should not be interpreted as meaning that New York City's entire handgun transportation regulatory scheme is unconstitutional as well. There are two reasons for this. First and foremost, New York City's entire handgun transportation regulatory scheme is not being challenged.<sup>178</sup> Second, as this article has outlined, as a matter of history-in-law, it is indisputable that legally requiring firearms be licensed, unloaded, and cased for transport, as well as requiring that firearms only be transported to certain destinations for lawful purposes, is historically longstanding.<sup>179</sup> Not to mention, throughout most of the twentieth-century, gun rights advocacy groups often conceded to such requirements in the interest of public safety.<sup>180</sup>

---

175. *See infra* pp. 141-69.

176. *Id.*

177. 554 U.S. at 629.

178. *See infra* pp. 125-26.

179. *See infra* pp. 162-68.

180. *Id.*