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## Taking Aim at New York's Concealed Carry Improvement Act

Leo Bernabei

*Fordham University School of Law*

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## NOTES

### TAKING AIM AT NEW YORK'S CONCEALED CARRY IMPROVEMENT ACT

*Leo Bernabei\**

*In June 2022, the U.S. Supreme Court held in New York State Rifle & Pistol Ass'n v. Bruen that New York's requirement, which mandated that applicants for concealed carry licenses show proper cause for carrying a handgun in public, violated the Second and Fourteenth Amendments. Responding to the likely increase in individuals licensed to carry handguns in the state, New York enacted the Concealed Carry Improvement Act (CCIA). This law bans all firearms from many places of public congregation, establishes a default rule that firearms are not allowed on private property without the owner or lessee's permission, and sets additional requirements for concealed carry license applicants to satisfy.*

*This Note explores the constitutionality of three major portions of the CCIA: (1) its requirement that applicants for concealed carry licenses prove good moral character, (2) its list of sensitive locations from which firearms are prohibited, and (3) its default rule that firearms are banned on private property without consent of the owner or lessee. Bruen held that laws infringing on the plain text of the Second Amendment are only constitutional if they are consistent with the nation's historical tradition of firearm regulation. The CCIA's restrictions on public carry, as well as its rule mandating that applicants prove good moral character before being issued a license, make no effort to conform with that tradition. For that reason, this Note concludes that these provisions of the CCIA violate the Constitution.*

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\* J.D. Candidate, 2024, Fordham University School of Law; B.A., 2021, Fordham University. My deepest thanks to Professors Nicholas Johnson and George Mocsary for their invaluable knowledge and feedback. For insightful comments and discussions, I thank Andrew Willinger; the attendees of the Firearms Law Works-In Progress Workshop, hosted by the University of Wyoming College of Law's Firearms Law Research Center and the Duke Center for Firearms Law; and my editor, Kevin Green. Last, but certainly not least, thank you to my family—particularly Mom, Dad, and Matthew—for your constant love and support.

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## INTRODUCTION

On May 31, 2023, sixty-five-year-old Charles Foehner shot and killed a suspect attempting to rob him in the middle of the night in a parking lot in Queens, New York.<sup>1</sup> Surveillance footage captured the scene, corroborating Foehner’s account that he shot the perpetrator in self-defense.<sup>2</sup> Instead of allowing him to return to his daily life, the Queens District Attorney charged him with criminal possession of a weapon because the revolver that he used to shoot his would-be mugger was unlicensed.<sup>3</sup> On top of that, a police search of his home revealed more than two dozen firearms, only a handful of which were properly registered pursuant to New York City ordinances.<sup>4</sup> Adding insult to injury, a county court judge set Foehner’s bail at \$50,000—twice the level requested by the district attorney’s office—remarking that “[t]here are too many shootings in this city” (despite the fact that Foehner was not charged with the shooting) and that he was troubled by Foehner being “on the street with a loaded, unlicensed gun.”<sup>5</sup> Foehner’s story is the tip of the iceberg of seemingly innocent victims ensnared by New York’s gun laws.<sup>6</sup>

On July 1, 2022, New York’s Governor Kathy Hochul signed into law the Concealed Carry Improvement Act<sup>7</sup> (CCIA), strictly limiting the locations in which one is allowed to possess or carry a firearm (not just a handgun).<sup>8</sup>

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1. See Billy Binion, *He’s Facing Life in Prison for Owning Firearms Without a License*, REASON (June 20, 2023, 4:16 PM), <https://reason.com/2023/06/20/hes-facing-life-in-prison-for-owning-firearms-without-a-license/> [<https://perma.cc/72W2-SBJ9>].

2. See *id.*

3. See *id.*

4. See *id.*

5. See *id.*

6. See, e.g., Matthew Bridge, *Exit, Pursued by A “Bear”?: New York City’s Handgun Laws in the Wake of Heller and McDonald*, 46 COLUM. J.L. & SOC. PROBS. 145, 145–46 (2012) (discussing instances of tourists being arrested for possessing firearms in violation of New York law). See generally Brief of the Black Att’ys of Legal Aid, The Bronx Defs., Brooklyn Defender Servs., et al. as *Amici Curiae* in Support of Petitioners, N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843) (public defenders’ accounts of indigent people charged with possessing unlicensed firearms in New York City). In one high-profile incident, Plaxico Burress, a wide receiver for the New York Giants, served nearly two years in prison after accidentally shooting himself in the thigh in a Manhattan nightclub. See Associated Press, *Burress Released from Jail with Comeback as Goal*, N.Y. TIMES (June 6, 2011), <https://www.nytimes.com/2011/06/07/sports/football/plaxico-burress-is-released-from-prison.html> [<https://perma.cc/ZUM3-ZLZW>].

7. See Concealed Carry Improvement Act, 2022 N.Y. Sess. Laws ch. 371 (McKinney).

8. See *id.* New York’s legal definition of “firearm” is unique, as it excludes most rifles and shotguns, see N.Y. PENAL LAW § 265.00(3) (McKinney 2023), which are defined elsewhere. See *id.* § 265.00(11) (rifles); *id.* § 265.00(12) (shotguns). Because the locational

Among other provisions, the CCIA requires that individuals with concealed carry licenses<sup>9</sup> seek permission of owners or lessees before carrying firearms on private property.<sup>10</sup> The legislation also categorically bans all firearms from locations such as places of worship,<sup>11</sup> public parks,<sup>12</sup> public transportation,<sup>13</sup> restaurants that serve alcohol,<sup>14</sup> arts and entertainment venues,<sup>15</sup> protests,<sup>16</sup> and even Times Square.<sup>17</sup> At its extremes, a concealed carry license holder has committed a felony under the CCIA if he or she checked a firearm at an airport in accordance with federal regulations,<sup>18</sup> took a firearm to a church to sell at a state-hosted buyback program,<sup>19</sup> or brought a handgun to a police precinct for a mandatory inspection.<sup>20</sup> The CCIA does not even exempt from the default private property rule *de minimis* infractions such as storing a locked and unloaded firearm in one's vehicle in a private parking lot or carrying a firearm through common areas of an apartment building to reach *one's own home*.<sup>21</sup>

The impetus for this law's enactment was the U.S. Supreme Court's decision eight days earlier in *New York State Rifle & Pistol Ass'n v. Bruen*,<sup>22</sup> its first major opinion in over a decade to squarely address the scope of the Second Amendment.<sup>23</sup> The decision resolved a circuit split over whether the

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restrictions of the CCIA prohibit the possession of a "firearm, rifle or shotgun," see *id.* §§ 265.01-d(1), 265.01-e(1), this Note refers to firearms as they are understood in common parlance, i.e., "[a] weapon that expels a projectile (such as a bullet or pellets) by the combustion of gunpowder or other explosive." See *Firearm*, BLACK'S LAW DICTIONARY (11th ed. 2019).

9. Although often called permits, documents enabling the holder to carry a firearm in public are referred to as licenses in this Note, as this is the term used in New York law.

10. PENAL § 265.01-d.

11. *Id.* § 265.01-e(2)(c).

12. *Id.* § 265.01-e(2)(d).

13. *Id.* § 265.01-e(2)(n).

14. *Id.* § 265.01-e(2)(o).

15. *Id.* § 265.01-e(2)(p).

16. *Id.* § 265.01-e(2)(s).

17. *Id.* § 265.01-e(2)(t).

18. Compare *id.* § 265.01-e(2)(n) (banning firearms in airports), with 49 C.F.R. § 1540.111(c)(2) (2021) (allowing individuals to travel on commercial airplanes with unloaded firearms in checked baggage).

19. Compare PENAL § 265.01-e(2)(c) (banning firearms in places of worship), with Eyewitness News, *Brooklyn Gun Buyback Program Yields Unprecedented Results Thanks to Added Incentives*, WABC (Dec. 17, 2022), <https://abc7ny.com/gun-buyback-150-guns-recovered-brooklyn-program/12584138/> [<https://perma.cc/9XZ2-S5LD>] (gun buyback held at a church in Brooklyn).

20. Compare PENAL § 265.01-e(2)(a) (banning firearms from municipal buildings), with 38 RULES OF N.Y.C. § 5-25(a)(6) (2022), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYRules/0-0-0-77275> [<https://perma.cc/P964-7LQ6>] (requiring police inspection of all handguns acquired by license holders).

21. PENAL § 265.01-d.

22. 142 S. Ct. 2111 (2022).

23. The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an individual right to possess firearms, including handguns, in the home for self-defense. Two years later, the Court incorporated the Second Amendment against the states in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Second Amendment guarantees the right to carry a firearm outside the home without proving to a government official some particular need to do so.<sup>24</sup>

In a 6-3 opinion authored by Justice Thomas, the Court held that New York's law requiring applicants for concealed carry licenses to show a special need to carry a handgun in public violated the Second<sup>25</sup> and Fourteenth<sup>26</sup> Amendments.<sup>27</sup> Despite the state's public safety considerations, the Court stated that the law could not withstand constitutional scrutiny because it was inconsistent with the nation's historical tradition of firearm regulation.<sup>28</sup> As a result, the text of the Second Amendment and historical evidence are the only relevant considerations for courts in assessing the constitutionality of modern gun laws.<sup>29</sup> Means-end scrutiny does not apply in the Second Amendment context.<sup>30</sup>

Therefore, whether the CCIA is constitutional depends entirely on constitutional text and historical analogues. This Note addresses three major portions of the CCIA: (1) a requirement that applicants for concealed carry licenses prove "good moral character," (2) a prohibition of firearms in certain sensitive locations,<sup>31</sup> and (3) a default rule that license holders must receive

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24. See Justine E. Johnson-Makuch, Note, *Statutory Restrictions on Concealed Carry: A Five-Circuit Shoot-Out*, 83 *FORDHAM L. REV.* 2757, 2784–96 (2015). Compare *Young v. Hawaii*, 992 F.3d 765, 773 (9th Cir. 2021) (en banc) (upholding discretionary statutory scheme of issuing public carry licenses), *vacated*, 142 S. Ct. 2895 (2022), *Gould v. Morgan*, 907 F.3d 659, 677 (1st Cir. 2018) (same), *Kachalsky v. County of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012) (same), *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013) (same), and *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) (same), with *Wrenn v. District of Columbia*, 864 F.3d 650, 668 (D.C. Cir. 2017) (permanently enjoining enforcement of discretionary statutory scheme of issuing public carry licenses).

25. The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

26. *Id.* amend. XIV.

27. See *Bruen*, 142 S. Ct. at 2156. The Court held that the law violated the Fourteenth Amendment because it is the mechanism through which the Second Amendment is incorporated against the states. See *id.* at 2137 (noting that "New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second"). For simplicity, this Note discusses laws that burden the right to keep and bear arms with respect to the Second Amendment.

28. *Id.* at 2156.

29. *Id.* at 2129–30.

30. *Id.* at 2129. Before *Bruen*, courts of appeals had largely coalesced around a two-part inquiry to address firearm regulations, evaluating whether the challenged regulation fell under the historical scope of the right to keep and bear arms and, if it did, subjecting it to means-end scrutiny. See, e.g., *Gould*, 907 F.3d at 669 (adopting the two-part framework); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) (same); *Kachalsky*, 701 F.3d at 93 (same); *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194–95 (5th Cir. 2012) (same); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012) (same); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (same); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (same); *Ezell v. City of Chicago*, 651 F.3d 684, 703–04 (7th Cir. 2011) (same); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (same); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010) (same); *United States v. Marzarella*, 614 F.3d 85, 89, 96–97 (3d Cir. 2010) (same).

31. This Note analyzes the following "sensitive" locations: (1) houses of worship; (2) public parks; (3) public transportation; (4) bars and restaurants that serve alcohol; and (5) Times Square.

an owner or lessee's permission to carry a firearm on their property. Because *Bruen* instructed lower courts to not apply means-end scrutiny in the Second Amendment context, this Note looks only to history in weighing the constitutionality of the CCIA.

Part I discusses the *Bruen* decision and its methodology. It outlines how the Supreme Court instructed lower courts to scrutinize firearm regulations under a test rooted in the text of the Second Amendment coupled with American history and tradition. Part II discusses the historical tradition of firearm regulation at common law in England and in the United States from the colonial era until Reconstruction, as it relates to the relevant provisions of the CCIA. Part III assesses whether the history identified and discussed in Part II provides sufficient analogues for the CCIA. Ultimately, this Note concludes that the bulk of the CCIA violates the Constitution because it is inconsistent with the nation's historical tradition of firearm regulation. Although few analogues to New York's novel scheme of firearm regulation can be identified, those that existed either arose too late in time or were too uncommon to shed light on the public understanding of the scope of the Second Amendment at the time of its ratification.

#### I. FROM PROPER CAUSE TO NO CAUSE: *BRUEN* AND THE LEGAL LANDSCAPE OF PUBLIC CARRY

Although the Supreme Court had previously considered the nature of the Second Amendment,<sup>32</sup> *Bruen* was the first case in which the Court squarely addressed the extent to which the Second Amendment protects the right to carry firearms in public.<sup>33</sup> Part I.A discusses the facts of the case itself. Part I.B details the test that *Bruen* established for courts to consider the constitutionality of laws implicating the Second Amendment and outlines how the Court in *Bruen* applied this analysis to New York's "proper cause" requirement. Finally, Part I.C provides an overview of New York's response to *Bruen* in the CCIA.

##### A. *Bruen's Facts*

*Bruen* addressed New York's requirement that applicants for concealed carry licenses show "proper cause" for carrying a handgun in public to a licensing official.<sup>34</sup> Since 1913, New York has required an applicant desiring an unrestricted concealed carry license to prove such proper cause.<sup>35</sup>

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32. See *supra* note 23 and accompanying text.

33. *Bruen*, 142 S. Ct. at 2122.

34. *Id.* at 2122–23; see also N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2021) (amended 2022), *invalidated by Bruen*, 142 S. Ct. 2111 (2022).

35. 1913 N.Y. Laws 1629, *invalidated by Bruen*, 142 S. Ct. 2111 (2022). Prior to 1911, one did not need a license to possess or openly carry a handgun in New York. See 1911 N.Y. Laws 443. Historians dispute the impetus for the 1911 Sullivan Law, but many contend that its eponymous sponsor, state senator Timothy "Big Tim" Sullivan, wanted to disarm minorities, particularly Italians. Compare Amici Curiae Brief of Italo-Am. Jurists & Att'ys in Support of Petitioners at 2, *Bruen*, 142 S. Ct. 2111 (No. 20-843) (arguing that "[t]he Sullivan Law was passed, in good part, as an effort to disarm Italian immigrants"), with Patrick J.

Although no statute defined proper cause, New York courts held that this standard required applicants to “demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession” to be granted a license.<sup>36</sup> Applicants who were not able to make a showing of proper cause could be offered, at the licensing official’s discretion, a restricted license allowing for public carry at certain times and locations, such as hunting, target shooting, or employment.<sup>37</sup>

The plaintiffs in *Bruen* were two New York residents who possessed such restricted concealed carry licenses, allowing them to carry their handguns only while engaged in hunting and target shooting.<sup>38</sup> Both individuals subsequently reapplied for unrestricted licenses.<sup>39</sup> Although the respective licensing officials amended the conditions on each plaintiff’s license to allow them to carry in certain additional areas, each denied the plaintiffs’ requests for unrestricted licenses.<sup>40</sup> The plaintiffs then sued, alleging that the proper cause requirement violated the Constitution.<sup>41</sup>

### B. Bruen’s Test

The Court eschewed the use of means-end scrutiny in applying the Second Amendment and held that “[w]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”<sup>42</sup> Because of this method of reasoning, the analysis courts must now conduct in Second Amendment cases hinges entirely on history,<sup>43</sup> as

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Charles, *A Historian’s Assessment of the Anti-Immigrant Narrative in NYSRPA v. Bruen*, DUKE CTR. FOR FIREARMS L. (Aug. 4, 2021), <https://firearmslaw.duke.edu/2021/08/a-historians-assessment-of-the-anti-immigrant-narrative-in-nysrpa-v-bruen/> [<https://perma.cc/7LBN-6764>] (concluding based on New York Times summaries of early arrests under the Sullivan Act that “[t]he anti-immigrant Sullivan Law narrative in *Bruen* . . . is false”).

36. *Klenosky v. N.Y.C. Police Dep’t*, 428 N.Y.S.2d 256, 257 (App. Div. 1980), *aff’d*, 421 N.E.2d 503 (N.Y. 1981); *see also* *Bernstein v. N.Y.C. Police Dep’t*, 445 N.Y.S.2d 716, 717 (App. Div. 1981); *Knight v. Bratton*, 13 N.Y.S.3d 799, 804 (Sup. Ct. 2015).

37. *Bruen*, 142 S. Ct. at 2123; *see, e.g.*, *Bando v. Sullivan*, 735 N.Y.S.2d 660, 661 (App. Div. 2002); *O’Brien v. Keegan*, 663 N.E.2d 316, 316–17 (N.Y. 1996).

38. *Bruen*, 142 S. Ct. at 2124–25. The New York State Rifle and Pistol Association is a public interest group that represented the two individual plaintiffs, both of whom were members of the organization. *Id.* at 2125.

39. *Id.* at 2125.

40. *Id.*

41. *Id.*

42. *Id.* at 2129–30. For discussions of *Bruen*’s methodology, *see* Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. L. REV. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4338811](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4338811) [<https://perma.cc/8R7Z-69N7>]; Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4366019](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4366019) [<https://perma.cc/AHK3-6GZ3>].

43. *Bruen*, 142 S. Ct. at 2130.



opposed to the interest-balancing approach<sup>44</sup> used by lower courts after *District of Columbia v. Heller*<sup>45</sup> and *McDonald v. City of Chicago*.<sup>46</sup>

*Bruen* provided guidance on how to apply this standard. To reach back in history and determine what constitutes the nation's historical tradition of firearm regulation, the Court made clear that the inquiry will often involve analogical reasoning.<sup>47</sup> Two metrics are of relevance in assessing what renders modern regulations "relevantly similar" to historical laws: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."<sup>48</sup> In other words, courts should look to whether modern regulations impose a "comparable burden on the right of armed self-defense" as their historical analogues (i.e., how) "and whether that burden is comparably justified" based on the purpose of both the modern and historical regulations (i.e., why).<sup>49</sup> Thus, the modern law must be analogous, both in the burden it imposes and in its justification, in order to be consistent with the nation's historical tradition of firearm regulation. Accordingly, when applying this test, courts must determine what laws are analogous and what constitutes a tradition. The following two sections describe these elements of *Bruen*'s test in greater detail. Part I.B.1 discusses how courts should identify historical analogues to modern firearm regulations under *Bruen*. Part I.B.2 discusses what constitutes a part of the nation's historical tradition of firearm regulation for the purpose of satisfying *Bruen*'s test.

### 1. What Constitutes a Historical Analogue?

Although analogical reasoning is a common method of reasoning for lawyers, anything can be likened to something else in an infinite number of ways.<sup>50</sup> In the context of historical restrictions on the public carry of

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44. See *supra* note 30 and accompanying text.

45. 554 U.S. 570 (2008).

46. 561 U.S. 742 (2010).

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

48. *Id.* at 2132–33. The "why" factor is not an invitation to invoke means-end scrutiny. Rather, it is important to consider because it prevents burdensome historical regulations "that were enacted for one purpose from being used as a basis to impose burdens for other purposes." NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, E. GREGORY WALLACE & DONALD KILMER, 2022 SUPPLEMENT FOR FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 89 n.34 (3d. ed. Supp. 2022). One example of this method of reasoning can be seen in *Heller*. In his dissent, Justice Stephen G. Breyer likened Washington, D.C.'s complete ban on handgun possession to a colonial law forbidding residents of Boston from taking loaded firearms into places like barns, stables, and dwelling houses. See *District of Columbia v. Heller*, 554 U.S. 570, 685 (2008) (Breyer, J., dissenting) (citing 1783 Mass. Acts 218). However, the majority did not find the two regulations analogous, noting that the purpose of the colonial law, made clear by its text and prologue, "was to eliminate the danger to firefighters posed by the 'depositing of loaded Arms' in buildings," rather than to advance public safety. See *id.* at 631 (majority opinion) (quoting 1783 Mass. Acts 218).

49. *Bruen*, 142 S. Ct. at 2133.

50. See Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 774 (1993); cf. *Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) ("[A]s many a curbstoep philosopher has observed, everything is related to everything else.").

firearms, a freewheeling reliance on history could result in nearly any modern carry restriction being upheld if the metric is too broad.

However, *Bruen* noted that analogical reasoning “is neither a regulatory straightjacket nor a regulatory blank check.”<sup>51</sup> Even though it clearly requires courts to strike down regulations that have no historical analogues or only remotely resemble a historical analogue, the government need only “identify a well-established and representative historical *analogue*, not a historical *twin*.”<sup>52</sup> Some cases, the Court noted, may be relatively easy to decide.<sup>53</sup> For instance, if a challenged law “addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.”<sup>54</sup> Or if such a societal problem *was* addressed, but was done “through materially different means, that also could be evidence that a modern regulation is unconstitutional.”<sup>55</sup> An even clearer indication that the challenged law is unconstitutional would be if historical proposals for analogous regulations were rejected on constitutional grounds.<sup>56</sup>

Even though a historical “dead ringer” is not required to sustain a modern regulation,<sup>57</sup> the historical analogues must still be “relevantly similar.”<sup>58</sup> This principle ultimately led to the invalidation of New York’s proper cause law. New York’s brief in *Bruen* pointed to several common-law practices and laws regulating public carry.<sup>59</sup> Any number of them might be analogized to a discretionary practice of issuing public carry licenses under a broad approach to analogical reasoning. But the Court rejected New York’s proffered historical support and concluded that the state failed to identify any regulations enacted before the late nineteenth century that “required law-abiding, responsible citizens to ‘demonstrate a special need for self-protection distinguishable from that of the general community’ in order to carry arms in public.”<sup>60</sup> Cabining appropriate analogues to New York’s law to this category rendered it unconstitutional.<sup>61</sup> Therefore, although *Bruen* disclaims any requirement to identify a historical twin,<sup>62</sup> its category of acceptable analogues to New York’s law was relatively circumscribed.

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51. *Bruen*, 142 S. Ct. at 2133.

52. *Id.*

53. *Id.* at 2131.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 2133.

58. Sunstein, *supra* note 50, at 773; *see also Bruen*, 142 S. Ct. at 2132–33 (discussing “features that render regulations relevantly similar under the Second Amendment”).

59. *See generally* Brief for Respondents, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

60. *Bruen*, 142 S. Ct. at 2156 (quoting *Klenosky v. N.Y.C. Police Dep’t*, 428 N.Y.S.2d 256, 257 (App. Div. 1980), *aff’d*, 421 N.E.2d 503 (N.Y. 1981)).

61. *See* Note, *Bruen’s Ricochet: Why Live-Fire Requirements Violate the Second Amendment*, 136 HARV. L. REV. 1412, 1426 n.128 (2023) (observing that “[t]he Court did not deem that task a hunt for a historical twin”).

62. *Bruen*, 142 S. Ct. at 2133.

The dissent argued that New York's law passed constitutional muster because historical enactments "*resembled* New York's law, similarly restricting the right to publicly carry weapons and serving roughly similar purposes," and "[t]hat is all that the Court's test . . . purports to require."<sup>63</sup> The fact that one third of the Supreme Court thought New York's law fit within the nation's historical tradition of firearm regulation illustrates the uphill battle that gun laws must weather in the aftermath of *Bruen*. The CCIA must face no less scrutiny.

## 2. What Constitutes a Historical Tradition?

Although the Court in *Bruen* did not define what would be necessary in order to find that a modern gun law fit within the nation's historical tradition of firearm regulation, it pointed to two relevant factors: (1) whether the law possesses a sufficient number of historical analogues and (2) whether those analogues come from around the founding era.<sup>64</sup>

As to the first factor, the Court noted that historical analogues must not simply be "well-established" but also "representative,"<sup>65</sup> presumably of the nation's population.<sup>66</sup> In *Bruen* itself, the Court rejected New York's reliance on regulations enacted in western territories during the mid-to-late nineteenth century that prohibited carrying arms in public in most instances.<sup>67</sup> The Court invoked the 1890 census to show that the population governed by such laws in these territories accounted for less than 1 percent of the U.S. population at the time.<sup>68</sup> Additionally, the Court pointed out that it was unable to ascertain the perceived legality of those regulations because such territorial laws were seldom subject to judicial scrutiny.<sup>69</sup> Therefore, this Note assumes that there is no magic number of analogues that is required to uphold a challenged regulation.<sup>70</sup> Rather, analogues can be sufficiently representative based on factors such as the overall population that they governed and whether they were "part of an enduring American tradition of state regulation" or merely "short lived."<sup>71</sup>

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

64. *Id.* at 2130 (majority opinion).

65. *Id.* at 2133.

66. See *Antonyuk v. Hochul (Antonyuk III)*, No. 22-CV-0986, 2022 WL 16744700, at \*7 n.5 (N.D.N.Y. Nov. 7, 2022), *stay granted*, No. 22-2908, 2022 WL 18228317 (2d Cir. Dec. 7, 2022) (interpreting *Bruen*'s meaning of "well-established" and "representative" analogues), *denying motion to vacate stay sub nom.* *Antonyuk v. Nigrelli*, 143 S. Ct. 481 (2023).

67. *Bruen*, 142 S. Ct. at 2154–55. For a critique of *Bruen*'s treatment of territorial enactments, see Andrew Willinger, *The Territories Under Text, History, and Tradition*, 101 WASH. U. L. REV. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4372185](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4372185) [<https://perma.cc/ABF4-5KES>].

68. *Bruen*, 142 S. Ct. at 2154 (citing DEP'T OF INTERIOR, *Part I.—Population, in COMPENDIUM OF THE ELEVENTH CENSUS: 1890*, at 2 (1892)).

69. *Id.* at 2155; *cf. id.* at 2152 n.26 (refusing to place weight on "military dictates" that were likely not "designed to align with the Constitution's usual application during times of peace").

70. *But see id.* at 2142 ("[W]e doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation.").

71. See *id.* at 2155.

Historical evidence from around the adoption of the Second Amendment in 1791 is particularly probative because the Court has held that “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them.”<sup>72</sup> Although the Fourteenth Amendment incorporated the Second Amendment against the states, post–Civil War discussions surrounding the right to keep and bear arms took place seventy-five years after the ratification of the Second Amendment.<sup>73</sup> Thus, “they do not provide as much insight into its original meaning as earlier sources.”<sup>74</sup> Instead, courts should look to this evidence only to the extent that it confirms what had already been established.<sup>75</sup> And although *Bruen* explored English common-law history, it cautioned that historical evidence long predating the Second and Fourteenth Amendments “may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years.”<sup>76</sup> For this reason, courts should also be reluctant to sustain modern gun regulations based solely on English common-law practices without evidence illustrating that they survived the journey to the United States during the founding era.<sup>77</sup>

Using this historical analysis test, the Court concluded that New York’s proper cause requirement was unconstitutional because American governments, except for a few late-nineteenth-century outliers, have not “required law-abiding, responsible citizens to ‘demonstrate a special need for self-protection distinguishable from that of the general community’ in order to carry arms in public.”<sup>78</sup> Part I.C explains how New York responded to *Bruen*.

### C. New York’s Response to Bruen

Undeterred by the Court’s rebuke of its proper cause requirement, New York responded with the CCIA, a comprehensive piece of legislation placing many additional restrictions on individuals with licenses to carry, including limitations on where guns can be carried in public. Even before the Court decided *Bruen*, Governor Hochul indicated that the State was “ready to take

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72. See *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

73. See *Bruen*, 142 S. Ct. at 2137.

74. See *id.* (quoting *Heller*, 554 U.S. at 614).

75. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2258–59 (2020) (holding that practices arising in the second half of the nineteenth century cannot establish an early American tradition but may reinforce an earlier practice); *Gamble v. United States*, 139 S. Ct. 1960, 1975–76 (2019) (noting that *Heller* only analyzed nineteenth-century treatises after surveying the text of the Second Amendment and contemporaneous state constitutions). Evidence from this period may also be useful to show that the analogues were “enduring” rather than “short lived.” *Bruen*, 142 S. Ct. at 2155.

76. *Bruen*, 142 S. Ct. at 2136.

77. Cf. *Hurtado v. California*, 110 U.S. 516, 529 (1884) (“[T]he words of *Magna Charta* stood for very different things at the time of the separation of the American colonies from what they represented originally.”); Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 382 (2006) (explaining that “Americans took pride in the modifications they made to English common law”).

78. *Bruen*, 142 S. Ct. at 2156 (quoting *Klenosky v. N.Y.C. Police Dep’t*, 428 N.Y.S.2d 256, 257 (App. Div. 1980), *aff’d*, 421 N.E.2d 503 (N.Y. 1981)).

whatever steps legally to ensure we're able to protect New Yorkers.”<sup>79</sup> She added that she did not want to “telegraph” the State’s strategy out of concern that the Supreme Court might write around it.<sup>80</sup> When asked whether she had “the numbers to show that it’s the concealed carry permit holders that are committing crimes,” Hochul responded, “I don’t need to have numbers.”<sup>81</sup> After the Court released *Bruen* on June 23, 2022, Hochul convened the state legislature in an emergency session that saw the CCIA passed on July 1.<sup>82</sup> The CCIA regulates the possession of all firearms—not just handguns—nearly everywhere outside of the home. Recall that it prohibits one from carrying a firearm onto private property without the owner or lessee’s express consent<sup>83</sup> and designates no fewer than twenty areas, with dozens of subcategories, as “sensitive locations” where firearms are totally prohibited, even if the owner or lessee would prefer to allow them.<sup>84</sup> The list includes any place of worship;<sup>85</sup> libraries, public playgrounds, public parks, and zoos;<sup>86</sup> public transportation;<sup>87</sup> any establishment licensed to serve alcohol;<sup>88</sup> theaters, stadiums, and other entertainment venues;<sup>89</sup> protests;<sup>90</sup> and Times Square.<sup>91</sup>

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79. Dan Clark (@DanClarkReports), TWITTER (June 10, 2022, 12:39 PM), <https://twitter.com/DanClarkReports/status/1535300612698546177> [<https://perma.cc/3LZ5-EQYT?type=image>].

80. Dan Clark (@DanClarkReports), TWITTER (June 10, 2022, 12:40 PM), <https://twitter.com/DanClarkReports/status/1535300858891706368> [<https://perma.cc/3LZ5-EQYT?type=image>].

81. Anne McCloy, *Hochul Won’t Allow NYS To Become “Wild West”, Defends New Proposed Limits on Conceal-Carry*, CBS 6 ALBANY (June 29, 2022, 7:06 PM), <https://cbs6albany.com/news/local/hochul-wont-allow-nys-to-become-wild-west-defends-new-proposed-limits-on-conceal-carry> [<https://perma.cc/NS9K-MZT5>].

82. See Concealed Carry Improvement Act, 2022 N.Y. Sess. Laws ch. 371 (McKinney); see also Governor Hochul Signs Landmark Legislation to Strengthen Gun Laws and Bolster Restrictions on Concealed Carry Weapons in Response to Reckless Supreme Court Decision, N.Y. STATE (July 1, 2022), <https://www.governor.ny.gov/news/governor-hochul-signs-landmark-legislation-strengthen-gun-laws-and-bolster-restrictions> [<https://perma.cc/A8HW-ZVVU>]. Her claim of urgency was “odd considering that the law, by its terms, became effective two months later.” See George A. Mocsary, *Treating Young Adults as Citizens*, 27 TEX. REV. L. & POL. 607, 617–18 (2023).

83. N.Y. PENAL LAW § 265.01-d (McKinney 2023). The law exempts certain individuals, including law enforcement officers, security guards, active-duty military personnel, and hunters, from this restriction. *Id.*

84. *Id.* § 265.01-e. This section also exempts certain individuals, including all of those who may carry on private property without consent of the owner or lessee. *Id.* § 265.01-e(3). Additionally, certain “persons operating a program in a sensitive location out of their residence” are exempt from this section. *Id.* § 265.01-e(3)(j). Grammatically, this clause extends the exemption for these individuals to all sensitive locations. It is highly unlikely that this was the legislators’ intent.

85. *Id.* § 265.01-e(2)(c).

86. *Id.* § 265.01-e(2)(d).

87. *Id.* § 265.01-e(2)(n).

88. *Id.* § 265.01-e(2)(o).

89. *Id.* § 265.01-e(2)(p).

90. *Id.* § 265.01-e(2)(s).

91. *Id.* § 265.01-e(2)(t).

Additionally, the CCIA imposes new requirements on applicants for concealed carry licenses. An applicant must now provide the names of any cohabitants<sup>92</sup> (including children),<sup>93</sup> four references attesting to the applicant's good moral character,<sup>94</sup> and all social media accounts used in the past three years.<sup>95</sup> Furthermore, an applicant must meet with a licensing official for an in-person interview<sup>96</sup> and complete a sixteen-hour state-certified training course,<sup>97</sup> as well as score a minimum of 80 percent on a written exam.<sup>98</sup> Early indications suggest that this course can cost upward of \$500.<sup>99</sup> The law gives a licensing official six months to approve or deny an application but allows a delay for good cause.<sup>100</sup>

A concealed carry license applicant must also prove their good moral character, defined as “having the essential character, temperament and judgement necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others.”<sup>101</sup> In order to assess an applicant's moral character, licensing officials are entitled to request information beyond what the law expressly requires.<sup>102</sup> The legislature crafted the CCIA in such a way that the law *prohibits* the issuance of a license *unless* the applicant proves good moral character to the licensing official.<sup>103</sup> This regulation has teeth. For example, the New York City Rules list a number of factors evincing a lack of good moral character, including any

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92. The New York City Police Department requires applicants to obtain their cohabitants' assent, witnessed by a notary public, to the approval of the application. NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, E. GREGORY WALLACE & DONALD KILMER, 2023 SUPPLEMENT FOR FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 248 (3d. ed. Supp. 2023). That requirement is not found in any state law or local ordinance, and the author is aware of no other constitutional right that an individual may exercise only after obtaining their roommate's permission.

93. PENAL § 400.00(1)(o)(i).

94. *Id.* § 400.00(1)(o)(ii).

95. *Id.* § 400.00(1)(o)(iv).

96. *Id.* § 400.00(1)(o).

97. *Id.* § 400.00(19)(a).

98. *Id.* § 400.00(19)(b).

99. *See, e.g., New York State [sic] and New York City Concealed Carry License Class Schedule: NYC Area Dates*, FIREARMS TRAINING OF W.N.Y., <https://ftwny.com/nys-concealed-carry-license-class-schedule-nyc-area-dates/> [<https://perma.cc/59Q5-UD4V>] (last visited Sept. 3, 2023) (\$575 training courses in the New York City area).

100. PENAL § 400.00(4-b). License applications in and around New York City appear to take far longer than six months to process. *See, e.g.,* Petition at 4, *Gindi v. Sewell*, No. 158142/2022 (N.Y. Sup. Ct. Sept. 23, 2022), NYSCEF No. 1 (alleging that petitioner has waited twenty months to receive a handgun license after applying for one in New York City); Memorandum of Law in Support of Plaintiffs' Application for a Preliminary Injunction at 1, *Giambalvo v. Suffolk County*, No. 22-CV-04778 (E.D.N.Y. Dec. 11, 2022), ECF No. 27-14 (alleging that “the process for obtaining a handgun license from the Suffolk County Police Licensing Bureau takes *between 2-3 years*”).

101. PENAL § 400.00(1)(b). Although the good moral character requirement predates the CCIA, the term was previously undefined. *See* Concealed Carry Improvement Act, 2022 N.Y. Sess. Laws ch. 371 (McKinney) (adding definition).

102. PENAL § 400.00(1)(o)(v).

103. *See* *Antonyuk v. Hochul (Antonyuk II)*, No. 22-CV-0986, 2022 WL 5239895, at \*9 (N.D.N.Y. Oct. 6, 2022), *appeal withdrawn*, No. 22-2379, 22-2403, 2022 WL 19396512 (2d Cir. Nov. 14, 2022) (discussing the CCIA's good moral character requirement).

arrest (even without a conviction),<sup>104</sup> a poor driving history,<sup>105</sup> termination from employment,<sup>106</sup> a history of lost or stolen firearms,<sup>107</sup> failure to pay debts,<sup>108</sup> and catchalls for “a lack of candor towards lawful authorities” and “a lack of concern for the safety of oneself and/or other persons.”<sup>109</sup> The New York City Police Department has denied applications based on an applicant’s post-nasal drip making him appear nervous in an interview;<sup>110</sup> the fact that an applicant’s son had an altercation with the police, despite the applicant himself carrying an unblemished record;<sup>111</sup> an applicant neglecting to inform licensing officials of a license revocation in another jurisdiction;<sup>112</sup> an applicant failing to disclose a sealed nineteen-year-old arrest in which the applicant was found not guilty;<sup>113</sup> and an applicant submitting misleading letters to licensing officials regarding the applicant’s employment.<sup>114</sup> In Westchester County, just north of New York City, licensing authorities once denied an application because the applicant’s psoriasis prevented his fingerprints from being recorded.<sup>115</sup> From that case and its progeny was born the glib phrase that still permeates both state and federal court cases surrounding the denial of a New York handgun license: “Possession of a handgun license is a privilege, not a right.”<sup>116</sup>

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104. 38 RULES OF N.Y.C. § 5-10(a) (2022), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-77275> [<https://perma.cc/P964-7LQ6>].

105. *Id.* § 5-10(h).

106. *Id.* § 5-10(j).

107. *Id.* § 5-10(k).

108. *Id.* § 5-10(l).

109. *Id.* § 5-10(n).

110. See Don B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 264 n.253 (1983).

111. See David T. Hardy & Kenneth L. Chotiner, *The Potentiality for Civil Liberties Violations in the Enforcement of Handgun Prohibition*, in RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 194, 205 (Don B. Kates ed., 1979). Granted, the previous two denials took place before *Heller*, when New York courts interpreted the Second Amendment as a restriction only on the federal government. See, e.g., *Moore v. Gallup*, 45 N.Y.S.2d 63, 66 (App. Div. 1943), *aff’d*, 59 N.E.2d 439 (N.Y. 1944). Nonetheless, the author questions the impact of *Heller*, *McDonald*, and *Bruen* on handgun license denials for trivial reasons considering that courts in New York continue to refer to the possession of a handgun as a privilege rather than a right. See *infra* note 116 and accompanying text.

112. See *Romanoff v. Kelly*, 806 N.Y.S.2d 6, 7 (App. Div. 2005).

113. See *Pilgrim v. City of N.Y. Police Dep’t License Div.*, No. 401766-11 (N.Y. Sup. Ct. Aug. 18, 2011), <https://firearmslaw.duke.edu/wp-content/uploads/2023/07/Pilgrim-v.-NYPD.pdf> [<https://perma.cc/TR92-CFZD>].

114. See *Perlov v. Kelly*, 799 N.Y.S.2d 502 (App. Div. 2005).

115. See *Parker v. Nastasi*, 467 N.Y.S.2d 906, 907 (App. Div. 1983), *aff’d*, 465 N.E.2d 45 (N.Y. 1984).

116. The exact quote is from *Campbell v. Kelly*, 924 N.Y.S.2d 269, 270 (App. Div. 2011). Variations of this phrase have appeared for decades, originating with *Parker*. See, e.g., *Kaplan v. Bratton*, 673 N.Y.S.2d 66, 68 (App. Div. 1998) (“The issuance of a pistol license is not a right, but a privilege subject to reasonable regulation.”); cf. *Parker*, 467 N.Y.S.2d at 908 (“The Legislature, while acting within its legal province, has mandated that certain conditions precedent be complied with by an applicant before the latter is granted the privilege of legally possessing a firearm.”). Amazingly, this quote continues to appear in state and federal courts following the Supreme Court’s decisions in *Heller*, *McDonald*, and *Bruen*, which clarify that the Second Amendment confers a right to possess and carry a handgun for self-defense. See *Campbell*, 924 N.Y.S.2d at 270; *Bodenmiller v. County of Suffolk*, No. 20-CV-00414, 2023

New York's enactment of the CCIA appears to be a direct challenge to the Supreme Court's holding in *Bruen*.<sup>117</sup> As discussed above, when told that its gun laws were too stringent, the State doubled down on its regulatory approach by instituting a host of new and more stringent burdens on the right to carry. But on this issue, the Supreme Court has the final word. Accordingly, the next part of this Note turns to the nation's history to determine if major provisions of the CCIA comport with the constitutional requirements imposed by the Second Amendment.

## II. TEXT, HISTORY, AND TRADITION: A SURVEY OF HISTORICAL REGULATIONS OF PUBLIC CARRY

The only method to determine whether New York's law is constitutional is by looking to historical analogues.<sup>118</sup> Therefore, this part presents potential analogues to the CCIA, ranging from English common law prior to the founding to Reconstruction-era America. Part II.A outlines the relevant history of prohibiting dangerous individuals from possessing firearms who might be analogous to those lacking good moral character today. Part II.B discusses the history of sensitive places from which English and American governments prohibited firearms. Finally, Part II.C identifies the historical laws prohibiting carrying arms on another person's property without their permission.

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WL 2214037, at \*12 (E.D.N.Y. Feb. 15, 2023). In one instance, a rejected applicant's counsel argued that *Heller* "changes an individual's possession of a gun from a 'privilege' to a 'right,'" and the court responded that it was "not prepared at this time to accept this interpretation," calling it "[i]nteresting[]." *Caputo v. Kelly*, No. 113232/10, 2011 WL 567978, at \*6–7 (N.Y. Sup. Ct. Feb. 8, 2011). Allegations of defiance of the Supreme Court's interpretations of the Second Amendment is nothing new. *See generally* Nicholas J. Johnson, *Heller as Miller, in 1 GUNS AND CONTEMPORANEOUS SOCIETY: THE PAST, PRESENT, AND FUTURE OF FIREARMS AND FIREARM POLICY* 83 (Glenn H. Utter ed., 2016); Mocsary, *supra* note 82; Leo Bernabei, *Bruen as Heller: Defiance of Text, History, Tradition, and the Supreme Court* 19–36 (June 25, 2023) (unpublished manuscript) (on file with author).

117. Governor Hochul admitted as much when she vowed to "fight back" against the decision after calling it "reprehensible." *See* Anders Hagstrom, *NY Gov. Hochul Defiant After Supreme Court Gun Decision: 'We're Just Getting Started'*, FOX NEWS (June 23, 2022, 12:13 PM), <https://www.foxnews.com/politics/ny-gov-hochul-defiant-supreme-court-handgun-ruling-were-just-getting-started> [<https://perma.cc/4MED-YBUM>] (quote within embedded video).

118. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2129–30 (2022). This Note analyzes New York's law illustratively. Its conclusions apply to any law or ordinance that restricts firearms in "sensitive" locations or on private property, as every state that conditioned public carry licenses on a showing of special need before *Bruen* has done or considered. *See* S.B. 1230, 2023 Leg., 32d Sess. (Haw. 2023) (enacted Hawaii bill); S.B. 1, 2023 Gen. Assemb., Reg. Sess. (Maryland 2023) (Maryland's Gun Safety Act of 2023); 2022 N.J. Laws ch. 131 (New Jersey law); Don Thompson, *California Gun Bill Fails on Tactical Error in Legislature*, AP NEWS (Sept. 1, 2022), <https://apnews.com/article/gun-violence-us-supreme-court-california-politics-anthony-portantino-8f491b7dc121a437632442e4be80c5b9> [<https://perma.cc/5ABR-P77X>] (reporting on defeated bill in California); Chris Lisinski, *Top Mass. House Democrat Unveils Sweeping Gun Safety Bill*, WBUR (June 27, 2023), <https://www.wbur.org/news/2023/06/27/house-gun-safety-bill-ghost-guns> [<https://perma.cc/S6ZU-GR7E>] (proposed bill in Massachusetts). To the extent that the provisions in those laws and ordinances are analogous to the CCIA, the history discussed in this part and the conclusions reached in Part III are probative as to their constitutionality.



A. *Good Moral Character and Dangerousness Considerations*

According to then-circuit judge Amy Coney Barrett, “[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous*.”<sup>119</sup> Indeed, history demonstrates that state governments could disarm individuals seen as dangerous, violent, or disloyal. This section outlines that history and, in doing so, helps to shed light on the public understanding of the Second Amendment at the time of ratification and the groups that historically fell outside of its “unqualified command.”<sup>120</sup> In turn, this Note analyzes that history with the goal of interpreting the constitutionality of New York’s practice of restricting public carry licenses to those deemed to possess good moral character. Part II.A.1 discusses how England prior to the American Revolution approached disarmament of dangerous individuals, namely Catholics. Part II.A.2 outlines how this tradition continued in the colonies and around the time of the founding. Finally, Part II.A.3 makes note of prohibitions on possessing arms in the nineteenth century in the United States.

1. The Crown Historically Disarmed Catholics Because It Viewed Them as Dangerous

At common law in England, the government categorically disarmed one distinct group: Catholics.<sup>121</sup> One year after the Glorious Revolution, Parliament passed the Bill of Rights, which included “[t]hat the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law.”<sup>122</sup> According to Justice Antonin Scalia, this right is the predecessor to the Second Amendment.<sup>123</sup> That Parliament limited the right to have arms to Protestants is one early example of a regulation that excluded groups deemed inherently dangerous from the right to arms.<sup>124</sup> But although Catholics could be disarmed in seventeenth- and eighteenth-century England, it is worth noting that they could swear an oath

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

120. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961).

121. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 258–61 (2020) (discussing how and why Catholics were disarmed throughout English history).

122. Bill of Rights 1688, 1 W. & M. Sess. 2 c. 2 § 7 (Eng.).

123. *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008) (first citing EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 51 (1st ed. 1957); then citing WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 122 (1825)).

124. See David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 203, 225 (2018) (mentioning that a legal manual for eighteenth-century English constables instructed them to search for arms possessed by those who were “‘dangerous’ or ‘papists’” (quoting ROBERT GARDINER, *THE COMPLEAT CONSTABLE* 18 (3d ed. 1708))); Greenlee, *supra* note 121, at 258–61 (discussing the classes of individuals, including Catholics, that the Crown frequently attempted to disarm).

rejecting the tenets of their faith to have their right restored.<sup>125</sup> The Crown did not disarm Catholics on the basis of their faith, but rather because the government assumed that they were disaffected persons who would be willing to promote armed rebellions.<sup>126</sup> Furthermore, as *Bruen* noted, even Catholics, who fell outside of the scope of the English right to bear arms, were allowed to possess such weapons necessary to defend themselves and their homes.<sup>127</sup> As one scholar has noted, the weapons that the Crown permitted Catholics to keep “for self-defense were distinguished from the home arsenals that seem to have been the real concern.”<sup>128</sup> This observation supports the idea that disarmament was used as a means to protect the government and society at large, not to revoke the right of armed self-defense.

Although Catholics faced the brunt of disarmament at common law, the American colonies expanded the categories of those who could be disarmed and did so on the basis that those groups were dangerous. The next section explores the nature of those groups.

## 2. Early American Governments Only Disarmed Groups That They Believed Threatened the New Nation

Similar to their English counterparts, America’s early legislatures disarmed individuals “only when they judged that doing so was necessary to protect the public safety.”<sup>129</sup> The groups of people recognized as potentially dangerous included Catholics, British Loyalists, enslaved people, and Native Americans.<sup>130</sup> In 1619, Virginia enacted a law requiring government permission to possess a firearm that applied to “Blacks and Indians living on frontier plantations.”<sup>131</sup> Other laws banned enslaved people from keeping arms except in the presence of their masters.<sup>132</sup> Some laws also prohibited the sale of arms to Native Americans.<sup>133</sup> At least one colony extended the

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125. *Range v. Att’y Gen. U.S.*, 69 F.4th 96, 122 (3d Cir. 2023) (en banc) (Krause, J., dissenting).

126. Greenlee, *supra* note 121, at 261.

127. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2142 n.12 (2022).

128. C. Kevin Marshall, *Why Can’t Martha Stewart Have A Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 723 (2009).

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

130. See Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 156–61 (2007); see also *infra* notes 131–36 and accompanying text.

131. See David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. ON LEGIS. 303, 336 (2016).

132. See, e.g., 1715 Md. Laws 117–18 (prohibiting enslaved persons from carrying a firearm without a license from their master); 1721 Del. Laws 104 (same).

133. See, e.g., 1723 Conn. Pub. Acts 292 (prohibiting sales of guns or ammunition to Indians); Act of Oct. 22, 1763, 1763 Pa. Laws, reprinted in 6 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 320 (WM Stanley Ray 1899) (prohibiting sales “of guns, gunpowder or other warlike stores to the Indians”).

arms prohibition to Catholics, likely a relic of English influence.<sup>134</sup> Like England, “it did so on the basis of allegiance, not on the basis of faith.”<sup>135</sup> Another notable group subject to disarmament included those disloyal to the new American nation and its fight for freedom.<sup>136</sup> Such disarmament statutes required individuals suspected of being dissidents to swear an oath of loyalty to repossess their arms.<sup>137</sup>

But as broad as these bans might seem, they had their limits. By disarming these groups, legislatures sought to quell uprisings and, during the Revolutionary War, frustrate the enemy.<sup>138</sup> In Massachusetts, where the first shots of the Revolutionary War rung out, individuals could not only be disarmed, but also imprisoned, disqualified from holding public office, and barred from voting.<sup>139</sup> But Loyalists were not *permanently* disarmed; in fact, most disarmed persons could see their right to arms restored.<sup>140</sup> The Massachusetts law just cited, for instance, allowed for those disarmed on the basis of suspected disloyalty to an American colony to receive their arms again by petition to a committee or court.<sup>141</sup> Even felons were not categorically disarmed.<sup>142</sup>

Far from enacting widespread prohibitions on owning or carrying arms, many colonies *required* all or most of their citizenry to own, and sometimes to carry, arms.<sup>143</sup> Although many of these laws were undoubtedly crafted to

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134. See, e.g., Act of Mar. 29, 1756, 1756 Va. Acts 331–33, reprinted in 7 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 35–36 (William Walter Hening ed., 1820).

135. See Churchill, *supra* note 130, at 157.

136. See Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 506–08 (2004) (discussing confiscation of firearms by those who refused to take an oath of allegiance to the state or the United States).

137. *Id.* at 506.

138. See *id.* (“To deal with the potential threat coming from armed citizens who remained loyal to Great Britain, states took the obvious precaution of disarming these persons.”).

139. See, e.g., 1776 Mass. Acts 31–32. As harsh as these laws were, they did not prohibit such individuals from acquiring new arms. See Marshall, *supra* note 128, at 724.

140. See Greenlee, *supra* note 121, at 268–69 (noting examples of laws allowing for restoration of arms rights in the founding era).

141. 1776 Mass. Acts 36.

142. Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1563 (2009) (“Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s . . .”); Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1374 (2009) (“[S]o far as I can determine, no colonial or state law in eighteenth-century America formally restricted the ability of felons to own firearms.”); Marshall, *supra* note 128, at 730 (“[I]t is difficult to see how the Second Amendment could allow a convict to be disabled from keeping or bearing arms.”). Following *Bruen*, the federal prohibition on felons possessing firearms appears increasingly vulnerable to constitutional challenges. 18 U.S.C. § 922(g)(1); see *Range v. Att’y Gen. U.S.*, 69 F.4th 96, 106 (3d Cir. 2023) (en banc) (holding the felon-in-possession ban unconstitutional as applied to an individual convicted of making false statements to obtain food stamps); *United States v. Bullock*, No. 18-CR-165, 2023 WL 4232309, at \*2, \*31 (S.D. Miss. June 28, 2023) (holding the felon-in-possession ban unconstitutional as applied to an individual convicted of aggravated assault and manslaughter).

143. NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, E. GREGORY WALLACE & DONALD KILMER, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 177 (3d ed. 2022).

ensure the effectiveness of the militias, many of them went further. Connecticut, Georgia, Maryland, Massachusetts Bay, Plymouth, South Carolina, and Virginia, for instance, *mandated* the carrying of arms to churches on Sundays.<sup>144</sup> Although some of these statutes applied explicitly to only members of the militia, others did not.<sup>145</sup> These laws were largely motivated by public safety, specifically preventing attacks.<sup>146</sup> Notably, decrees from Maryland, Rhode Island, and Virginia extended beyond requiring arms at church and mandated that individuals carry a firearm on any journey longer than a short distance.<sup>147</sup> For the vast majority of settlers, “[f]irearms were an essential part of daily life.”<sup>148</sup>

### 3. Nineteenth-Century Prohibitions on Who Could Possess Firearms Were Limited and Did Not Infringe on the General Right to Carry

As was the case both in England prior to the founding and America in the eighteenth century, governments in the nineteenth century sometimes prohibited individuals deemed dangerous from possessing arms.<sup>149</sup> Many of these prohibitions targeted enslaved individuals or free Black Americans.<sup>150</sup> In at least one instance, a challenge to a law requiring free Black Americans to obtain a license to possess a gun failed on the rationale that “free people of color cannot be considered as citizens.”<sup>151</sup> In the latter half of the century, states enacted bans on “tramps,” now known as vagrants,<sup>152</sup> from carrying firearms in certain instances.<sup>153</sup> An 1878 New Hampshire statute, for instance, prohibited tramps from carrying firearms or dangerous weapons.<sup>154</sup> These bans were expressly predicated on promoting public safety, with one

144. *Id.* at 189–91.

145. Virginia’s law applied to “[a]ll men.” *Id.* at 189 (quoting 1632 Va. Acts, *reprinted in* 1 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 198 (William Waller Hening ed., 1823)). Massachusetts Bay’s law applied to everyone over eighteen, with exceptions for magistrates and church elders. *Id.* at 190.

146. *See, e.g.*, 1740 Ga. Laws, *reprinted in* 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA (PART I) 137–40 (Allen D. Candler ed., 1911).

147. *Id.* at 190–91. The Virginia law, for instance, required “[t]hat no man go or send abroad without a sufficient partie will armed.” 1619 Va. Acts, *reprinted in* 1 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 127 (William Waller Hening ed., 1823).

148. *See* Greenlee, *supra* note 121, at 261.

149. *See id.* at 269.

150. *See, e.g.*, 1806 Md. Laws 542 (requiring free Black Americans to have a license to carry a gun and banning enslaved Black people from doing so altogether); 12 Del. Laws 332 (1863) (prohibiting free Black Americans from owning firearms, swords, and warlike instruments).

151. *State v. Newsom*, 27 N.C. (5 Ired.) 250, 254 (1844). The court rejected the argument that the act violated the Second Amendment on the ground that the Second Amendment did not bind state governments. *Id.* at 251.

152. *See Tramp*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/tramp> [<https://perma.cc/NTD7-ECEZ>] (last visited Sept. 3, 2023).

153. *See* Greenlee, *supra* note 121, at 270–71 (discussing these bans).

154. 1878 N.H. Laws 170.

court claiming that tramps were “vicious persons.”<sup>155</sup> However, based on New Hampshire’s law utilizing the verb “carrying,” as opposed to “owning” or “keeping,” it is inconceivable that it would have been interpreted to prohibit tramps from merely owning firearms.<sup>156</sup>

In the mid-nineteenth century, some states enacted surety statutes, which were laws requiring certain individuals who appeared likely to “breach the peace” to post a bond before carrying arms in public.<sup>157</sup> The bond would be held for a certain period of time, generally not longer than six months,<sup>158</sup> after which point it would be returned so long as the individual did not breach the peace.<sup>159</sup> The Supreme Court noted that the surety laws *presumed* a general right to carry arms in public “that could be burdened only if another could make out a specific showing of ‘reasonable cause to fear an injury, or breach of the peace.’”<sup>160</sup> Although these laws bucked the trend of regulating the possession of firearms only by discrete groups, they were not a severe constraint on the right to carry firearms in public.

After Reconstruction, some cities required citizens to obtain a license to carry concealed handguns.<sup>161</sup> Some of these ordinances required a showing of good moral character.<sup>162</sup> For instance, Oakland, California had an

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155. *State v. Hogan*, 58 N.E. 572, 575 (Ohio 1900).

156. 1878 N.H. Laws 170.

157. *See* N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2148 (2022) (quoting 1836 Mass. Acts 750).

158. *See* Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121, 132 n.61 (2015) (noting that various surety statutes applied a six-month term).

159. *See, e.g.*, 1836 Mass. Acts 750; *see also* Bruen, 142 S. Ct. at 2148–50 (discussing the limited burden of surety statutes on public carry). This Massachusetts statute became a model for the surety laws of other states in the nineteenth century. *See* Ruben & Cornell, *supra* note 158, at 132 n.61 (collecting various surety statutes enacted in different U.S. states).

160. Bruen, 142 S. Ct. at 2148 (quoting 1836 Mass. Acts 750).

161. *See* Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting, 1328–1928*, 55 U.C. DAVIS L. REV. 2545, 2596 (2022) (cataloguing public carry licensing ordinances of cities in the late nineteenth century); Patrick J. Charles, *The Fugazi Second Amendment: Bruen’s Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. 623, 660–65, 708–10 (2023) (cataloging ordinances). In the nineteenth century, states often banned concealed carry because it “was seen as a dubious practice characteristic only of thugs, robbers, duelers, and other deplorables.” *See* JOHNSON ET AL., *supra* note 143, at 409. In contrast, open carry, which went unregulated, was seen “as appropriate for honest citizens.” *Id.* Most state courts upheld bans on concealed carry or interpreted general bans on carrying firearms to apply only to concealed carrying. *See, e.g.*, *State v. Reid*, 1 Ala. 612, 619 (1840) (holding that Alabama could not ban carrying arms openly under the state constitution’s Second Amendment analogue); *Nunn v. State*, 1 Ga. 243, 251 (1846) (dismissing an indictment for carrying a pistol when there was no evidence that the defendant carried it concealed); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (upholding Louisiana’s ban on concealed carry because it did not prohibit carrying arms openly); *cf.* *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897) (noting among the limitations to the provisions of the Bill of Rights that “the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons”). *But see* *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 94 (1822) (invalidating Kentucky’s prohibition on concealed carry based on the state constitution’s Second Amendment analogue).

162. The Author thanks Second Circuit Librarian Adriana Mark for her generous assistance in providing copies of many of these ordinances.

ordinance that required a license to carry a concealed pistol that could be granted by the mayor to “peaceable person[s].”<sup>163</sup> To carry a concealed pistol in late nineteenth-century New York City, an applicant needed to apply for a license from the police, and the investigating officer had to be “satisfied that the applicant [was] a proper and law-abiding person” to recommend issuance of the license to their superior.<sup>164</sup> Jersey City required that applicants for concealed carry licenses produce “a written endorsement of the propriety of granting a permit from at least three reputable freeholders.”<sup>165</sup> It is important to note, however, that these licensing laws left open carry unregulated. In other words, individuals unable to procure a license to carry a concealed firearm in these cities still had an avenue to exercise their right to public carry.

To summarize, legislatures historically excluded certain groups from the right to carry, but the upshot is that American governments never forced members of the general public to affirmatively prove their virtuousness or good moral character before carrying arms in public. The next section discusses the related concept of locations from which English and American governments historically prohibited arms.

#### *B. Sensitive Locations Off-Limits to Firearms*

*Bruen* noted that states retain the ability to identify certain locations from which firearms can be prohibited without violating the Second Amendment.<sup>166</sup> The Court named legislative assemblies, polling places, courthouses, schools, and government buildings as presumptive examples.<sup>167</sup> *Bruen* designated these places as presumably acceptable sensitive locations because the Court was “aware of no disputes regarding the lawfulness of [firearm] prohibitions” in these locations during the eighteenth or nineteenth centuries.<sup>168</sup> Although *Bruen* identified five presumptively lawful sensitive locations, the CCIA names no fewer than *twenty* sensitive locations, with dozens of subcategories, from which firearms of all types and states (e.g., unloaded in a locked case) are prohibited.<sup>169</sup> Therefore, historical analogues of banning firearms from sensitive places are of great importance to this Note. This section addresses that history. Part II.B.1 discusses the common-law crime of carrying with a terrifying intent in certain locations. Part II.B.2 describes the growth of sensitive place restrictions during the nineteenth century.

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163. OAKLAND, CAL., GENERAL MUNICIPAL ORDINANCES No. 1141, § 1 (1890).

164. N.Y.C., N.Y., MISCELLANEOUS ORDINANCES art. XXVII, § 265 (1881). Another ordinance requiring a license to carry a concealed pistol did not mention a requirement that the applicant show good moral character or peaceable nature. See SAINT LOUIS, MO., GENERAL ORDINANCE PROVISIONS ch. 18, § 1471 (1892).

165. JERSEY CITY, N.J., REV. ORDINANCES ch. XXI, § 3 (1899) (enacted 1871).

166. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2133 (2022).

167. *Id.*; see also District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

168. *Bruen*, 142 S. Ct. at 2133.

169. N.Y. PENAL LAW § 265.01-e(2) (McKinney 2023).

### 1. The Common Law Prohibited Carrying Arms with an Intent to Terrify in Certain Locations

Although one could count on one hand the number of places from which governments categorically banned firearms in eighteenth-century America,<sup>170</sup> the common law prohibited carrying arms with an intent to terrify the public.<sup>171</sup> When codified into law, some regulations specifically prohibited carrying arms offensively in fairs or markets.<sup>172</sup> One of the most prominent,<sup>173</sup> and perhaps most perplexing, of these regulations was what is now called the Statute of Northampton,<sup>174</sup> enacted in 1328 in England.<sup>175</sup> The law stated:

That no Man great nor small . . . be so hardy to come before the King's Justices, or other of the King's Ministers doing their Office, with Force and Arms, (2) nor bring no Force in affray of the Peace, (3) nor to go nor ride armed by Night nor by Day, in Fairs, Markets, nor in the Presence of the Justices or other Ministers, nor in no Part elsewhere, upon Pain to forfeit their Armour to the King, and their Bodies to Prison at the King's Pleasure.<sup>176</sup>

The precise meaning of this statute has been hotly contested by academics and courts alike in recent years, and both sides of the debate as to whether the Second Amendment extends outside the home claim that it supports their position.<sup>177</sup> Fortunately for the purposes of this Note and for lower courts grappling with permissible restrictions on public carry, *Bruen* analyzed this very statute and concluded that even if it was originally enforced on its literal terms, it had largely fallen into obsolescence by the seventeenth century.<sup>178</sup>

What remained of the statute after the seventeenth century, however, was a common-law prohibition against “go[ing] armed to terrify the King’s

170. See *infra* notes 183–85 and accompanying text.

171. See Kopel & Greenlee, *supra* note 124, at 241–42.

172. See *infra* notes 180–81 and accompanying text.

173. *Bruen*, 142 S. Ct. at 2139.

174. 2 Edw. 3 c. 3 (1328) (Eng.).

175. *Id.*; see also *Bruen*, 142 S. Ct. at 2139–40 (discussing the statute).

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

177. Compare Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 8 (2012) (“A textual reading of the Statute supports a broad prohibition on the public carrying of arms to prevent public injury, crime, and breaches of the peace.”), with Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009) (arguing that the framers understood the statute to cover only “those circumstances where carrying of arms was unusual and therefore terrifying”). See Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1507–08 (2014) (discussing the competing theories surrounding the statute’s nature and its implications for the Second Amendment, concluding that “the correct interpretation is far from clear”).

178. *Bruen*, 142 S. Ct. at 2141; cf. *Rex v. Sir John Knight* (1686) 90 Eng. Rep. 330, 330; 1 Comb. 38, 38–39 (explaining that the Statute had “almost gone in *desuetudinem*”). *Desuetudinem*, or its modern form, *desuetude*, is defined as “[t]he longtime discontinuance of a practice or custom; obsolescence through disuse.” *Desuetude*, BLACK’S LAW DICTIONARY (11th ed. 2019).

subjects.”<sup>179</sup> This tradition worked its way to the other side of the Atlantic, where Virginia enacted a law in 1786 particularly close in language to the Statute of Northampton.<sup>180</sup> Although Virginia’s law called out fairs and markets by name, it only prohibited carrying arms there if done “in terror of the county.”<sup>181</sup> Additionally, it prohibited most people from carrying firearms before the justices of any court, making an exception for “the Ministers of Justice . . . and such as be in their company assisting them.”<sup>182</sup>

Aside from regulating the manner of carrying arms in fairs or markets, colonial governments enacted almost no laws categorically prohibiting firearms from specific locations.<sup>183</sup> Maryland prohibited carrying arms in the state’s capitol while the legislature was in session,<sup>184</sup> and Delaware’s constitution banned firearms in polling places.<sup>185</sup> But aside from these three regulations, which cannot alone constitute a tradition for regulating location under *Bruen*,<sup>186</sup> carrying arms was a commonplace practice in the American colonies.<sup>187</sup>

## 2. Sensitive Places in the Nineteenth Century Were Largely Confined to the Post–Civil War South

Nearly all locational restrictions on carrying firearms in the nineteenth century came from Southern states following the Civil War.<sup>188</sup> Many of these laws were motivated by the desire to disarm African Americans.<sup>189</sup> The

179. See Sir John Knight’s Case (1686) 87 Eng. Rep. 75, 76; 3 Mod. 117, 118.

180. 1786 Va. Acts 35 (“[N]o man . . . be so hardy to . . . ride armed by night nor by day, in fairs or markets, or in other places, in terror of the county . . .”). Two courts upholding the firearms ban in Times Square have cited for support a supposed 1792 North Carolina statute that copied the Statute of Northampton verbatim. See *Frey v. Nigrelli*, No. 21-CV-05334, 2023 WL 2473375, at \*16 (S.D.N.Y. Mar. 13, 2023); See *Antonyuk III*, No. 22-CV-0986, 2022 WL 16744700, at \*37 n.66 (N.D.N.Y. Nov. 7, 2022), *stay granted*, No. 22-2908, 2022 WL 18228317 (2d Cir. Dec. 7, 2022), *denying motion to vacate stay sub nom.* *Antonyuk v. Nigrelli*, 143 S. Ct. 481 (2023). The North Carolina legislature repudiated this law and held that it “never [was], and never could have been in force . . . in the State.” *Preface of the Commissioners of 1833 of REVISED CODE OF NORTH CAROLINA ENACTED BY THE GENERAL ASSEMBLY AT THE SESSION OF 1854*, at xiii (Bartholomew F. Moore & Asa Biggs eds., 1855).

181. 1786 Va. Acts 35.

182. *Id.*

183. See Kopel & Greenlee, *supra* note 124, at 234 (marking that the list of sensitive places during the founding era is “rather short”).

184. 1650 Md. Laws 273.

185. DEL. CONST. OF 1776, art. 28. This provision appears short-lived, having not survived the passage of Delaware’s new constitution in 1792. See DEL. CONST. OF 1792.

186. See *supra* note 70.

187. See *supra* notes 143–48 and accompanying text; see also Brief of *Amicus Curiae* the Independent Inst. in Support of Petitioners at 11–17, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (discussing the extremely limited scope of gun-free zones in the founding era).

188. See *infra* notes 193–214 and accompanying text.

189. See Kopel & Greenlee, *supra* note 124, at 250 (noting that “the racial subtext of Southern gun control was obvious”); Robert J. Cottrol & Raymond T. Diamond, “*Never Intended to be Applied to the White Population*”: *Firearms Regulation and Racial Disparity – the Redeemed South’s Legacy to a National Jurisprudence?*, 70 CHL.-KENT L. REV. 1307, 1329–33 (1995) (discussing efforts of Southern states to ban public carry of all but the most



laws did not explicitly mention race,<sup>190</sup> but that is simply because the Fourteenth Amendment forbade discrimination on the basis of that category.<sup>191</sup> Because the vast majority of locational restrictions came from Reconstruction, it is also unsurprising that New York has almost exclusively attempted to analogize the laws from this period to its own list of sensitive places.<sup>192</sup>

Much ink has been spilled by New York in its defense of the CCIA through appeals to a particular 1870 law from Texas, which banned firearms in most places frequented by the general public.<sup>193</sup> The law, entitled “An Act Regulating the Right to Keep and Bear Arms,” banned all firearms, not just handguns, from

any church or religious assembly, any school room or other place where persons are assembled for educational, literary or scientific purposes, or into a ball room, social party or other social gathering composed of ladies and gentlemen, or to any election precinct on the day or days of any election, where any portion of the people of this State are collected to vote at any election, or to any other place where people may be assembled to muster or to perform any other public duty, or any other public assembly.<sup>194</sup>

There is no denying that this regulation’s scope is broad. It is unclear under this law where carrying firearms *would* be allowed, as “any other

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expensive type of pistols in attempts to price freedmen out of the right to carry); *State v. Nieto*, 130 N.E. 663, 669 (Ohio 1920) (Wanamaker, J., dissenting) (noting that in the Southern states “there has extremely intensified a decisive purpose to entirely disarm the negro”).

190. *See* JOHNSON ET AL., *supra* note 143, at 501.

191. *See id.*

192. In New York’s memorandum of law in opposition to a preliminary injunction in *Antonyuk III* (challenging various portions of the CCIA), the State cited thirty-five regulations from the post-Civil War period and thirty-five from *all* prior historical periods, including medieval England. *See* State Defs.’ Memorandum of L. in Opposition to Plaintiffs’ Motion for a Preliminary Injunction, *Antonyuk III*, No. 22-CV-0986, 2022 WL 16744700 (N.D.N.Y. Nov. 7, 2022), *stay granted*, No. 22-2908, 2022 WL 18228317 (2d Cir. Dec. 7, 2022), *denying motion to vacate stay sub nom.* *Antonyuk v. Nigrelli*, 143 S. Ct. 481 (2023) (No. 22-CV-0986). In its memorandum in opposition to a preliminary injunction in *Hardaway v. Nigrelli* (challenging the prohibition on carrying firearms in places of worship), the State cited *exclusively* to regulations enacted after the Civil War. *See* State’s Memorandum of L. in Opposition to Plaintiff’s Motion for a Preliminary Injunction, *Hardaway v. Nigrelli*, No. 22-CV-00771 (W.D.N.Y. Oct. 28, 2022), ECF No. 40. The memoranda of law filed by New York City and New York State in *Goldstein v. Hochul* (challenging the prohibition on carrying firearms in places of worship) cited only laws from the Reconstruction era (save one law cited by the State from sixteenth-century England). *See* City Defs.’ Memorandum of L. in Opposition to Plaintiffs’ Motion for a Preliminary Injunction, *Goldstein v. Hochul*, No. 22-CV-8300, 2023 WL 4236164 (S.D.N.Y. June 28, 2023); State Defs.’ Memorandum of L. in Response to Ord. to Show Cause, *Goldstein v. Hochul*, No. 22-CV-8300, 2023 WL 4236164 (S.D.N.Y. June 28, 2023). The City defendants also cited two laws from the twentieth century, even though *Bruen* expressly dictates that these laws are of no value in interpreting the scope of the Second Amendment. *See Bruen*, 142 S. Ct. at 2154 n.28 (“We will not address any of the 20th-century historical evidence brought to bear by respondents or their *amici*.”).

193. 1870 Tex. Gen. Laws 63.

194. *Id.*

public assembly” could arguably include any town square or public business.<sup>195</sup> Nevertheless, it is worth putting this development into context.

As a preliminary matter, this law was crafted under the then most recent version of the Texas Constitution, which narrowed the state’s Second Amendment analogue to include the limitation that the right to keep and bear arms would be subject to “such regulations as the Legislature may prescribe.”<sup>196</sup> One year after this provision went into effect, the legislature banned public carry of handguns altogether and reiterated that all firearms were prohibited from the locations listed in the 1870 law.<sup>197</sup> The Supreme Court of Texas upheld this law in two cases, which both concluded that the legislation was a valid exercise of the state’s power.<sup>198</sup> Additionally, these firearm regulations were intended to address chaos in the state following the Civil War.<sup>199</sup> During this era, Texas faced uniquely high levels of violence.<sup>200</sup> The reasons for this are beyond the scope of this Note,<sup>201</sup> but notably, these restrictive gun regulations were enacted by a pro-Union gubernatorial administration in order to restore order in Texas.<sup>202</sup> Moreover, even this chorus of highly restrictive legislation had its limits. The 1871 law exempted travelers from its scope, and courts interpreted that group quite broadly.<sup>203</sup> In any event, according to *Bruen*, the Texas statute and the cases

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195. *Id.* However, the offense of carrying a firearm in one of the locations mentioned in the statute could only be committed by carrying a firearm when people were assembled there. *See Owens v. State*, 3 Tex. Ct. App. 404, 406 (1878).

196. TEX. CONST. of 1869, art. I, § 13.

197. 1871 Tex. Gen. Laws 25. The law allowed one accused of openly carrying a handgun to show “that he was in danger of an attack on his person, or unlawful interference with his property” as an affirmative defense.

198. *See English v. State*, 35 Tex. 473, 477 (1871) (upholding the 1871 carry ban against a Second Amendment challenge on the basis that it made “all necessary exceptions” for self-defense and therefore “fully cover[ed] all the wants of society”); *State v. Duke*, 42 Tex. 455, 459 (1875) (upholding the 1871 law under Texas’s Second Amendment analogue on the basis that “it appears to have respected the right to carry a pistol openly when needed for self-defense or in the public service, and the right to have one at the home or place of business”).

199. *See* Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 97–100, 103–06 (2017) (discussing the origins and purpose of the regulations).

200. *See id.* at 97.

201. *See id.* at 99 (arguing that “Texas was especially resistant to emancipation and Reconstruction, resulting in staggering levels of violence against blacks and Unionists”).

202. *See id.* at 101.

203. For cases holding that an individual was a traveler under the statute, see *Rice v. State*, 10 Tex. Ct. App. 288, 289 (1881) (driving herds of cattle to market in another state); *Campbell v. State*, 28 Tex. Ct. App. 44, 45 (1889) (going from a temporary residence to a permanent home); *Impson v. State*, 19 S.W. 677, 678 (Tex. Ct. App. 1892) (traveling home by train from a town sixty miles away); *Price v. State*, 34 Tex. Crim. 102, 102 (1895) (accompanying one’s wife on a return trip from her father’s home twenty-five miles away); *cf. Ex parte Boland*, 11 Tex. Ct. App. 159, 171 (1881) (construing a city ordinance banning carrying of arms to exempt travelers in accordance with state law). For a discussion on Texas’s exemption for travelers, see Jack Skaggs, Comment, *Have Gun, Will Travel?: The Hopelessly Confusing Journey of the Traveling Exception to the Unlawful Carrying Weapons Statute*, 57 BAYLOR L. REV. 507, 513–19 (2005) (discussing case law interpreting whether one was a traveler under the statute based on the length of their journey and distance traveled).

upholding it were outliers to be contrasted with the general ability to freely carry arms in public during the nineteenth century.<sup>204</sup>

Although the 1870 and 1871 Texas laws were the most expansive public carry regulations of the late nineteenth century, they were by no means the only ones. Many states in the South and the West restricted firearms in various locations. In 1869, Tennessee banned firearms from polling places, fairs, race courses, and public assemblies.<sup>205</sup> In 1870, Georgia banned firearms from polling places, places of worship, and public gatherings.<sup>206</sup> In 1874, Missouri banned concealed weapons in churches, schools, polling places, courtrooms while a court was in session, and public assemblies other than militia drills.<sup>207</sup> Nine years later, Missouri updated its law to entirely prohibit firearms in these locations, whether carried openly or concealed.<sup>208</sup> In 1877, Virginia forbade carrying arms at churches and also outside one's "premises" on Sundays without good cause,<sup>209</sup> but it is obvious that this regulation was a "blue law," which is a regulation against certain activities on Sundays, the Christian Sabbath day.<sup>210</sup> In fact, the act was even entitled "Violation of the Sabbath."<sup>211</sup> In 1878, Mississippi prohibited students from carrying concealed weapons at schools and universities, but the law did not ban open carry, nor did it apply to faculty or visitors.<sup>212</sup> All of these regulations came from Southern states following the Civil War and the ratification of the Fourteenth Amendment, which prohibited racial discrimination by the government.<sup>213</sup> Although the laws "were not explicit in any discrimination against blacks," they were likely a thinly veiled attempt to oppress freedmen.<sup>214</sup>

Cities also began exploring their own forms of firearm regulation during this period. In addition to permitting schemes,<sup>215</sup> some regulations prohibited firearms in public parks.<sup>216</sup> Other ordinances, which banned carry under most circumstances, were enacted mainly by "small towns near the cattle drive routes that ran from Texas to Kansas, and onward into Nebraska

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204. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2153 (2022).

205. 1869 Tenn. Pub. Acts 23–24.

206. 1870 Ga. Laws 421.

207. 1874 Mo. Laws 43.

208. 1883 Mo. Laws 76.

209. 1877 Va. Acts 305.

210. See Kopel & Greenlee, *supra* note 124, at 246–47 (noting that blue laws became common in the late nineteenth century).

211. 1877 Va. Acts 304.

212. 1878 Miss. Laws 176.

213. U.S. CONST. amend. XIV.

214. See Cottrol & Diamond, *supra* note 189, at 1328.

215. See *supra* notes 161–65 and accompanying text.

216. See, e.g., BD. OF COMM'RS OF THE CENTRAL PARK, FOURTH ANNUAL REPORT 106 (1861) (prohibiting carriage of firearms in Central Park in New York City); COMM'RS OF FAIRMOUNT PARK, FIRST ANNUAL REPORT 18 (1869) (prohibiting carriage of firearms in Fairmount Park in Philadelphia); CHI., ILL., MUN. CODE, art. XLIII, § 1690 (1881) (prohibiting carriage of firearms in Chicago's public parks); see also Charles, *supra* note 161, at 711 nn.556–66 (cataloging ordinances).

and Wyoming” where there was a fear of “large group[s] of cowherds, eager to drink, gamble, and fornicate.”<sup>217</sup>

One location from which states *never* banned firearms was public transportation. The author is unaware of any laws prohibiting firearms from trains, boats, or carriages prior to the twentieth century.<sup>218</sup> Although some private railroads regulated firearms, few banned them in all forms.<sup>219</sup> Some late nineteenth-century laws buttress the notion that carrying firearms on trains was acceptable. For instance, numerous states made it a crime to fire any gun on or at a train, except in self-defense.<sup>220</sup>

Aside from a handful of Southern states and scattered cities, by the end of the nineteenth century, statutes and ordinances broadly restricting the right to carry arms in public were not the norm.<sup>221</sup> In fact, “there was an outpouring of discussion” in Congress about securing constitutional rights, including the Second Amendment, for freedmen.<sup>222</sup> Even the Supreme Court indirectly acknowledged this in *Dred Scott v. Sandford*,<sup>223</sup> in which Chief Justice Roger B. Taney “offered what he thought was a parade of horrors that would result from recognizing that free blacks were citizens of the United States.”<sup>224</sup> One of those was the right to “keep and carry arms *wherever they went*.”<sup>225</sup>

To recap, states occasionally banned firearms from specific locations. But the vast majority of these bans came during the late nineteenth century, which *Bruen* held was too late to form a tradition in the nation’s history.<sup>226</sup> Moreover, the purpose of these regulations was generally to enforce segregation, not to promote public safety. The following section addresses the history of the related concept of prohibiting carrying arms on private property without the owner or lessee’s consent.

217. JOHNSON ET AL., *supra* note 143, at 517.

218. Although not dispositive of the lack of relevant historical regulations, Washington, D.C., could not identify “a single instance, much less an established history and tradition, of legislation banning gun carry on public transportation” before the twentieth century in defense of its prohibition on firearms in the capital’s public transit system. See Memorandum of Points and Auths. in Reply to Oppositions to Application for Preliminary Injunction at 22, Angelo v. District of Columbia, No. 22-CV-01878 (D.D.C. Oct. 30, 2022), ECF No. 29.

219. See Josh Hochman, Note, *The Second Amendment on Board: Public and Private Historical Traditions of Firearm Regulation*, 133 YALE L.J. (forthcoming 2023) (manuscript at 13–16), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4522818](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4522818) [<https://perma.cc/CF97-6EB6>].

220. See, e.g., 1855 Ind. Acts 153; 1897 Ga. Laws 96; 1899 Ala. Laws 154; 1899 Fla. Laws 93.

221. JOHNSON ET AL., *supra* note 143, at 501, 517.

222. *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008).

223. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

224. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2150 (2022); see also *Dred Scott*, 60 U.S. (19 How.) at 417.

225. *Dred Scott*, 60 U.S. (19 How.) at 417 (emphasis added).

226. *Bruen*, 142 S. Ct. at 2137; cf. *id.* at 2163 (Barrett, J., concurring) (“[T]oday’s decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.”).

C. *Historical Restrictions on Carrying Arms on Private Property*

Variations of a default rule prohibiting firearms on certain types of private property are not a novel creation of the CCIA. In enacting similar rules, however, legislatures throughout American history sought to prevent poaching, not to disarm citizens. This section explores those laws.

Beginning in the seventeenth century, several colonies “reinforced their general laws against trespassing by enacting specific statutes against hunting on someone else’s land without permission.”<sup>227</sup> Typically, these laws applied to enclosed land, such as plantations.<sup>228</sup> Like the colonial Massachusetts law prohibiting firearms from homes, legislatures did not enact these statutes as gun control measures.<sup>229</sup> Rather, they acted as anti-poaching measures by levying fines on those caught hunting on enclosed land without the owner’s permission.<sup>230</sup> At the time, deer were a crucial source of protein, so states found it wise to prevent their slaughter out of season.<sup>231</sup>

Pennsylvania’s 1721 law, for instance, prohibited settlers from “carry[ing] any gun or hunt[ing] on the improved or inclosed [sic] lands of any plantation other than his own, unless he have license or permission from the owner of such lands or plantation.”<sup>232</sup> The statute’s preamble noted that “persons carrying guns *and* presuming to hunt on other people’s lands” had resulted in “abuses, damages and inconveniencies.”<sup>233</sup>

New York’s 1763 statute made it eminently clear that its purpose was to protect farmland.<sup>234</sup> Its preamble stated that the law’s purpose was to combat the longstanding “Practice of great Numbers of idle and disorderly Persons in and about the City of *New-York*, and the Liberties thereof, to hunt with Fire-Arms, and to tread down the Grass, and Corn and other Grain standing and growing in the Fields and Inclosures [sic] there.”<sup>235</sup> To address that societal problem, the statute established a fine of twenty shillings if one were to “carry, shoot, or discharge any Musket, Fowling-Piece, or other Fire-Arm whatsoever, into, upon, or through any Orchard, Garden, Corn-Field, or other inclosed [sic] Land whatsoever, within the City of *New-York*, or the Liberties

227. Kopel & Greenlee, *supra* note 124, at 234–35.

228. *See infra* notes 232–36 and accompanying text; *see also* 1715 Md. Laws 90 (prohibiting persons convicted of certain crimes to hunt or carry a firearm on land with a “seated planation” without the owner’s permission and after one free warning); 1721 N.J. Laws 100–01 (“That if any Person or Persons shall presume, at any Time after the Publication hereof, to carry any Gun, or hunt on the improved or inclosed [sic] Lands in any Plantation, other than his own, unless he have License or Permission from the Owner of such Lands or Plantation . . . he shall, for every such Offence forfeit the Sum of *Fifteen Shillings* . . .”).

229. *See supra* note 48.

230. *See* Kopel & Greenlee, *supra* note 124, at 234–35.

231. *See* Koons v. Platkin, No. 22-7464, 2023 WL 3478604, at \*64 (D.N.J. May 16, 2023).

232. 1721 Pa. Laws 158, *reprinted in* 3 STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 255 (James T. Mitchell & Henry Flanders eds., 1896).

233. *Id.* (emphasis added).

234. *See* 1763 N.Y. Laws 441, *reprinted in* 2 LAWS OF NEW-YORK FROM THE YEAR 1691, TO 1773 INCLUSIVE 441–42 (Hugh Gainé ed., 1774).

235. *Id.*

thereof” without first obtaining a written license from the owner, proprietor, or possessor of such land.<sup>236</sup>

Finally, in 1771, New Jersey updated its 1722 anti-poaching statute and broadened its reach beyond enclosed plantations.<sup>237</sup> Nevertheless, the law was still clearly intended to prevent poaching. Its language prevented one from “carry[ing] any gun on any lands not his own, and for which the owner pays taxes, or is in his lawful possession, unless he hath license or permission in writing from the owner.”<sup>238</sup> Apparently, the state incorporated this broader language because the 1722 law had proved insufficient in addressing poaching problems.<sup>239</sup> Clearly, however, the legislature did not intend this change to serve as a public safety measure, as the law provided that a nonresident of the State who violated the statute had to forfeit their firearm to the complainant.<sup>240</sup>

These anti-poaching laws apparently faded in importance after the founding, as this author is aware of only a handful of states passing analogous measures in the nineteenth century. A Louisiana law from 1865 forbade individuals from “carry[ing] fire-arms on the premises or plantations of any citizen, without the consent of the owner or proprietor.”<sup>241</sup> Texas enacted a provision in 1866 barring individuals from “carry[ing] firearms on the enclosed premises or plantation of any citizen, without the consent of the owner or proprietor.”<sup>242</sup> Finally, in 1893, Oregon provided that “[i]t shall be unlawful for any person, other than an officer on lawful business, being armed with a gun, pistol, or other firearm, to go or *trespass* upon any enclosed premises or lands without the consent of the owner or possessor thereof.”<sup>243</sup> By its plain language, Oregon’s law appears to have applied only to trespassers and even then, only to enclosed land.<sup>244</sup>

With the history relevant to the provisions of the CCIA that this Note analyzes now assembled, Part III assesses the constitutionality of these CCIA provisions in light of the historical evidence of similar regulations.

### III. APPLYING *BRUEN* TO THE CCIA

Under *Bruen*, states may no longer defend their gun laws by citing public safety considerations.<sup>245</sup> Instead, “the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.”<sup>246</sup> This part shows fidelity

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236. *Id.*

237. 1771 N.J. Laws 343–44, reprinted in A DIGEST OF THE LAWS OF NEW JERSEY 219 (Lucius Q. C. Elmer ed., 1838). Interestingly, the law is cataloged in this digest under a section entitled “Game.”

238. *Id.*

239. *Id.*

240. *See id.*

241. *See* 1865 La. Acts 14.

242. 1866 Tex. Gen. Laws 90.

243. 1893 Or. Laws 79 (emphasis added).

244. *Id.*

245. *See supra* Part I.B.

246. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2127 (2022).

to *Bruen* by analyzing the three discussed provisions of the CCIA through comparisons to historical laws and assessing whether both the CCIA and its potential historical analogues “impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified.”<sup>247</sup> Both “how” and “why” the modern and historical regulations burden the right to armed self-defense are important to consider in order to prevent historically burdensome laws that were not enacted with public safety in mind from justifying New York’s law.<sup>248</sup> This Note recognizes that *Bruen* does not require a historical “dead ringer,” but it also recognizes that analogical reasoning has teeth, and the evaluation of New York’s law in *Bruen* itself was highly demanding.<sup>249</sup>

For the reasons laid out below, this Note concludes that New York has failed to justify the CCIA as consistent with the nation’s historical tradition of firearm regulation.<sup>250</sup> Part III.A concludes that the CCIA’s good moral character requirement burdens the right to armed self-defense in a way that is out of proportion to historical laws permitting the disarmament of dangerous individuals. Part III.B concludes that the CCIA’s long list of sensitive places finds no support in the historical record. Finally, Part III.C concludes that the CCIA’s default rule banning firearms on private property cannot be justified through the bare existence of anti-poaching laws in American history.

A. *The CCIA’s Good Moral Character Requirement Is Not Relevantly Similar to Historical Laws Prohibiting Dangerous Persons from Possessing Arms*

This section addresses New York’s good moral character requirement, which prevents a licensing official from issuing a concealed carry license unless an applicant proves that he or she possesses “the essential character, temperament and judgement necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others.”<sup>251</sup> The requirement exists to promote public safety (“why”),<sup>252</sup> and it burdens the

247. *Id.* at 2133. Although *Bruen*’s test only applies to legislation that infringes on the “plain text” of the Second Amendment, it is easy to conclude that each challenged provision of the CCIA implicates the right to bear arms. *See id.* at 2129–30. Therefore, the burden shifts to New York to “justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 2130.

248. *See supra* note 48.

249. *Bruen*, 142 S. Ct. at 2133; *see supra* Part I.B.1.

250. *Bruen*, 142 S. Ct. at 2130.

251. N.Y. PENAL LAW § 400.00(1)(b) (McKinney 2023).

252. *See Governor Hochul Signs Landmark Legislation to Strengthen Gun Laws and Bolster Restrictions on Concealed Carry Weapons in Response to Reckless Supreme Court Decision*, *supra* note 82 (“Today, we are taking swift and bold action to protect New Yorkers. After a close review of the *NYSRPA vs. Bruen* decision and extensive discussions with constitutional and policy experts, advocates, and legislative partners, I [Governor Hochul] am proud to sign this landmark legislative package that will strengthen our gun laws and bolster restrictions on concealed carry weapons.”). One court noted that the legislature may have enacted this requirement simply to frustrate and delay the application process. *See Antonyuk III*, No. 22-CV-0986, 2022 WL 16744700, at \*43 n.73 (N.D.N.Y. Nov. 7, 2022), *stay granted*,

right to armed self-defense by prohibiting issuance of a license to possess or carry a handgun<sup>253</sup> unless an applicant affirmatively proves to a licensing official that he or she possesses good moral character (“how”).<sup>254</sup>

Potential historical analogues to the good moral character requirement consist of prohibitions that forbade dangerous individuals from possessing arms.<sup>255</sup> Although these regulations were also enacted with public safety considerations in mind—whether that was aiding the Revolutionary War by disarming Loyalists or requiring those who were likely to breach the peace to post a surety—they approached these societal problems using a far different means from the CCIA’s good moral character requirement.<sup>256</sup> New York argues that its good moral character requirement is simply an extension of the historical attempts to disarm dangerous people,<sup>257</sup> but that analogy fails because the Supreme Court emphasized that the state could disarm individuals only if the state proved their dangerousness.

It is safe to assume that the good moral character requirement is an attempt to disarm those who might either recklessly or intentionally cause mayhem with a firearm. As important as this goal may be, there is simply no historical precedent for requiring *everyone* seeking to carry a firearm to affirmatively prove that they possess good moral character. None of the historical statutes burdening the right to keep and bear arms for dangerous individuals established a *general presumption* that *everyone* was dangerous unless they proved otherwise. This is made clear because the historical laws only applied to discrete groups based on obvious characteristics, such as race or religion.<sup>258</sup> Moreover, many of these groups fell outside of the category of individuals whom colonists considered part of “the people” protected by the Second Amendment, so restrictions on the right to keep and bear arms as applied to those individuals shed no light on the understanding of that right during the country’s early years.<sup>259</sup> Even surety statutes, which did not discriminate based on such obvious characteristics, required the state to bring forth at least some evidence of a firearm carrier’s dangerousness before they burdened that individual’s right to carry for self-defense.<sup>260</sup> And even then, the statutes did not disarm someone unless they refused to post a bond.<sup>261</sup> *Bruen* rejected New York’s reliance on surety statutes as appropriate

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No. 22-2908, 2022 WL 18228317 (2d Cir. Dec. 7, 2022), *denying motion to vacate stay sub nom.* Antonyuk v. Nigrelli, 143 S. Ct. 481 (2023).

253. The regulation also applies to individuals applying for a license to purchase a semiautomatic rifle. *Id.* § 400.00(2).

254. *See id.* § 400.00(1)(b).

255. *See supra* Part II.A.

256. *See supra* Part II.A.

257. *See* State Defs.’ Memorandum of L. in Opposition to Plaintiffs’ Motion for a Preliminary Injunction, *supra* note 192, at 20–26.

258. *See supra* Part II.A.

259. *Cf.* United States v. Harrison, No. CR-22-00328, 2023 WL 1771138, at \*20 (W.D. Okla. Feb. 3, 2023) (noting that “neither slaves nor Indians were understood to be a part of the ‘political community’ of persons protected by the Second Amendment”).

260. *See supra* notes 157–60 and accompanying text.

261. *See supra* note 157 and accompanying text.



analogues for its proper cause requirement for the very reason that the surety laws only disarmed individuals based on ex post evidence of dangerousness, rather than an ex ante belief.<sup>262</sup> The same logic fits comfortably when comparing the CCIA's good moral character requirement to historical laws disarming dangerous individuals. Therefore, although the reason that the historical regulations burdened the right to armed self-defense was the same as the good moral character requirement of the CCIA—public safety—the historical statutes approaching the problem of disarming dangerous people did so in a way that makes them materially different from the CCIA. The following section addresses the CCIA's list of sensitive locations and the locations in which New York may constitutionally prohibit firearms from among that list.

*B. Historical Regulations Banning Firearms from Most Sensitive Locations Were Too Uncommon to Establish a National Tradition*

The CCIA's list of sensitive places appears to specifically target the precise issue presented by the former proper cause requirement: “‘handgun violence,’ primarily in ‘urban area[s].’”<sup>263</sup> It focuses on places that are “‘crowded and protected generally by the New York City Police Department,’”<sup>264</sup> such as Times Square, public transportation, and protests.<sup>265</sup> This section compares the historical tradition of banning firearms in certain locations to the sensitive areas from which the CCIA bans guns of any kind or state (e.g., unloaded and locked in a case).

Starting again by evaluating how and why both the present-day regulations burden the right to armed self-defense, the legislature crafted the CCIA's list of sensitive places as a public safety measure (“why”).<sup>266</sup> The way in which the list of sensitive locations attempts to accomplish this purpose is by prohibiting nearly everyone, even those with concealed carry licenses, from carrying firearms in those locations (“how”).

It was a crime at common law to carry a firearm with a terrifying intent, particularly in crowded places like fairs and markets, although legislatures did not generally declare specific locations to be off-limits to firearms.<sup>267</sup>

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262. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2148–49 (2022).

263. *Id.* at 2131 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008)).

264. *Id.* at 2134.

265. See N.Y. PENAL LAW § 265.01-e(2)(a)–(t) (McKinney 2023).

266. See *Governor Hochul Signs Landmark Legislation to Strengthen Gun Laws and Bolster Restrictions on Concealed Carry Weapons in Response to Reckless Supreme Court Decision*, *supra* note 82 (“Today’s legislative package furthers the State’s compelling interest in preventing death and injury by firearms by . . . [r]estricting the carrying of concealed weapons in sensitive locations . . . .”); *Antonyuk III*, No. 22-CV-0986, 2022 WL 16744700, at \*61 (N.D.N.Y. Nov. 7, 2022), *stay granted*, No. 22-2908, 2022 WL 18228317 (2d Cir. Dec. 7, 2022), *denying motion to vacate stay sub nom.* *Antonyuk v. Nigrelli*, 143 S. Ct. 481 (2023) (noting that the apparent reason for the sensitive place restrictions “is to reduce non-self-defensive handgun violence (whether intentional or accidental, and whether in the home or outside the home) that is caused in some way by the possession or use of a handgun by someone who also possesses a concealed-carry license”).

267. See *supra* Part II.B.

Instead, they merely prohibited carrying in a manner apt to terrify the public.<sup>268</sup> But instead of simply barring individuals from openly carrying firearms in these sensitive locations,<sup>269</sup> New York banned possession of all firearms in expansive categories of places of public congregation, nearly morphing a specific intent crime into a strict liability crime.<sup>270</sup> Only in the nineteenth century did legislatures increasingly ban firearms at specific locations.<sup>271</sup> Like the CCIA, these restrictions banned public carry by all members of the public in specific areas (“how”).<sup>272</sup> But unlike the CCIA, legislatures crafted these regulations to prevent armed uprisings and to enforce segregation in the post–Civil War South (“why”).<sup>273</sup> Although some scholars argue that there is no proof tying these restrictions to racism,<sup>274</sup> it appears hardly coincidental that Southern states stood largely alone in enacting broad locational restrictions on the right to bear arms following the Civil War. It goes without saying that New York did not enact the CCIA with segregation in mind.<sup>275</sup>

With those initial observations in mind, this Note addresses the following locations from which New York bans firearms: (1) places of worship; (2) public parks; (3) public transportation; (4) bars and restaurants that serve alcohol; and (5) Times Square.<sup>276</sup>

### 1. Places of Worship

As outlined in Part II.B, four states (Georgia, Missouri, Texas, and Virginia) prohibited firearms in churches, and all did so during the late nineteenth century.<sup>277</sup>

Setting aside the fact that Virginia’s regulation was a blue law,<sup>278</sup> these four statutes cannot establish a historical tradition of regulating firearms in churches. *Bruen* cautioned that nineteenth-century evidence is only probative to the extent that it confirms what had already been established.<sup>279</sup> During the colonial era, multiple colonies not only permitted but *required*

268. *See supra* Part II.B.1.

269. New York already prohibits license-holders from openly carrying handguns in public. N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2023) (noting that handgun licenses “shall be issued to have and carry concealed”).

270. This Note uses the word “nearly” because the CCIA does not completely remove any mens rea requirements. Criminal liability can only fall on one who “knows or reasonably should know” that he or she is carrying a firearm in a sensitive location. PENAL § 265.01-e(1).

271. *See supra* Part II.B.2.

272. *See supra* Part II.B.2.

273. *See supra* notes 189–91 and accompanying text.

274. *See, e.g.,* Charles, *supra* note 161, at 704–06.

275. *See supra* note 266 and accompanying text.

276. Although this Note only analyzes these five “sensitive” locations in detail, the author doubts that most of the other locations singled out as “sensitive” under the CCIA pass constitutional muster. This is largely because they lack relevant analogues in the nation’s historical tradition of firearm regulation.

277. *See supra* notes 194, 206–09 and accompanying text.

278. *See supra* notes 209–10 and accompanying text.

279. *See supra* notes 74–75 and accompanying text.

men to bring firearms to worship services.<sup>280</sup> Legislatures expressly based these mandates on protecting the public, often from attacks by Indians.<sup>281</sup> Second, even if the four late nineteenth-century laws *could* establish a historical tradition, it is evident that the population governed by these laws (roughly 12.9 percent)<sup>282</sup> was not representative of the nation.<sup>283</sup> Finally, why Southern states enacted these firearm prohibitions is unclear. As noted earlier, scholars debate whether these restrictions were rooted in racism and a desire to maintain segregation.<sup>284</sup> Although it is likely that the Texas legislature was motivated to enhance public safety,<sup>285</sup> one state's law surely cannot establish a tradition.<sup>286</sup>

For these reasons, New York's ban on firearms in places of worship violates the Second Amendment.

## 2. Public Parks

Historically, municipalities, rather than states, generally took the lead in banning firearms in public parks.<sup>287</sup> Most of these ordinances were enacted in the late nineteenth century. Even assuming that these bans constituted a tradition, they could not have been representative of the country because the combined populations of those cities at that time amounted to “less than 10% of the nation's entire population.”<sup>288</sup> Nor were parks an invention of the nineteenth century, as “village greens, commons, gardens, and squares were the colonial forerunners to today's public park.”<sup>289</sup> Therefore, these late nineteenth-century ordinances contradict the apparent earlier practice of allowing firearms in public parks.

For these reasons, New York's ban on firearms in public parks likewise cannot pass constitutional muster.

## 3. Public Transportation

Public transportation is older than the United States itself, with the first ferry reportedly beginning operation near Boston in 1630.<sup>290</sup> Travel by rail took root in the mid-nineteenth century.<sup>291</sup> In response to an apparent

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280. *See supra* notes 144–45 and accompanying text.

281. *See supra* note 146 and accompanying text.

282. *See Antonyuk III*, No. 22-CV-0986, 2022 WL 16744700, at \*61 (N.D.N.Y. Nov. 7, 2022), *stay granted*, No. 22-2908, 2022 WL 18228317 (2d Cir. Dec. 7, 2022), *denying motion to vacate stay sub nom.* Antonyuk v. Nigrelli, 143 S. Ct. 481 (2023).

283. *See supra* note 66 and accompanying text.

284. *See supra* notes 189–91 and accompanying text.

285. *See supra* note 201.

286. *See supra* Part I.B.2.

287. *See supra* note 216 and accompanying text.

288. *See Koons v. Platkin*, No. 22-7464, 2023 WL 3478604, at \*85 (D.N.J. May 16, 2023).

289. *Id.* at \*83.

290. *See History of the NTD and Transit in the United States*, U.S. DEP'T OF TRANSP. (Dec. 19, 2017), <https://www.transit.dot.gov/ntd/history-ntd-and-transit-united-states> [https://perma.cc/X65F-VVPF].

291. *See The Beginnings of American Railroads and Mapping*, LIBR. OF CONG., <https://www.loc.gov/collections/railroad-maps-1828-to-1900/articles-and-essays/history-of->

societal problem of firearms on trains, states did not prohibit guns on trains but rather made it illegal to fire a gun while aboard them.<sup>292</sup> This clearly imposes a materially different burden on the right to bear arms than a blanket ban on firearms on public transportation.

Just as notable is the fact that most states that banned concealed carry during the nineteenth century or banned public carry altogether in vast areas generally exempted travelers from such restrictions.<sup>293</sup> Granted, several private railroad corporations during the nineteenth century issued rules prohibiting passengers from carrying loaded firearms, and at least one banned firearms in even checked baggage.<sup>294</sup> Courts and academics alike have suggested that modern firearm bans on public transportation may be analogized to these private regulations, particularly because “[i]t was not until the twentieth century that American cities began to exercise purely public ownership over the major channels of public transportation.”<sup>295</sup> But private actors are generally not bound by the Second Amendment, so their actions are unlikely to shed light on the historical understanding of that right.<sup>296</sup>

Some states explicitly authorized railroads to enact rules that did not violate that state’s constitution or laws.<sup>297</sup> At least two railroads acting under these laws regulated or prohibited firearms.<sup>298</sup> However, one of these two states was antebellum South Carolina, which did not enumerate a Second Amendment analogue in its state constitution until 1865.<sup>299</sup> Therefore, that state’s enactments “provide little insight about the scope of the Second

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railroads-and-maps/the-beginnings-of-american-railroads-and-mapping/ [https://perma.cc/P9KH-QNEX] (last visited Sept. 3, 2023).

292. See *supra* note 220 and accompanying text.

293. See, e.g., 1871 Tex. Laws 25 (“[T]his section shall not be so constructed as to . . . prohibit persons traveling in the State from keeping or carrying arms with their baggage . . . .”); 1841 Ala. Laws 148–49 (“Everyone who shall hereafter carry concealed about his person, a . . . pistol or any species of fire arms, or air gun, unless such person shall . . . be travelling, or setting out on a journey, shall on conviction, be fined . . . .”).

294. See Hochman, *supra* note 219 (manuscript at 12–16).

295. See *id.* (manuscript at 8); see also Frey v. Nigrelli, No. 21-CV-05334, 2023 WL 2473375, at \*19 (S.D.N.Y. Mar. 13, 2023) (analogizing New York’s public transportation firearm ban to historical firearm restrictions imposed by private rail companies).

296. Of course, there are likely instances in which a private actor’s conduct is tantamount to state action, in which case the Second Amendment would constrain that actor’s conduct. Cf. *Marsh v. Alabama*, 326 U.S. 501, 509 (1940) (holding that a privately owned company town’s restriction on distribution of religious literature violated the First Amendment). Absent unique circumstances such as those found in *Marsh*, this Note assumes “that if a property owner were to call on the state’s authority to exclude a gun owner, doing so would not amount to state action. *But cf.* *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that [state] court enforcement of racially restrictive covenants constituted state action in violation of the Equal Protection Clause).” See Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 38 n.185 (2012).

297. Hochman, *supra* note 219 (manuscript at 12–13).

298. *Id.*

299. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & P. 191, 202 (2006).

Amendment right.”<sup>300</sup> That leaves one state with an enumerated Second Amendment analogue that passed such a law.<sup>301</sup> That’s hardly a tradition.<sup>302</sup>

Because banning firearms on all public transportation is unquestionably more burdensome than historical state regulations addressing the concern of firearms on public transportation, New York’s law clearly violates the Second Amendment.

#### 4. Bars and Restaurants That Serve Alcohol

Aside from one lonely territorial regulation, there are no historical analogues prohibiting the possession of firearms in locations where intoxicating substances are sold.<sup>303</sup> Although the states that banned firearms in bars and restaurants that serve alcohol following *Bruen* point to a handful of nineteenth-century laws prohibiting the possession of a gun while actually intoxicated,<sup>304</sup> this “impose[s] a materially different burden on arms bearers.”<sup>305</sup>

Although *Bruen* only demands a historical analogue, not a historical twin, bans on carrying firearms while actively intoxicated do not come close in their restrictiveness to categorically prohibiting firearms in the over 51,000 locations that serve alcohol in New York state.<sup>306</sup> For this reason, New York’s provision is unconstitutional.

#### 5. Times Square

The CCIA’s last listed sensitive location, Times Square,<sup>307</sup> was “a last-minute addition in the late-night negotiations” of the law.<sup>308</sup>

300. *See* *Range v. Att’y Gen.*, 69 F.4th 96, 106 (3d Cir. 2023) (en banc) (Porter, J., concurring).

301. Hochman, *supra* note 219 (manuscript at 13) (citing 1849 Pa. Laws 80).

302. *Cf.* *District of Columbia v. Heller*, 554 U.S. 570, 632 (2008) (“[W]e would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms . . .”).

303. *See* 1890 Okla. Sess. Laws 496 (making it unlawful to carry a pistol “to any place where intoxicating liquors are sold”).

304. *See, e.g.*, State Defs.’ Memorandum of L. in Opposition to Plaintiffs’ Motion for a Preliminary Injunction, *supra* note 192, at 68; Def. Anne E. Lopez’s Memorandum in Opposition to Plaintiffs’ Motion for Temp. Restraining Order at 8–9, *Wolford v. Lopez*, No. 23-CV-00265, 2023 WL 5043805 (D. Haw. Aug. 8, 2023),.

305. *See* Leo Bernabei, *Taking Aim at New York’s Concealed Carry Improvement Act*, DUKE CTR. FOR FIREARMS L. (Aug. 7, 2023), <https://firearmslaw.duke.edu/2023/08/taking-aim-at-new-yorks-concealed-carry-improvement-act/> [<https://perma.cc/GSK4-L94G>].

306. *See* *Liquor Authority Current List of Active Licenses*, N.Y. STATE, <https://data.ny.gov/Economic-Development/Liquor-Authority-Current-List-of-Active-Licenses/hrvs-fxs2/data> [<https://perma.cc/V2E5-K5YX>] (last visited Sept. 3, 2023).

307. N.Y. PENAL LAW § 265.01-e(2)(t) (McKinney 2023).

308. *See* Luis Ferré-Sadurní & Grace Ashford, *N.Y. Democrats To Pass New Gun Laws in Response to Supreme Court Ruling*, N.Y. TIMES (June 30, 2022), <https://www.nytimes.com/2022/06/30/nyregion/handgun-concealed-carry-ny.html> [<https://perma.cc/ZN5B-BJDD>].

At the outset, this Note recognizes that several states codified the common-law offense of going armed to terrorize the people, and at least one specifically named fairs and markets as places in which one was forbidden to “ride armed . . . in terror of the county.”<sup>309</sup> But it was not until 1869 that any state categorically prohibited firearms in fairs, and even then, Tennessee appears to have stood alone in doing so.<sup>310</sup> Even if other late nineteenth-century laws prohibiting firearms in public assemblies<sup>311</sup> could be considered relevantly similar to the Times Square prohibition, those laws contradict the earlier practice of merely requiring those bearing arms in fairs or markets to do so in a peaceable manner.<sup>312</sup>

Because neither common law nor historical statutes prohibited bearing arms in fairs or markets, and comparisons to firearms bans in public assemblies are inapposite, New York’s ban on carrying firearms in Times Square violates the Constitution.

At most, sensitive places historically included only those locations “where government officials met to conduct the core functions of government” and offered to entrants “some heightened assurance of governmental protection from violence.”<sup>313</sup> It is impossible to analogize such locations to the places from which New York banned arms. Instead, what New York’s legislators consider to be sensitive locations appears based on a denominator specifically rejected in *Bruen*: “all places of public congregation that are not isolated from law enforcement.”<sup>314</sup> Because, at best, states historically only sporadically banned firearms from such locations, and many did so for materially different reasons than public safety, the CCIA’s long list of sensitive places is largely unconstitutional. The following section discusses the closely related concept of establishing a default rule that firearms are banned on private property.

### *C. There Are No Historical Analogues to a Default Rule Prohibiting Firearms from Private Property for Public Safety Purposes*

Like the sensitive place restrictions, New York enacted the default rule of prohibiting firearms from private property with public safety in mind (“why”).<sup>315</sup> The rule accomplishes this purpose by forcing concealed carry

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309. See *supra* notes 180–81 and accompanying text.

310. See *supra* note 205 and accompanying text.

311. See *supra* notes 194, 205–08 and accompanying text.

312. See *supra* Part II.B.1.

313. See Brief of *Amicus Curiae* the Indep. Inst. in Support of Petitioners, *supra* note 187, at 8; *supra* notes 184–85 and accompanying text (discussing colonial restrictions on carrying firearms into legislative assemblies and polling places).

314. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2134 (2022).

315. See Governor Hochul Signs Landmark Legislation to Strengthen Gun Laws and Bolster Restrictions on Concealed Carry Weapons in Response to Reckless Supreme Court Decision, *supra* note 82 (“This [regulation] allows people to make an informed decision on whether or not they want to be in a space where people could potentially be carrying a weapon.”). *But see* Bernabei, *supra* note 305 (arguing that “the state’s rationale seems entirely contrived and a pretext to prevent license holders from carrying a firearm outside their homes”).

licensees to obtain the permission of an owner or lessee before entering the latter's property with a firearm ("how").<sup>316</sup>

Although some find the policy wise,<sup>317</sup> there are no historical analogues to a default rule requiring individuals carrying firearms to seek permission of property owners or lessees before bringing their weapons onto their property.<sup>318</sup> Colonies and states historically prohibited firearms on enclosed farmland and plantations as a method of deterring poaching.<sup>319</sup> Because numerous legislatures enacted these laws during both the founding era and around the adoption of the Fourteenth Amendment, this Note concludes that such laws constitute a national tradition of regulating poaching. Nevertheless, these laws do not constitute a national tradition regulating *firearms*. Regulating poaching is not akin to promoting public safety. Therefore, the historical laws regulating poaching and the CCIA's regulation of firearms on private property are not relevantly similar.

Although some of the anti-poaching laws appeared broad on their face,<sup>320</sup> their purpose was not to restrict the right of armed self-defense. In *Heller*, the Supreme Court noted that colonial Massachusetts's law prohibiting storing firearms in buildings in Boston was not analogous to a District of

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316. See *supra* note 83 and accompanying text.

317. See Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J.L. MED. & ETHICS 183, 189–90 (2020) (concluding based on a survey that a majority of U.S. citizens favor the CCIA's default rule requiring individuals wishing to carry firearms on private property to seek the property owner's permission). But see *Antonyuk III*, No. 22-CV-0986, 2022 WL 16744700, at \*84 n.137 (N.D.N.Y. Nov. 7, 2022), *stay granted*, No. 22-2908, 2022 WL 18228317 (2d Cir. Dec. 7, 2022), *denying motion to vacate stay sub nom.* *Antonyuk v. Nigrelli*, 143 S. Ct. 481 (2023) (noting that the wording of that survey's questions may have mislead participants into believing "that the ancient common law rule that owners may exclude others from their property has been or will be repealed (which it has not been and will not be)").

318. This Note acknowledges that there is some academic debate over whether the Second Amendment protects the right to carry firearms on private property at all. Compare Jake Charles, Bruen, *Private Property & the Second Amendment*, DUKE CTR. FOR FIREARMS L. (Dec. 2, 2022), <https://firearmslaw.duke.edu/2022/12/bruen-private-property-the-second-amendment/> [<https://perma.cc/DB5R-FXDP>] (arguing that New York's anti-carry presumption on private property survives Second Amendment scrutiny because carrying on private property is outside the scope of the text), with Robert Leider, *Pretextually Eliminating the Right to Bear Arms through Gerrymandered Property Rules*, DUKE CTR. FOR FIREARMS L. (Dec. 23, 2022), <https://firearmslaw.duke.edu/2022/12/pretextually-eliminating-the-right-to-bear-arms-through-gerrymandered-property-rules/> [<https://perma.cc/Y5JC-G9Z5>] (characterizing the anticarry default as a "constitutional loophole to nullify the practical effect of *Bruen*" and arguing that it is underinclusive of its stated goal of allowing property owners to decide whether they would prefer firearms on their property by exempting retired police, judges, and others). Because the textual threshold that *Bruen* established to bring conduct within the Second Amendment's guarantees is so broad, the author is hesitant to incorporate wholesale principles of property law into this analysis. The Second Amendment draws no public/private distinction, so "the right to keep and bear arms" naturally encompasses both public and private property. See U.S. CONST. amend. II.

319. See *supra* Part II.C.

320. Pennsylvania's 1721 statute, for instance, prohibited one from "carry[ing] any gun" or hunting on someone's land without permission. See 1721 Pa. Laws 158, *reprinted in* 3 STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 255 (James T. Mitchell & Henry Flanders eds., 1896); see also *supra* note 232 and accompanying text.

Columbia law banning handgun possession in the home, since the regulation was intended not to disarm residents, as the District's was, but rather to prevent fires.<sup>321</sup> As was the case there, the fact that the anti-poaching laws used broader language than was required to fulfill their purpose should not be the basis for considering them relevantly similar to New York's law. In any event, most of these statutes applied only to enclosed land and plantations, not all private property generally, or even all residential private property.<sup>322</sup> Enclosed land is, by definition, "actually enclosed and surrounded with fences."<sup>323</sup>

This Note acknowledges that the 1865 Louisiana law might be the broadest iteration of such anti-poaching laws and thus analogous to New York's approach.<sup>324</sup> But even here, the logical jump required to harmonize the two laws stretches analogical reasoning to its extreme. Louisiana's law applied solely to "premises or plantations."<sup>325</sup> New York's law applies to *all* private property.<sup>326</sup> Although Louisiana's law is worded more broadly than the traditional anti-poaching statutes, this Note is inclined to acknowledge the former as being part of the anti-poaching lineage.<sup>327</sup> This analysis more faithfully comports with *Bruen*'s instruction to interpret a precedent subject to multiple meanings in a way "that is more consistent with the Second Amendment's command."<sup>328</sup> In any event, a lonely piece of legislation from the latter half of the nineteenth century "cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry."<sup>329</sup> Although owners and lessees may choose to prohibit firearms on their property, the state may not make that decision for them.

#### CONCLUSION

"At the end of this long journey through the Anglo-American history of public carry," this Note concludes that New York has "not met [its] burden to identify an American tradition justifying the State's" extremely stringent restrictions on public carry.<sup>330</sup> The State's law in effect reduces *Bruen* to a mere inkblot and, by corollary, the Second Amendment to a nullity. The Second Amendment, like all constitutional provisions, "necessarily takes certain policy choices off the table."<sup>331</sup> There is no serious question that the CCIA is one of them; it is forbidden by the Second Amendment's

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321. *See supra* note 48.

322. *See supra* notes 230–36 and accompanying text.

323. *Enclosed land*, BLACK'S LAW DICTIONARY (11th ed. 2019).

324. *See supra* note 241 and accompanying text.

325. *See supra* note 241 and accompanying text.

326. *See supra* note 83 and accompanying text.

327. *See supra* Part II.C.

328. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2141 n.11 (2022).

329. *Id.* at 2154.

330. *Id.* at 2156.

331. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).



“unqualified command.”<sup>332</sup> Even its academic sympathizers question the law’s constitutionality.<sup>333</sup>

New York’s legislators decided in 1913 and 2022 that firearms are dangerous, and therefore, members of the general population should not carry them in public. Although that conclusion is debatable,<sup>334</sup> what is not debatable is that it is not the role of New York’s state government to decide whether its citizens may keep or bear arms. New York’s response to *Bruen* ignores what is historically permissible and appears fashioned to obstruct public carry from the moment that one applies for a license. Justice Scalia once noted that “it is not the role of this Court to pronounce the Second Amendment extinct.”<sup>335</sup> Likewise, it is not the role of New York, or any other state, to defy the Supreme Court.

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332. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961).

333. See, e.g., Morgan Band, Note, *Don’t Pull the Trigger on New York’s Concealed Carry Improvement Act: Addressing First and Second Amendment Concerns*, 91 FORDHAM L. REV. 1943, 1981 (2023) (concluding that the CCIA “jeopardizes individuals’ First and Second Amendment rights”).

334. *But see* NAT’L RSCH. COUNCIL OF THE NAT’L ACADS., FIREARMS AND VIOLENCE: A CRITICAL REVIEW 115–16 (2005) (stating that defensive gun use reduces the probability of injury in assaults from 57.4 percent to 27.9 percent and in robberies from 30.2 percent to 12.8 percent and reduces the probability of property loss in robberies from 69.9 percent to 15.2 percent as opposed to not defending or defending without a firearm). This report “was developed by the National Academies at the request of a consortium of federal agencies and private foundations, including the CDC and the Joyce Foundation (both of which have taken positions strongly favoring increased gun control).” See JOHNSON ET AL., *supra* note 143, at 3.

335. *Heller*, 554 U.S. at 636.